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No. 2944
S.C.

A.D. 1975
Yellowknife

NWTSC 74

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:-

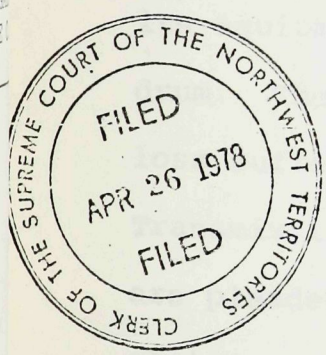
ALJON HOLDINGS LTD.,

Plaintiff.

- and -

NORTHERN TRANSPORTATION COMPANY
LIMITED

Defendant.



J U D G M E N T----------Disbery, J.

No. 2944
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IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:-

ALTON HOLDINGS LTD.

Plaintiff

- and -

NORTHERN TRANSPORTATION COMPANY LIMITED

Defendant

John McGee, Esq. appearing for the Plaintiff.

C. J. Wilson, Esq. appearing for the Defendant.

J U D G M E N T .

The plaintiff carried on a general cement and gravel business from its mixing plant situated some five miles south of the Town of Hay River in the Northwest Territories. Among its equipment were six trucks each mounting a concrete mixing drum. The plaintiff brings this action to recover damages for loss suffered as a result of injury and damage to its 1967 Reo Transmix truck on December 6th, 1973. The bases of its claim are pleaded in the following paragraphs of its statement of claim.

> "2. On or about the 6th day of December, 1973, the mixer while being driven by J.F.Robarts, with the consent express or implied of the Plaintiff, rolled the mixer such that it came to rest on the shoulder and in the ditch at the airport turnoff on the MacKenzie (sic) Highway, at the Town of Hay River, in the Northwest Territories.

5. Subsequent to the said rolling, the defendant was engaged for reward to remove the mixer from the shoulder and ditch, aforesaid.

6. The defendant held itself out as being capable and willing to undertake the recovery operation required and took possession of the mixer on that basis.

7. It was an implied term of the engagement that the equipment supplied should be fit for the purpose, that it would be properly operated and that the mixer would not be physically endangered by the recovery operation.

8. At all material times the employees of the Defendant who carried out the recovery operation were acting in the course and scope of their employment and the plaintiff pleads and will rely upon the doctrine of respondent (sic) superior.

9. During the course of the recovery operation the mixer was excessively damaged and rendered unfit for further use.

10. The unfit condition, aforesaid, was a breach of the implied terms of the engagement, the equipment supplied was not fit for the purpose, it was not properly operated, and the mixer was physically endangered.

11. Further, or in the alternative, the unfit condition, aforesaid, was the result of the negligence of the Defendant, particulars of which include:-

a) failure to instruct its employees as to the proper methods to be employed for the removal of the mixer from the shoulder and ditch;

b) supplying equipment which was inadequate for the purpose for which it was to be employed;

c) failure to request assistance from persons knowledgable in the recovery operation required;

d) failure to provide employees properly trained and competent to undertake the recovery operation required.

> 12. The plaintiff will rely on the fact that the mixer was in the control of the Defendant and its employees, and the unfit condition of the mixer is not an occurrence which would ordinarily take place without negligence on the part of the persons controlling it. All the facts concerning the recovery operation undertaken are solely and exclusively within the knowledge of the Defendant and its employees, and the plaintiff pleads and relies upon the doctrine of res ipsa loquitor."

The Defendant in its statement of defence first pleaded the usual general denial of the plaintiff's allegations. By paragraph 2 thereof, the defendant then pleaded as follows:-

> " In reply to all of the Statement of Claim, the Defendant admits that it recovered the mixer but did so in a careful and competant (sic) manner and damaged the mixer no more than the mixer had already been damaged while rolling over and that such recovery was carried out at the direction of law enforcement officers with the object of removing a hazard from the highway."

Finally the Defendant pleaded that "if it was negligent" then the said Robarts was "initially negligent in rolling the mixer" and his negligence "was the cause of the damage to the mixer" or alternatively his negligence amounted to "a substantial degree of contributory negligence".

In the circumstances of this case it is necessary to find the facts with some particularity.

The Plaintiff's 1967 Rio Transmix Truck.

