CITATION: T.C.O. Agromart Ltd. v. Sutton Farms (Nacona) Ltd., 2025 ONSC 1996
COURT FILE NO.: CV-18-00000417-0000
DATE: 2025/03/31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
T.C.O. Agromart Ltd.	Tino J. Kasi, for the Plaintiff
Plaintiff	
– and –	
Sutton Farms (Nacona) Ltd.	R. Steven Baldwin, for the Defendant
Defendant	
	HEARD: September 25, 26, 27, 28 and 29, 2023, October 21, 22, 23, 24, 25, and 28, 2024

JUSTICE K.A. JENSEN

Introduction

[1] On the morning of June 1, 2017, Colin Denyes, an employee of the Plaintiff, T.C.O. Agromart Ltd. (TCO Agromart), was driving a crop sprayer (the Sprayer) across a private bridge (the Bridge) on the Defendant's land when the Bridge broke and the Sprayer fell off the Bridge landing in the Napanee River. Mr. Denyes was trapped underwater in the Sprayer, but fortunately he was able to escape from the machine. The Sprayer, however, was badly damaged.

[2] After receiving a claim, the Plaintiff's insurance company, Co-Operators General Insurance Company (Co-Operators), paid out $331,559.49 for the Sprayer to be repaired. TCO Agromart chose to take that money and put it towards the purchase of a new sprayer.

[3] Co-Operators commenced this litigation in TCO Agromart's name, pursuant to the subrogation rights set out in the applicable insurance policy, to recover the settlement funds from the Defendant, Sutton Farms (Nacona) Ltd (Sutton Farms) in the amount of $331,559.49, and the uninsured losses totalling $84,803.50. The Plaintiff alleges that the Bridge on the Defendant's property was poorly designed and in poor repair, and therefore the Defendant is liable for the Plaintiff's losses. The Defendant's insurer, Bay of Quinte Mutual Insurance Company (Bay of Quinte), responded to the claim in the name of Sutton Farms.

[4] Sutton Farms denies liability. However, if liability is found, Sutton Farms states that TCO Agromart, through the actions of Mr. Denyes, should be found to have contributed to the loss. Sutton Farms further asserts that the estimate of damages is excessive. The replacement value of the Sprayer was much lower than the amount paid out by Co-Operators, according to Sutton Farms.

[5] There was initially an issue as to whether there was a right of subrogation in this case because TCO Agromart referenced the incorrect insurer, Lague Vary Verreault & Associates Inc. (Lague), in the Statement of Claim. After this error was discovered, I granted leave for the Plaintiff to remove the paragraph in which Lague was named as the insurer.

[6] Sutton Farms subsequently conceded that Co-Operators was the insurer and that they had a right to subrogation under the insurance contract.

Factual Background

[7] The following factual findings are made on the basis of the Agreed Statement of Facts and uncontroverted evidence presented during trial.

The Plaintiff - TCO Agromart

[8] TCO Agromart is a retail farm supply company that provides products and services to farmers, such as fertilizer and herbicide spraying. TCO Agromart is jointly owned by Terry O'Neill and Sollio Cooperative Group, an agri-food cooperative based in Quebec. It was

previously Agronomy Company of Canada Inc., which was purchased by La Co-op fédérée and later became Sollio Cooperative Group.

[9] TCO Agromart has provided spraying services to Sutton Farms for upwards of 30 years.

[10] On June 1, 2017, TCO Agromart was retained to spray herbicides on Sutton Farm's corn fields.

The Defendant - Sutton Farms

[11] Sutton Farms had been a customer of TCO Agromart since 1994. Sutton Farms is a dairy farm with some cash crops. Sutton Farms has a number of locations, but the incident in question occurred at 1285 County Road #1.

[12] Sutton Farms is a family farm, owned and operated by Robert Sutton and his parents. Mr. Sutton's great grandparents began the farming operations many years ago. The farming operations in recent years have included dairy and cash crops, on lands approximating 1,450 acres.

[13] A portion of the farm is separated by the Napanee River, which generally runs east/west. The lands north of the river are used for crops. On the south side of the river are dairy barns and other crop lands.

[14] For the purposes of the present litigation, Sutton Farms was the occupier and owner of 1285 County Road #1 in Napanee and the property at issue in this litigation.

The Bridge

[15] Early in the 1900's, the Sutton family constructed the Bridge over the Napanee River for easier access between the north and south lands. The Bridge connected the fields on the Sutton Farm. The intended and customary use of the Bridge was and is to transport heavy farm equipment and heavy loads to and from the north and south fields of the Sutton Farm.

