Claim No: 10-334211

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Naugler v. J.R. Eisener Contracting Ltd., 2010 NSSM 82

BETWEEN:

JOHN F. NAUGLER

CLAIMANT

- and -

J.R. EISENER CONTRACTING LTD.

DEFENDANT

DECISION

DATE OF HEARING:	Tuesday, September 28, 2010 and Tuesday, October 13, 2010
DATE OF DECISION:	Friday, October 29, 2010
PLACE OF HEARING:	Dartmouth, Nova Scotia
HEARD BEFORE:	Patrick L. Casey, Q.C. Small Claims Court Adjudicator
COUNSEL:	John F. Naugler, appeared on his own behalf
	Ashley Dunn, on behalf of the Defendant

SUMMARY OF PLEADINGS

(1) The Claimant, John F. Naugler (Naugler), claims the sum of $3,105.59 from the Defendant, J.R. Eisener Contracting Ltd. (Eisener). The Claimant alleges that the Defendant directed vehicles around a work zone and that the Defendant's vehicles had spilled crusher dust in the detour zone causing the Claimant's motorcycle to tip over while the Claimant was driving it causing damage and injury to the Claimant and the motorcycle. The Defendant denies that it spilled crusher dust, denies that the Claimant was directed outside the work zone and states that even if liable the Claimant has not proven any damages that were caused by the accident.

FINDINGS

(2) The Claimant was driving his motorcycle along Major Street in Dartmouth, Nova Scotia, on May 31, 2010, at approximately 4:30 p.m. He came upon a work zone where the Defendant, Eisener, was installing water pipes. He proceeded down a street adjacent to Major Street known as Second Street, then turned onto Walker Street and as he was navigating a right turn from Walker Street onto First Street, the motorcycle that he was driving slid on the roadway causing it to fall and the Claimant's leg to be pinned underneath it temporarily. The Claimant's intention was to travel down First Street back onto Major Street and then out onto the #7 Highway, thus travelling around the aforesaid work zone.

(3) The road conditions were normal at the time and the accident occurred during daylight hours.

(4) Naugler was wearing appropriate clothing including a helmet, motorcycle jacket, motorcycle pants and boots.

(5) The saddlebag and the mirror detached from the motorcycle when it hit the ground.

(6) As the accident was occurring an employee of Eisener's was coming in the other direction and he witnessed the accident. After the accident he approached Naugler to see if he was injured. They spoke for a brief period of time. Naugler did not complain of any injuries to the employee. He got back up on his motorcycle and left the area.

(7) Naugler was able to reattach the saddlebag and the mirror to the motorcycle. He shortly afterwards contacted the Police and an accident file was opened.

(8) A week or so after the accident, Naugler contacted Halifax Regional Municipality (HRM) and dealt with them concerning a potential claim. Around the end of June he was advised by HRM that it was their position that they were not liable. He was instructed to contact Eisener.

(9) On or about July 6, 2010, there was a meeting between Naugler and representatives of the Defendant to discuss potential liability. A Google map was printed out and an employee of the Defendant marked out the place where Naugler stated that the accident occurred. Naugler referred to the street as Raymond Street not Walker Street. There was a further discussion as a result of which the Defendant denied any liability.

(10) Naugler subsequently commenced this action in the Small Claims Court.

(11) He is seeking reimbursement of the following amounts:

(a) $117.00 to replace his pants which he says were damaged in the accident;

(b) $92.00 to replace his boots which he says were damaged in the accident;

(c) $504.00 for paint repairs which he says are required for the motorcycle but have not yet been completed;

(d) $1,800.24 for clutch repairs;

(e) $313.75 for the clutch plate which he purchased and had installed as part of the motorcycle repairs;

(f) $90.00 for the windshield support arm which he purchased and had replaced as part of the motorcycle repairs;

(g) $49.75 for labour to install the aforesaid parts;

(h) $100.00 for general damages; and

(i) $89.68 for Court filing fee.

TOTAL: $3,156.42

BURDEN OF PROOF

(12) The Claimant has the burden of proof of proving the facts upon which liability is alleged to be based, and to prove that damages were incurred and to prove that those damages were caused by the accident. The burden of proof is the balance of probabilities.

WAS THE CLAIMANT DIRECTED OUTSIDE OF THE WORK ZONE BY TRAFFIC CONTROL?