The truck was a concrete carrier and mixer. It had two oversize front wheels situated just ahead of the driver's cab and eight drive wheels at the back, Its overall length was 22 feet and its maximum width did not exceed eight feet. It was powered by a 200 horsepower gas motor. The mixer itself was mounted on the frame of the truck and occupied approximately the rear eleven feet of the unit. It was a large cylindrical, barrel shaped container

made of steel 3/16ths of an inch in thickness. It had a capacity of 10 cubic yards. Hereafter I shall refer to the mixer as the "drum". The truck together with the drum when empty had a combined weight of 20,000 to 22,000 pounds.

The drum, which must be kept rotating in order to both mix the concrete and keep it from setting, received its support from two "A frames" that were bolted to the frame of the truck. One A frame was situated close to the back of the driver's cab and it supported a pillow block bearing, hereafter referred to as the "pillow bearing". This pillow bearing received and held a 4 inch steel shaft that projected from the centre of the bottom of the drum, while the bearing still permitted the shaft to rotate with the drum of which it was a part. The other A frame was bolted to the frame of the truck at the back. Affixed to this A frame were two rollers upon which the drum was able to rest and still continue to rotate. There was no direct attachment of the drum to this A frame. The drum had a maximum leeway or freedom of movement away from the rollers or either of them of approximately 3 inches.

The drum was rotated by a sprocket wheel and chain that was hooked on to the truck frame and driven by a power take off from the truck's engine. This chain, which was a heavy one also had some holding effect in keeping the drum in position with the pillow bearing.

The defendant admitted that the plaintiff was the owner of this Rio Transmix truck. I find that it was in good servicable condition on December 6th, 1973, prior to the accident.

At approximately 4.50 p.m. one of the plaintiff's drivers, F. Robarts, picked up a load of 8½ cubic yards of concrete mix at the plant. A cubic yard of concrete mix weighs between 3,900 and 4,000 pounds. The drum therefore contained 16½ to 17 tons of concrete. Adding thereto 10 tons for the weight of the truck and mixer, the weight of the loaded unit was between 26 and 27 tons. Robarts set out to make the delivery and drove the truck northward along the Mackenzie Highway.

At the point where the truck slid into the ditch the travelled part of the highway was about 30 feet wide. In keeping the road open highway maintenance snowplows had pushed snow into the right ditch and on the shoulder of the highway. Constable Azak of the R.C.M.P. testified that the snow formed a "false shoulder" that was flat with the road surface and concealed where the actual shoulder of the road commenced to fallaway. The ditch itself was a wide one and the slope from the shoulder to the bottom of the ditch was a gentle one. (Ex.P.4)

At all material times the visibility was poor. The plaintiff and the defendant admit that it was "dark, blowing snow and below zero temperature". Constable Azak described it as a miserable night to be out in. Vehicles using the highway had their lights on, as did the plaintiff's truck.

As Robarts drove the truck northwards he met a heavy flow of southbound traffic and he drove the truck well on his right hand side of the travelled portion of the highway. About 5.00 p.m. or shortly thereafter in the vicinity where a road branches off to go to the Airport, the right rear wheels of the truck slid over the edge of the shoulder; and being successively

followed by the other rear wheels, the heavily loaded rear of the truck continued to slide further down the slope. For a distance of 30 to 40 feet Robarts unsuccessfully tried to get the truck back up on the highway. The truck then tipped over on its right side and lay extended from the shoulder of the road to the bottom of the ditch at an angle of about 45 degrees. The impact when the truck tipped over was not severe. No glass was broken, Robarts, who was not hurt, turned the ignition switch off, and then crawled out through the left side car window.

In passing it is significant to note that the defendant admitted that "the truck went into the ditch because of a driver error" (Ex.P.14). Certainly the evidence did not disclose any negligence on the part of Robarts. Orser v Mireault 1914 7 W.W.R. 837.

It therefore becomes important to ascertain the extent of damage to the truck resulting from this upset because, the defendant not having yet become involved with the truck, is in no way to be held responsible for such damage.

Robarts immediately walked around the truck to see what damage had been done. He found the right hand mirror fixture broken and the right hand front fender had been damaged. The right rear fender had also been damaged but the extent of such damage could not be seen because it was buried in snow. Some concrete was running out of the drum. Neither the left side of the truck nor the rear nor the front thereof had been in contact with the ground and Robarts found those sides undamaged. A gas tank fixed to the left side frame, the truck cab and the tires were not damaged. The drum and the pillow bearing were in place.