[16] The Bridge was rebuilt in 1980. The reconstruction of the Bridge included placing concrete abutments on either side of the Bridge. Five steel beams, which were attached to the abutments, were placed across the river. The steel beams were attached together with space in between, such that the total width of the steel beams is 10 feet.

[17] Wood decking was placed over top of the steel beams. The wood deck is 16 feet wide. On both sides of the Bridge, running the length of the Bridge, are wooden planks that hold the wood deck together. There is also a heavy cable that runs the length of the Bridge on both sides, which is anchored on each side of the riverbank. There is approximately 3 feet of wood overhang outside of the steel beams on each side of the Bridge. There is nothing that supports the 3-foot overhang on either side of the length of the Bridge.

[18] The total length of the Bridge's wood deck is 57 feet. There are no guard rails or barriers installed on the outer sides of the Bridge to permit wide farm equipment to pass over the Bridge.

[19] Given that the Bridge is on private property, the Suttons were not required to have a building permit. The Bridge is not subject to any of the provisions of the *Building Code*[1] or any legal requirements, other than a height requirement to ensure that if the Napanee River flooded the water could pass under the Bridge.

[20] The evidence of Mr. Sutton, which was unchallenged, established that the Bridge was used multiple times each day. During harvest season, the Bridge was used 40 to 50 times each day by large and heavy farm equipment, weighing anywhere from 30,000 to 80,000 pounds. The operator of the farm equipment, be that Mr. Sutton, his father (Mr. Sutton Senior), or a farm employee, would drive the equipment over the Bridge, staying centered on the Bridge so that the steel beams supported the weight of the equipment.

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[1] *Building Code Act*, 1992, S.O. 1992, c. 23

The Sprayer

[21] TCO Agromart owned three sprayers in 2017. A sprayer is a piece of heavy equipment that has tank booms that extend 100 feet out and which spray product, such as herbicides or fertilizer, on the fields. The sprayer's cab has control systems that allow the operator to control the rates of the spray.

[22] The Sprayer that went into the river was a 2014 Rogator 1100. It had 100-foot booms. It was purchased from HJV Equipment, a specialized farm equipment business, located in Alliston, Ontario, in 2014 for $342,832. At the time, TCO Agromart also had a 2013 Rogator sprayer and a 2016 Rogator sprayer.

[23] The Sprayer weighed approximately 31,270 pounds when it was empty.

[24] On June 1, 2017, the width of the sprayer measured 157 inches from outside tire to outside tire. The sprayer's tires were 24 inches wide. The width between the tires was set at the narrowest setting, which was ten feet.

Colin Denyes

[25] Mr. Denyes was a long-term, experienced employee of TCO Agromart when the accident occurred on June 1, 2017. He had been working for TCO Agromart for nine years by then. Mr. Denyes had been operating the Rogator 1100 that went into the river for four years. That was the only machine he operated. Mr. O'Neill testified that once an operator starts on a machine, he stays on that machine because it is important to get to know the machine one is driving.

[26] Mr. Denyes had done spraying for Sutton Farms many times in the past. He knew the farm and had used the Bridge often in the past. He knew that the Bridge was 16 feet wide. He said he did not use the Bridge every year, but when he had to spray both the north and south fields, he used either the Bridge or a public bridge that was 500 metres away from the Bridge. The public bridge was used by the Suttons when they were crossing the river with wider equipment than the Bridge could accommodate.

[27] The arrangement between the parties was that Sutton Farms would request sprayer services for a specific field from TCO Agromart, typically the day before they wanted the service completed, as spraying services are time sensitive in relation to the state of the crop. TCO Agromart would inform Mr. Denyes of the requested service, and Mr. Denyes would attend Sutton Farms without the involvement, supervision, or attendance of Mr. Sutton. Mr. Denyes knew the layout of the Sutton Farm and independently determined when and how he would access the farm to provide the service.

The Accident

[28] On June 1, 2017, Mr. Denyes was spraying both the south and north fields with pesticides. Around mid-morning, he had completed the north field and needed to go to the south field to complete his assignment. Mr. Denyes decided to use the Bridge because it was closer than the public bridge.

[29] When Mr. Denyes was approximately two-thirds of the way across the Bridge (going north to south), the wood planking on the right side of the Bridge broke under the Sprayer's right front tire. The Sprayer rolled off the Bridge, rotating 360 degrees and landing in the Napanee River on its tires.

[30] The cab of the Sprayer immediately filled with water. Mr. Denyes tried to open the Sprayer door to exit the vehicle, but it was pinched, and he could not open it. Fortunately, there was a pocket of air at the top of the submerged cab and he was able to breathe, until he realized that if the water had gotten in, there must be a way to get out. He felt around the damaged cab and finally found an escape route. His hands were cut from the broken glass.