(13) It is standard practice to retain a company for traffic control when undertaking construction projects of this nature.

(14) In this case, a traffic control company was hired by the Defendant to regulate the flow of traffic along Major Street and I find that they were so operating on May 31, 2010, the date of the accident.

(15) Naugler alleges that as he approached traffic control on Major Street he was directed onto Second Street. This would constitute a detour around the work area. The Superintendent of the construction site testified on behalf of the Defendant, however, that the type of traffic control used was “from two lanes to one lane” in other words, a system of stopping traffic in one lane going in one direction and then reversing this process for the other direction, to

allow one lane of traffic flow while the construction progressed. The procedure for having a detour was not employed in this case as there is a two week process to set up a detour through Nova Scotia Traffic Advisory and a detour can only be used if there is no other alternative. There were no detour signs used on this project.

(16) I accept the evidence of the Defendant on this point as it is unrefuted. The Claimant did not testify that there was a detour sign, only that he was directed by the traffic control person to go around.

(17) Although a detour was not used, this does not preclude me from finding that the Defendant actually was, or reasonably believed that he was directed to go around the work site, however, and I am prepared to accept the Claimant's evidence on this point.

(18) Whether or not the Claimant was so directed in this case is not particularly relevant however since if crusher dust was spilled by the Defendant in the area where the accident occurred then this area becomes part of the "work zone" of the Defendant, that is to say that if the Defendant is hauling crusher dust over streets that are not part of the actual construction project then this effectively extends the work zone, and expands the area over which the Defendant is responsible to maintain the roads in such a manner that no accidents are caused should crusher dust be spilled.

DID THE DEFENDANT SPILL CRUSHER DUST OR SIMILAR MATERIAL AT THE INTERSECTION OF WALKER STREET AND FIRST STREET?

(19) The project in this case involved several stages. The first stage was to install temporary water lines so that the adjacent houses on Major Street would not lose water supply while the water pipe extension was being constructed. In order to install temporary water lines, a temporary water pipe adjacent to the street is laid down and this involves the use of "chips and dust" which is a fine aggregate product similar to crusher dust (it is essentially crusher dust that has been washed and I will use the terms interchangeably in this Decision). The gravel is laid over the temporary water pipes so that vehicles are able to access their driveways. Chips and dust or crusher dust is used as it is a product that does not wash off in the rain or other weather and I agree with the Defendant's conclusion in this case that it would not have been possible for this product to run uphill, across the street and up First Street to the corner of Walker.

(20) The storage area for the gravel was originally on a side street off Major Street and it was trucked in along Major Street.

(21) Coincidentally, May 31st was the first day of the work involved in the construction of the permanent water lines, as the work for the temporary water lines had been completed as of that day.

(22) May 31, 2010 was also the day on which the Defendant secured permission to store piping and gravel at a location on Lakecrest Drive.

(23) The Defendant, through its witnesses, states that crusher dust was never at any time stored on Lakecrest Drive, only class "A", "B" and "C" gravel in addition to the piping.

(24) The Claimant, however, states that he observed crusher dust at the location on Lakecrest Drive on June 1, 2010, the day after the accident.

(25) Donnie Mason (Mason) a resident of Major Street, testified that between the end of May and the end of July he observed construction going on on Major Street. He stated that crusher dust was brought from Lakecrest Drive and he observed it at that location. He stated that he witnessed crusher dust being brought up Walker Street towards Major Street using front-end loaders. On cross-examination he states that he observed this activity "sometime in July".

(26) Wayne Savage (Savage) testified that he was an employee of Halifax Regional Municipality, working out of the same location on Lakecrest Drive where the piping and gravel were stored during the relevant time period. He states that he was approached "mid-May" by Eisener to store materials at that location. He states that subsequently various materials were moved into the parking lot by Eisener including piping and different types of gravel including crusher dust. He recalls observing gravel being moved in two directions, either left onto Lakecrest Drive directly to Major or up onto Walker Street and down to Major. He could provide no specific dates of when he observed crusher dust being moved from the yard.

(27) I conclude that the Defendant's witnesses were likely mistaken when they testified that crusher dust had never been stored at the Lakecrest Drive location. Based on all of the evidence, however, I am unable to conclude that crusher dust was at the location on Lakecrest Drive by May 31, 2010. Any crusher dust hauled prior to that date came from another location which did not require travelling through the intersection where the accident happened.