Boyd Mansell was driving another of the plaintiff's mixer trucks that day. He arrived at the scene a few minutes after the accident and saw the truck lying on the shoulder. He testified that he saw the unit clearly and neither the truck nor the drum had suffered any "substantial" damage.

Mr. G. Armistead, who was the acting manager of the defendant company, went to the scene and inspected the truck with the defendant's yard foreman, G. Hansen. Armistead saw the damaged mirror fixture and right front fender. He also testified that an aircleaner affixed to the right side of the truck had suffered damage. He also ascertained that the drum contained a load of concrete.

Hansen testified that the drum was not resting on the rollers and that it was slightly twisted away from the "A" frame and pointing in a northerly direction. He also saw the damaged mirror fixture and front fender. He also discovered the drum contained a load of concrete. He said he saw nothing else out of the ordinary at that time.

I accept the evidence of these witnesses on this point and find that the truck only suffered these minor damages from the upset.

A. J. Azak, then a R.C.M.P. constable, arrived at the scene about ten minutes after the accident. He discussed the accident with Robarts. Azak testified that the front of the truck protruded about a foot into the northbound traffic lane and such constituted a danger to northbound traffic, and as such it had to be removed. Robarts testified the front only projected 2 or 3 feet on to the plowed portion of the highway. Azak's was concerned

with traffic safety and he did not concern himself with the nature and extent of the damage to the truck. I accept the evidence of Robarts that he told Azak the plaintiff could move the truck the next day. This was not satisfactory to Azak who, through other officers at the Detachment Office, arranged for the defendant to come to the scene to remove the truck from the highway. Robarts returned to the plaintiff's mixing plant and found four other employees there.

Learned counsel for the defendant in his summation referred to the Public Highways Ordinance R.O.N.W.T. 1974, Ch. P-11 Secs 22 and 26. Sec. 22 makes it an offence to obstruct a highway without justification or excuse therefor. It empowers a court to order a convicted person to remove the obstruction and also empowers " the highway authority " to remove obstructions from the highway. Sec. 2(c) defines "highway authority" as being the Commissioner or a municipality where the obstruction is on a highway under its control. Section 22 confers no powers on police officers and in the circumstances of this case this section is irrelevant.

Section 26 enacts as follows:-

> "26. (1) Where a peace officer finds upon any land conditions existing that may cause danger to life or to property of any person travelling on a highway, the peace officer may enter upon the land with such equipment and persons as he deems necessary and do any acts necessary to remedy the conditions.
>
> (2) No person is entitled to compensation in respect of damages resulting from any acts done pursuant to this section. "

By Sec 2(b) "highway" is defined as "land used or surveyed for use as public highway". By Sec 2(j) "roadway" is defined

as "that part of a highway designed or intended for use by vehicular traffic;".

I find that Azak was a peace officer; that the truck created a condition that might "cause danger to life or to property of any person travelling on the highway": that, as stated in the admissions, (P 14) "Constable Azak of the R.C.M.P. requested of Northern Transportation that the truck be removed as it was blocking traffic": and that it was in answer to that request that the defendant's men and equipment went to the scene and removed the truck.

I also find that Azak did not "enter upon the land with such equipment and persons---- and do any acts necessary to remedy the conditions." He testified that he did not even watch the defendant's removal activities: that he was at the time up on the highway about 100 yards away from the truck engaged in directing traffic. The allegation in the statement of defence that the recovery " was carried out at the direction of law enforcement officers " is contrary to the fact. The defendant's employees acted on their own.

Section 22 of the Ordinance deals with obstructions on a highway. Sec. 26 deals with " conditions existing that may cause danger to life or property of any person travelling on a highway". Such a dangerous condition may or may not be an obstruction or a common law nuisance depending on the circumstances. Maitland v R.T. and J. Hewitt 1944 K.B. 689. Situations that are not dangerous to those using the public way do not come within the ambit of the section.