[31] Mr. Denyes made it to the shore and started walking along the road, until he met the Suttons' hired hand, Derrick, who contacted Mr. Sutton. Mr. Sutton made sure Mr. Denyes got some dry clothes, got washed up, and was taken by his family to the hospital, where he received several stitches to his fingers.

[32] For ten hours, the Sprayer was almost entirely submerged in the Napanee River. Only the rotating hazard lights on top of the cab were sticking out of the water. Quite a bit of work had to be done to get the Sprayer safely out of the water and to ensure that there was no leakage of toxic chemicals into the river water. However, it was finally hauled out of the river and taken to HJV Equipment, where an assessment of the damage was completed and an estimate of the cost to repair the Sprayer was prepared.

Post-Accident Events

[33] After the accident, Mr. O'Neill contacted his business partner at Sollio, Larry Hutchinson, to find out about insurance coverage, as it was Sollio who arranged coverage for TCO Agromart. Mr. O'Neill relied on the representative from Sollio (then Agronomy Company of Canada) to handle insurance matters.

[34] It was thought that the insurer was Lague. However, Lague was a third-party administrator, in the Province of Quebec, acting as the agent of Co-Operators. Lague adjudicated and administered TCO Agromart's claims as a result of this loss on behalf of Co-Operators. Lague appointed ClaimsPro, in the Province of Ontario, as an independent adjuster for the claim.

[35] Bob Francis, an adjuster from ClaimsPro, initially handled the claim. Mr. Francis asked Mr. O'Neill to provide information about the Sprayer, the accident, and other relevant details.

[36] ClaimsPro, on behalf of TCO Agromart, did not send an engineering firm out to the accident site to investigate the accident. However, Sutton Farms' insurer, Bay of Quinte, did. Bay of Quinte sent out an engineer by the name of Frédérick Beaucage from CEP Forensic (CEP) to investigate the accident.

[37] ClaimsPro retained the services of Bert Overveld, who owned B&M Appraisal Service, to provide them with an assessment of whether the Sprayer could be repaired.

[38] Mr. Overveld told ClaimsPro that the Sprayer was not a total write-off. He thought the Sprayer could be repaired. Mr. Overveld's assessment of the cost of repairing the Sprayer was $331,559.49 inclusive of HST.

[39] ClaimsPro also investigated other options for replacing the Sprayer. They tried to find a used 2014 Rogator 1100 with the same options as the Sprayer but were unable to find one. ClaimsPro then looked into whether a new Rogator 1100, which was the same model as the Sprayer, could be purchased. HJV Equipment provided an estimate for a new Rogator 1100. It was $435,910.

[40] Mr. Francis told Mr. O'Neill that TCO Agromart's insurance coverage would permit TCO Agromart to choose from the following options: (1) have the Sprayer repaired; (2) purchase a Rogator sprayer of similar value; or (3) take the dollar value of the repair and apply it to a new sprayer.

[41] Mr. O'Neill signed a Proof of Loss form indicating that the total loss was $357,538.03. Co-Operators indemnified TCO Agromart for that loss.

[42] TCO Agromart decided not to have the Sprayer repaired. Instead, they decided to purchase a new John Deere Sprayer for $452,563.29. TCO Agromart used the proceeds from the insurance claim to cover part of the cost of the new John Deere Sprayer.

[43] Mr. O'Neill sold the damaged Sprayer to Vantayge Farms. Vantayge Farms buys old sprayers, refurbishes them, and resells them. Vantayge Farms paid Mr. O'Neill $18,000 for the damaged sprayer. Mr. Van Aaken, the owner of Vantayge Farms, had the Sprayer refurbished and sold it for $112,500.

Issues

[44] The issues in the present case are as follows:

(a) Did the Defendant breach the duty of care owed to the Plaintiff under s. 3 of the *Occupiers' Liability Act*?[2]

(b) Was Mr. Denyes contributorily negligent?

(c) What are the damages for the Defendant's breach of the duty of care?

(d) What portion of the damages should be attributed to Mr. Denyes' negligence?

Analysis of Liability

Occupiers' Liability Act

[45] This action arises under the *Occupiers' Liability Act*. Section 3(1) of the OLA states as follows:

> Occupier's duty
>
> > 3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

[46] There is no debate in this case that Sutton Farms was an occupier, and as such, they owed a duty to make the premises reasonably safe for Mr. Denyes and the Sprayer.