THE CLAIMANT'S SAMPLES OF CRUSHER DUST

(28) The Claimant, who is a retired Police Officer, states that shortly after the accident occurred and before he left the site, he scooped up portions of the gravel that he says caused his motorcycle to slip on the pavement and later placed these materials into a container. He stated that on the day following the accident, June 1, 2010, he went back to the area where the accident occurred and he observed a vehicle driven by an employee of Eisener travelling through the same intersection where the accident occurred and spilling material. He states that he picked up some of this material as well. Finally he stated that on June 1, 2010, he attended at the site on Lakecrest Drive where the piping and gravel were being stored, went onto the premises, and scooped up some gravel from the pile that was there.

(29) All three of these samples were tendered as evidence in the proceeding. All three samples appeared to be a similar product and were identified by various witnesses as crusher dust or chips and dust.

(30) The Defendant's position is that it would have been impossible for the Claimant to encounter crusher dust on the intersection where the accident occurred, that was spilled by the Defendant's vehicles, since there was no crusher dust hauled from the location at Lakecrest Drive on or before May 31, 2010, since no permission had been obtained to store it until that date. This is confirmed by notes taken by the Superintendent on that date. Also, the

Foreman testified and produced his calendar of activities for that day confirming that the morning was spent breaking up concrete as part of the excavation to install the permanent water mains and the majority of the afternoon was spent cleaning out the trench and laying bedding down getting ready to hook-up the pipes. Other employees were bagging the pipes at the Lakecrest Drive location. Gravel was used for backfilling late in the day but primarily class "A" gravel, not crusher dust since crusher dust is used for the temporary piping only. I accept the Defendant's evidence over the evidence of Mason and Savage since their evidence was very specific as to dates and events and confirmed by notes and diary entries that were made at the time.

(31) Furthermore, I have difficulty in accepting the Claimant's version concerning how he obtained the samples for several other reasons. Firstly, there was no mention made of these samples in the meeting he had with representatives of the Defendant on or about July 6, 2010. I fail to understand why the Claimant would not have mentioned the samples and shown them to representatives of the Defendant since he believed they so strongly supported his case. One would reasonably assume that if he felt he had a strong case he would show his best evidence to the Defendant in order to avoid litigation. Secondly, while the Claimant produced the samples as strong evidence in support of his case, he failed to produce other evidence without reasonable explanation. The Claimant is, according to his own statements and presentation, familiar with Court proceedings through his work as a former Police Officer. He has a working knowledge of the rules of evidence. He failed however to produce basic evidence such as photographs of his pants or boots that he says were damaged in the accident or the clothing themselves, documentation of his personal injuries such as a medical report, photographs or other evidence to prove alleged damage to the motorcycle, a witness who observed the damages, or the person who gave the repair estimate for the paint damage. Thirdly, the Claimant stated several times in evidence that he was intimately familiar with the streets in question, yet when he attended at the meeting with the representatives of the Defendant on July 6, 2010, he identified the street as Raymond Street, not Walker Street. Fourthly, I accept the evidence of the witness to the accident that the Claimant did not complain of any injuries immediately after the accident, yet the Claimant now states that he suffered a leg injury.

(32) To the extent that any issue of credibility arises in regards to these samples or other issues, I accept the evidence of the Defendant's witnesses over the evidence of the Claimant for these reasons.

SUMMARY RESPECTING LIABILITY

(33) I find that the Defendant's motorcycle slipped at the intersection of Walker Street and Second Street on May 31, 2010, at approximately 4:30 p.m. I accept that it was likely that the cause of the vehicle slipping was that it drove over some loose dirt or gravel that was on the road at that time.

(34) The Claimant has failed to prove however that the Defendant, its agents or workmen were responsible for leaving crusher dust, chips and dust or any other types of gravel that would have caused the Claimant's vehicle to slip on the day in question.

(35) For these reasons the Claimant has failed to establish liability and his claim is dismissed.

PROVISIONAL ASSESSMENT OF DAMAGES

(36) I will provisionally assess damages which I am required to do even though the Claimant has not been successful.

(37) (a) The cost of pants - It would have been a very simple matter for the Claimant to have shown a photograph of the pants which he says were ripped or to bring the clothing into Court. He was very careful to bring in the samples of gravel. The failure to produce photographs or the clothing itself was not adequately explained by the Claimant. He has not proven damages under this heading.