The section then provides a summary way to remedy such dangerous situations. It empowers a police officer finding such a situation to obtain the necessary men and equipment and with such assistance to enter upon the land and " do any acts necessary to remedy the conditions". Thus the peace officer is to decide what is necessary to be done to remove the danger and to direct his helpers what to do. The section does not empower the peace officer to delegate his powers to his helpers or anybody else. In the present case Azak secured men and equipment but then left them to their own devises. Azak took no part in their activities, obviously because he had the further task of directing and safeguarding traffic which clearly had a higher priority than seeking to remove an upset truck. The situation clearly called for the presence of two officers, one to warn traffic of the danger and direct it while Azak went with the defendant's employees and directed the removal of the upset truck. The removal of the truck was not carried out under the direction of a peace officer and therefore the defendant does not come within the ambit of Section 26(1) and cannot claim the benefit of Sec 26(2), because what it did was not done " pursuant to this section".

The removal of the truck.

Following the police request Armistead, the acting manager, and the yard foreman, Hansen, drove to the scene. There, sitting in their vehicle on the paved roadway they looked at the plaintiff's truck lying upset on the shoulder of the roadway. Considering the darkness and the then blizzard conditions, it is not surprising that Armistead testified he could not see much

specifically at that time. Armistead and Hansen then drove to the defendant's yard where they assembled men and equipment for the task. Some consideration was given to using a crane but as it would have taken about six hours to make the crane mobile the idea was abandoned. The following equipment was chosen for the operation.

(1) A Terex front end bucket loader, hereinafter referred to as "the Terex". Its bucket only had a lifting capacity of 5 or 6 tons.

(2) A No. 966 front end bucket loader, hereinafter referred to as " No. 966".

(3) A Kemworth winch truck, hereinafter referred to as"Kemworth".

(4) A pick up truck hereinafter referred to as "the pickup truck".

The Terex was driven and operated by C McKay; No. 966 by L Stark; and Kemworth by Meskell, all employees of the defendant.

Arriving at the scene Armistead and Hansen walked around the plaintiff's truck, and both became aware that the drum contained a load of concrete mix. The drum contained approximately 16 tons of mix and the unit itself weighed approximately another 10 tons. Under cross-examination Armistead admitted that when planning the removal of the truck the amount of concrete in the drum should have been taken into consideration. Such was not done. Armistead and Hansen decided to try and lift the unit back onto its wheels. Armistead, who was not adequately dressed for blizzard conditions, retreated to the cab of the pickup truck

and left Hansen in charge of the operation. Hansen had no experience whatever in lifting a concrete mix truck back onto its wheels: nor did he know how the drum could be emptied.

After clearing away some snow the Kemworth was positioned in the northbound traffic lane and its winch cable was looped around the truck's left side frame just to the rear of the truck's cab. The Terex was positioned in the ditch with its loader bucket up against the drum. No. 966 was positioned on the highway to the north of the truck. Hansen hooked a chain around the left side frame near the rear thereof and just ahead of the rearmost left outside wheel, attaching the other end of the chain to No. 966. Thus Kemworth and No. 966 were to pull while Terex was, as McKay put it, to budge and push the drum up the slope of the shoulder to the road.

For approximately 10 minutes Kemworth and No. 966 tried to pull the plaintiff's unit up the slope. During the same period of time the Terex, using its loading bucket endeavoured to budge and push the drum up the slope. While this attempt was underway Armistead saw the drum become dislodged from the truck frame; and upon a closer examination after the attempt had been abandoned, he testified that "the barrel was 90% dislodged from the truck". (Dis. Q. 206). After the attempt Hansen found that the sprocket was partly separated and the drum was nearly separated from the pillow bearing. I also find that the drum itself suffered multiple dents and scrape marks that were caused by the loading bucket of the Terex. The evidence satisfies me that the abovementioned damage and certain

other damage disclosed in the evidence were caused by the acts of the defendant's employees during this first attempt to right the unit. The attempt proving unsuccessful it was abandoned.

The equipment they had brought having proved inadequate to move the truck and drum as a unit and the drum having partially separated from the pillow bearing and the truck frame, Armistead and Hansen decided to dislodge the drum and recover the truck alone. The Terex was withdrawn and Kemworth and No. 966 again commenced pulling. There was a great deal of noise and no longer supported by the Terex bucket the drum broke loose from the truck and rolled some 16 feet away where it came to rest in the ditch. Free from the drum the truck was dragged on its side up and onto the road where No. 966 put it back on its wheels. It was then towed half a mile away to a location known as Island D near a railway crossing. The drum was left behind in the ditch.