[47] In its seminal decision on the OLA, the Court of Appeal held that s. 3(1) "imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm".[3]

[48] Section 3 of the OLA assimilates occupiers' liability with the modern law of negligence.[4]

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[2] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2. (OLA).

[3] *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717 (C.A.), at p. 723, aff'd [1991] 2 S.C.R. 456.

[4] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2., s. 3 (OLA).

[49] To succeed with a negligence claim, the plaintiff must be able to establish all four essential elements: (1) that the defendant owed the plaintiff a duty of care to avoid the kind of loss alleged; (2) the defendant's conduct breached that duty by failing to observe the applicable standard of care; (3) the plaintiff sustained compensable damage; and (4) the damage was caused, in fact and in law, by the defendant's breach.[5]

[50] In the present case, it is the fourth element of the test – causation – that must first be addressed. If the Defendant's conduct did not cause the accident, then the inquiry is over.

[51] Therefore, assuming without deciding that the first three elements of the test have been met, the question is this: did the negligent conduct cause the accident?

What Caused the Accident?

[52] TCO Agromart claims that the accident was caused by the following problems with the Bridge which Sutton Farms negligently failed to address: (1) the overhang was unsupported; (2) the Bridge was in a state of disrepair due to the presence of rot; (3) the wooden deck was not secured to the steel beams and therefore, it was susceptible to shifting; and, (4) there was no warning that the overhang was unsupported.

[53] In contrast, Sutton Farms asserts that it was driver error that caused the accident, which is something they could not have foreseen or prevented. The Defendant states that since 1980, the Bridge has been used many times a day during crop seasons, without incident. The Bridge was fully capable of supporting the weight of farm equipment that was much heavier than the Sprayer, provided the driver kept the vehicle centred over the steel beams. Unfortunately, Mr. Denyes steered the Sprayer onto the unsupported overhang, which was not capable of supporting the

[5] *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13 (Saadati), citing *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3 (*Mustapha*).

weight of the Sprayer, regardless of its condition. Mr. Denyes knew that he had to keep the Sprayer centred but failed to do so.

[54] The test for establishing causation is the "but for" test. That means that the plaintiff must establish, on a balance of probabilities that "but for" the defendant's negligent act, the accident would not have occurred. [6]

[55] In addition to showing that Sutton Farms' conduct was the factual cause of the damage to the Sprayer, TCO Agromart must also prove that Sutton Farms' negligence was the legal cause of the damage.[7] As the Court of Appeal stated recently in *Hemmings v. Peng*, "[i]n general terms, foreseeability lies at the heart of this inquiry".[8]

The Evidence

Mr. Denyes

[56] Mr. Denyes testified on the first day of trial. Mr. Denyes refreshed his memory by reading his notes, and then gave his oral testimony. I ruled that Mr. Denyes' notes would not be entered into evidence.[9]

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[6] *Algra v. Comrie Estate*, 2023 ONCA 811, at para. 19 (Algra).

[7] *Saadati*, at para. 20.

[8] *Hemmings v. Peng*, 2024 ONCA 318, at para. 67.

[9] I based my ruling on *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535.

[57] Mr. Denyes gave evidence that he was alert and feeling well on June 1, 2017, when he drove the Sprayer across the Bridge. He testified that he decided to use the Bridge rather than the public bridge because it was closer. He had seen Mr. Sutton Senior using the Bridge just prior to him. Mr. Sutton Senior crossed the Bridge with a payloader, which was a heavy tractor.

[58] Mr. Denyes testified that he lined the Sprayer up with the centre of the Bridge before crossing. He knew he had to stay in the centre of the Bridge because this was “common sense”. Mr. Denyes denied being told by anyone, including Mr. Sutton, that he should not use the Bridge, that he had to stay in the centre, or that the overhang on the sides of the Bridge was unsupported. Nevertheless, he knew he had to stay in the centre of the Bridge.

[59] Mr. Denyes testified that he drove slowly over the Bridge, in first gear. He stated that he stayed in the centre of the Bridge and denied veering consciously or inadvertently to the right side of the Bridge.

[60] Mr. Denyes agreed that it was solely his decision and up to his discretion to use the Bridge on the day of the incident. Mr. Denyes acknowledged it was his responsibility to know where and how he would operate the Sprayer, and that his decisions in that regard were "on him". He did not look to the Suttons to tell him how to do his job.

[61] Mr. Denyes testified that he did not ever get out of the Sprayer to examine the Bridge. He testified that he had no concerns about using the Bridge with the Sprayer because he "always" centered the Sprayer on the Bridge and drove straight ahead over the Bridge.