(b) The cost of boots - I repeat my comments with respect to item (a). The Claimant has not proven damages under this heading.

(c) Painting repairs - The Claimant has produced two estimates which average $504.00 for painting repairs. The person who provided the estimate was not made available for cross-examination. I do accept that the motorcycle sustained some scratches to the paint as a result of the accident. This was confirmed by the witness for the Defendant who saw the accident happen. This would logically be anticipated by a fall of this nature. The Claimant has failed to prove that the damage which he now seeks to repair was caused entirely by the accident. I would allow $200.00 under this heading.

(d) The cost of the motorcycle repairs - The person who effected the motorcycle repairs (Josey) testified. He confirmed that the Claimant purchased the various items required including the clutch plate and the windshield support arm. He confirmed his labour cost. I accept these as proven. I also accept the amount that the Claimant states that he paid for the clutch repairs as accurate. The only two questions are firstly, whether the clutch was damaged as a result of the accident and secondly, the state that the clutch was in prior to the accident. If the clutch was damaged the Claimant is not entitled to a new clutch. The motorcycle was four years old and a betterment allowance or depreciation allowance must be applied to discount the damages, if any. The repair person, Barry Josey (Josey) testified that when he saw the motorcycle several days later there was oil in the clutch disc which came from the input shaft of the transmission. The seal had failed. The oil came out because the bike was lying on its side. He stated that the reason that the seal failed could have been as a result of the impact when the motorcycle hit the ground.

The Defendant, in its submissions, stated that it was unlikely that the clutch damages were caused by the accident due to the existence of the saddlebag which protected the motorcycle to some extent when it fell and due to the fact that the clutch is encased in a housing and the fact that the Claimant was admittedly travelling at a low rate of speed at the time of the accident and the lack of proof of damage by way of scrapes and markings and the fact that Josey admitted that the clutch could be damaged by means other than an accident.

The Defendant's submissions are however somewhat speculative on this point and I accept the evidence of Josey, and find that it is likely, based on the balance of probabilities, that the damages were caused by the accident. The total cost of repair as noted earlier in this Decision including parts and labour is $2,253.74. I will apply a forty percent betterment and would have awarded the Defendant sixty percent of this amount or $1,352.24.

(e) General damages - For the same reasons expressed under headings (a) and (b), the Claimant has failed to provide proof on the balance of probabilities that he suffered any personal injuries in the accident. No medical reports, photographs or other documentary evidence or evidence that would tend to corroborate the Claimant's position has been provided to the Court. I would dismiss any claim for personal injury for these reasons.

(38) For the reasons outlined above I would provisionally assess damages at a total of $1,552.24.

COSTS

(39) The Claimant is seeking his filing fee of $89.68 from the Defendant. The Defendant is seeking costs of service of Subpoenas of $67.54.

(40) Both parties went to great effort to bring in witnesses to testify. Both put considerable preparation into the claim, which was of great assistance to the Court.

(41) I exercise my discretion not to award costs against either party in this case.

SUMMARY

(42) The claim is dismissed. Each party shall party shall bear their own costs.

Dated at Dartmouth, Nova Scotia,
on October 29, 2010.

Patrick L. Casey, Q.C., Adjudicator

Original Court File
Copy Claimant
Copy Defendant

Form 7(c) - Order

In the Small Claims Court of Nova Scotia

Claim No: 10-334211

BETWEEN:

Name	JOHN F. NAUGLER	Claimant
Address	2 Cranbrook Street, Dartmouth, Nova Scotia, B2X 1E8	
Phone	902-434-7300	

Name	J.R. EISENER CONTRACTING LTD.	Defendant
Address	35 Perrin Drive, Fall River, Nova Scotia, B2T 1J6	
Phone	902-860-0477	

COUNSEL: Claimant: Appeared on his own behalf.

Defendant: Ashley Dunn

On September 28, 2010, and October 12, 2010, a hearing was held in the above matter and the following Order is made:

The claim is hereby dismissed.

Each party shall bear their own costs.

Dated at Dartmouth, Nova Scotia,
on October 29, 2010.

Patrick L. Casey, Q.C., Adjudicator

Original	Court File
Copy	Claimant
Copy	Defendant