A great deal of evidence was given as to the extent of the damage done to the truck and the drum during these operations by the witnesses Robarts, Johnson, Collins, Hansen and McKay. Numerous photographs are also in evidence. In considering the photographs it must be borne in mind that P 6 (a and b) were taken by a newspaperman before December 11th, 1973; but P 4,5,7, 8,9,10, and 11 were not taken until May 1974. No useful purpose would be served by going into this evidence in detail. I have considered all of it and I find, without any hesitation, that the truck and the drum were each damaged beyond repair during these operations. Armistead was, in my opinion, mistaken in his evidence when he said that Ex. P 6 showed the condition of

the truck and drum before recovery.

Obviously the 16 tons of concrete mix should have been emptied out of the drum before any attempt was made to move the unit. Armistead knew the drum contained concrete mix because some had spilled out, but he made no attempt to ascertain how much mix the drum still contained. He freely admitted that in planning to remove the unit the amount of mix still in the drum should have been known and taken into consideration.

The drum was so constructed that near the bottom thereof there was a circular hatchway which can be clearly seen in Ex. P. 4(b). It was large enough to enable a man to enter the drum and its main purpose was to empty the drum whenever it became necessary to do so. This hatchway was covered by a hatch that was secured to the drum by a number of removable bolts. Had these been withdrawn and the hatch removed the mix could have been emptied out. The uncontradicted evidence of Collins was that emptying the drum in this manner would have occupied approximately an hour to accomplish. With the drum so emptied No. 966 alone could have put the unit back on its wheels.

Again, in the planning no thought was apparently given to the possibility of pushing or pulling the unit further down into the ditch or by pushing or pulling the front of the truck in a southeasterly direction down the slope and away from the traffic lane. Either method would have removed the one foot projection of the front of the truck into the northbound traffic lane and the danger it created. It would have been easier to move the unit downward than upward.

This hasty and negligent planning is probably explained by Armistead who testified that because of the inclement weather he had not been very happy to have to go to the scene; and having got there he wanted to get the job done and go home. No doubt others had like feelings.

I now turn to consider the legal bases advanced by the plaintiff in support of its claim. Paragraphs 5, 7 and 10 sound in contract and allege that the Defendant was "engaged for reward" and breach of certain implied terms of the engagement. I find that there was no communication of any kind between the plaintiff and the defendant with respect to the truck at any time before the defendant removed it from the ditch and parked it at Island D. There having been no communication the plaintiff had no contract with the defendant. If in the circumstances a contractual relationship was created between the police and the defendant then the plaintiff was not a party thereto.

In Vandepitte v. Preferred Accident Insurance Corporation of New York 1933 A.C. 71, Lord Wright in delivering the judgment of their Lordships said at p. 79 :-

> "No doubt at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds : the rule is stated by Lord Haldane in Dunlop Pneumatic Tyre Co. v. Selfridge & Co. 1915 A.C. 847 at p. 853 :
>
> ' My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. ' "

The plaintiff therefore has no cause of action against the defendant in contract.

By paragraphs 11 and 12 the plaintiff, in the alternative, bases his action in tort and alleges that its truck and drum " were excessively damaged and rendered unfit for further use " as a result of the Defendant's negligence.

To put back on its wheels and move an upset truck and concrete mixer was a task that required the exercise of special knowledge and skills. By agreeing with the police to undertake this work the Defendant implied that it possessed such knowledge and skill. In carrying out the work the law imposed upon the Defendant the duty to exercise due care and skill; and in default of so doing the law imposed legal liability upon the Defendant to compensate the plaintiff for any loss or damage suffered by it as a result of negligent acts or omissions on the part of the Defendant.

Banbury v Bank of Montreal 1918 A.C. 626, 44 D.L.R. 234.

So also where the services performed were rendered gratuitously. Charlesworth on Negligence 5th Ed. p. 162; Banbury v Bank of Montreal (supra) at p 689; and Utter v Great Western Railway (1859) 17 U.C.Q.B. 392.

When work or services are carried out in a careful and reasonable manner pursuant to statutory authority therefor; and the doing of the work or services necessarily causes damage to another; such damage is not actionable because the doing of such work or services in such manner is authorized by law.

However, if such work or services is performed in a negligent manner and such negligence causes loss or damage to another person; then such loss is actionable at common law because the authorizing statute is not to be interpreted as authorizing work or services to be done in an improper or negligent way. If and when it is the intent of the legislative body that in certain circumstances damage caused by negligence or improper conduct is not to be actionable, then such exemption from liability should be explicitly set forth in the statute. Guelph Worsted Spinning Company v City of Guelph et al. 1914 30 O.L.R. 467: Elliott v Winnipeg Electric Railway 1918 56 S.C.R. 560 at pp. 576, 577, and 579: and Craies on Statute Law 7th ed. pp. 279 and 341.

Learned Counsel for the defendant in his summation took the position that in the circumstances of this case the defendant was, in law, an agent of necessity. In support he cited Orser v Mireault (supra) Haigh v Grand Trunk Pacific Railway Co. 7 W.W.R.806; and Converse v Canadian Pacific Railway Co. 1932 2 W.W.R.1.

In Hastings v Village of Semans 1946 3 W.W.R. 449, MacDonald J. A. said at p. 452.

> "But agency of necessity arises where, in an emergency, an agent with limited express powers has to take prompt action in excess of his instructions: Sims & Co. v Midland Ry. Co. 1913 1 K.B. 103, 82 L.J.K.B. 67: Springer v G.W.Ry.Co. 1921 1 K.B. 257, 89 L.J.K.B. 1010.

> ' The conditions which entitle an agent to exceed his authority under the doctrine of necessity are: (1) that he could not communicate with his principal; (2) that the course he took was necessary in the sense that it was in the circumstances the only reasonable and prudent course to take; and (3) that he acted bona fide in the interest of the parties concerned 1 Halsbury 2nd ed. p 208 ' ".

Again in Gwilliam v Twist and Another 1895 Q.B.Div. 84;

Smith, L. J. said at p. 88:-

> " To constitute a person an agent of necessity he must be unable to communicate with his employer; he cannot be such an agent if he is in a position to do so. The impossibility of communicating with the principal is the foundation of the doctrine of an agent of necessity."

And see the judgment of Lord Esher M.R. at p. 87.

The doctrine of agency of necessity is not applicable to the circumstances of this case. The defendant acted specifically upon the request of the police and not at the request of any employee of the plaintiff. Hansen testified that they did not communicate in any way with the plaintiff because they were told by the police that Allan Johnson was not in Hay River at the time. The evidence established that when Robarts returned to the plaintiff's plant four other employees were there. It was open to Armistead and Hansen to communicate with such employees particularly with respect to emptying the concrete mix from the drum. They did not do so.

I find the preponderance of evidence clearly establishes that the following negligences on the part of the defendant resulted in damaging both the truck and the drum beyond repair

(1) In failing to instruct its employees as to

the proper method to be employed to remove the said truck and drum from the highway, having regard to the fact that the drum was then loaded with concrete mix as aforementioned.

(2) In supplying equipment that, while adequate to move and upright the said truck and drum when it was empty; was inadequate to move and upright the same when the drum was loaded with concrete mix; and on using said inadequate equipment for said purpose.

(3) With knowledge that the drum was so loaded, in failing to obtain the necessary assistance from knowledgeable persons, such as the plaintiff's employees, to empty the mix from the drum before attempting to move and upright said truck and drum; and in making such attempt to move and subsequently moving said truck and drum without such assistance and without emptying said drum.

(4) In providing employees to carry out said task who were not competent to move and upright said truck and loaded drum because they lacked the knowledge of how to unload the concrete mix from the drum; and in failing to unload said mix before entering upon the task of moving and uprighting said truck and drum.

DAMAGES

In the admissions (P. 14) it is agreed that the plaintiff purchased the 1967 Rio Transmix truck for approximately $16,500.00 in 1973, just a few months prior to the accident. It is further agreed that at the time of the accident its mileage was 50,628 miles. The plaintiff had made some small improvements to the truck after he bought it, and he had used it for a few months. Considering the relevant evidence I find that immediately prior to the accident on December 6th, 1973 the market value of the plaintiff's truck was $16,500.00.

From the said market value of $16,500.00 must first be deducted the diminution in the truck's value as a result of damages suffered from the upset, such being, of course, the cost of repairing such damage. The damage was to the right hand mirror fixture, the right front and rear fenders and to an aircleaner attachment. There was conflicting evidence as to whether or not the truck's frame had been bent or twisted in the upset. I find the frame was not damaged thereby. The evidence as to what it would have cost to repair such damage is unfortunately very scanty. I accept the evidence of Collins and I find such repair costs would have been $500.00. Thus the value of the truck and drum following the upset was $16,000.00.

While the truck was damaged beyond repair, the law required the plaintiff to take all reasonable steps to mitigate the loss it had suffered from the defendant's negligence. Certain parts of the truck were undamaged and salvable. The truck's engine was not damaged and had a sale value of $800.00.

The plaintiff removed certain other parts to use in its other trucks and mixers; namely:- some tire rims, the driving motor, some parts of the drum and some airhose. Johnson valued these second-hand parts at between $300.00 and $400.00. I fix their value at $350.00. There is no suggestion that there are any further salvable parts. Deducting this $1,150.00 from the said $16,000.00 reduces the plaintiff's loss to $14,850.00.

SPECIAL DAMAGES

At the opening of the trial certain documents with respect to special damages were entered by the plaintiff as exhibits without formal proof thereof; and by agreement of counsel such were received in evidence as proof of the truth of the facts therein stated. These documents are:-

P.2. A copy of the defendants invoice dated December 13th, 1973, to the plaintiff for $281.00 for its services on December 6th showing payment thereof by the plaintiff by the defendant charging said amount against money it owed the plaintiff.

P.12. The Invoice of Hay River Esso Service dated December 11th, 1973, for towing the truck to the River Bank for $35.00.

P.13. Invoices of Kaps Transport Limited for removing the drum from the ditch in the amount of $230.00.

These special damages in the total amount of $546.00 I allow.

Finally the plaintiff claims "general damages" in the sum of $5,000.00. In Prehn v Royal Bank of Liverpool (1870) L.R. 5 Ex. 92, Martin B. said:-

> " General damages---- are such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man----".

Johnson made a broad statement that while in 1973 the plaintiff operated 6 concrete mixer trucks, in 1974 the company only operated 3 such trucks, with the result that it could only take on jobs that it could handle with its reduced equipment. The definition of Martin B. does not relieve the plaintiff seeking general damages from complying with the rule that it should adduce what proof it can to assist the Court to arrive at a reasonable assessment of such damages. The plaintiff adduced no evidence before me of the loss of any specific contract or work, or loss of income or profits because of the loss of the said Reo truck. The fact that it was short a further two transmix trucks in its 1974 operations was not shown to be attributable to the destruction of the Reo truck on December 6th, 1973. No doubt the sudden destruction of its truck caused the plaintiff some loss of income or profit and upset the organization of its work force temporarily for all of which the plaintiff is entitled to be reasonably compensated. However, without such evidence I could not reasonably award any large sum. In these circumstances I am of the opinion

that $750.00 would be a reasonable award for general damages; and I allow that amount.

While it is not necessary for the determination of this case, I point out that Section 26(1) of the Public Highways Ordinance, (supra), is open to an interpretation that its application is restricted to dangerous conditions caused by things situated entirely or partly on land adjacent to the highway: for example and overhanging dead tree. All the Queen's subjects including Her peace officers have the common law right to travel on the public way. Peace Officers do not need legislative authorization to enter on to highways, but they need legislative authorization to enter on other lands and deal with things situate thereon. Section 22 deals with the removal of obstructions situate on the highway.

THERE WILL THEREFORE BE JUDGMENT AS FOLLOWS

1. The Plaintiff will have judgment against the defendant, Northern Transportation Company Limited for the sum of Sixteen Thousand One Hundred and Forty Six Dollars ($16,146.00).
2. The Plaintiff will also have judgment against the said defendant for its costs of and incidental to this action.

Dated at the City of Yellowknife, in the Northwest Territories this 26th day of April A.D. 1978.

Deputy Judge of the
Supreme Court of the
Northwest Territories.