Expert Evidence

[62] The insurers of both TCO Agromart and Sutton Farms retained experts to testify about the cause of the accident.

[63] Mr. Beaucage was the Defendant’s expert witness. Mr. Beaucage is a forensic investigator and a civil engineer with CEP. Mr. Beaucage started his professional career as a bridge field engineer, constructing bridges. After that, he inspected bridges. On consent, Mr. Beaucage was

qualified as an expert in the area of structural engineering as it applies to bridges and the matters in issue in the present case.

[64] The Plaintiff's expert witness was Shawn Jay. Mr. Jay has been an engineer with Arcon Forensic Engineers (Arcon) for 28 years and has been working as a civil engineer for 34 years. He is currently the president of Arcon. The majority of Mr. Jay's work has been in structural engineering, in the area of analysis, design, and assessment of building structures. On consent, Mr. Jay was qualified as an expert in civil engineering and structural engineering for the purposes of this matter.

[65] Mr. Beaucage was retained by the Defendant's insurer, Bay of Quinte, to attend at the scene of the accident on June 12, 2017. When he arrived, Mr. Beaucage met with Mr. Sutton and Mr. Sutton Senior. The Bridge was blocked off with tape so that the scene would not be disturbed by passersby. Mr. Beaucage inspected the Bridge carefully. He numbered the planks of wood on the wood deck near the site of the collapse for future identification and analysis. He also took measurements and saved some of the pieces of wood that broke off from the deck.

[66] Following his visit to the accident site, Mr. Beaucage prepared an initial opinion, dated June 30, 2017, in which he concluded that the accident was likely caused by human error. This report was entered into evidence. In Mr. Beaucage's words:

> Since the tractor's track width can be adjusted, the tractor's weight should have been right above the exterior steel beam in the narrowest setting. If the tractor's track width is wider and/or the operator doesn't stay in the center of the bridge, it's very likely that the overhang portion of the wood deck could break and initiate the fall. We are of the opinion that the accident was caused by a human error; whether it was adjusted to the track to the minimum, driving too fast or being distracted. The bridge deck must be repaired and exterior steel beam replaced. The steel beam was damaged by the tractor's impact during [the] fall. We recommend that the specifications for repair be done by a bridge engineer for the safety of the users.

[67] ClaimsPro, the independent adjuster for Co-Operators, did not retain an engineer to attend at the site immediately. Instead, after ClaimsPro received Mr. Beaucage's initial opinion, they contacted Bay of Quinte and asked if they could have access to Mr. Beaucage's notes,

measurements, and photographs so that they could have their own forensic engineer do further analysis. Bay of Quinte provided everything that ClaimsPro asked them to provide from Mr. Beaucage's file.

Mr. Jay's Evidence

[68] Mr. Jay was retained on November 8, 2017, to review Mr. Beaucage's documents, including statements and a third-party engineering report, to assess the most probable cause of the Sprayer's rollover off the Bridge. Mr. Jay was advised that the Bridge had already been repaired by the time he was retained and therefore, he was not able to independently assess the condition of the Bridge structure and its construction at the time of the accident. As a result, Mr. Jay's analysis was based on a review of the documents and information provided by CEP. Mr. Jay provided his initial report on December 15, 2017.

[69] Mr. Jay testified that the wooden deck showed signs of wear and decay. He stated that if in fact the wooden deck had been replaced within the last four years, as Mr. Sutton claimed, the wooden boards would not have been as decayed as they were. Mr. Jay thought that it was the presence of rot that caused the collapse of the Bridge. He testified that one of the pictures showed that there were three rotten boards at the collapsed section of the deck. Mr. Jay thought that the overhang would have been capable of supporting the weight of the Sprayer up to a certain point, had it not been for the rot.

[70] Mr. Jay was also of the opinion that the lateral shifting of the wood deck on the Bridge contributed to its collapse. Mr. Jay testified that the wood deck was not secured to the steel girders, which in his opinion meant that the wood surface could shift to either side, leaving more of the wood deck unsupported by the steel beams.

[71] He testified that it was likely that the wood deck on the Bridge had shifted laterally across the steel beams, such that the overhang was wider on the right side. As a result, although the Sprayer may have been centred on the wood deck, it was in fact off centre of the steel beams. Because the wood deck was rotten in several places, it was weak and collapsed under the weight of the Sprayer, according to Mr. Jay.

[72] Mr. Jay testified that at the location of the collapse, CEP measured approximately 10 feet of remaining deck of the 16 feet of deck that was originally present. Mr. Jay was of the view that this confirmed that the overhang at the point of collapse was much wider than 36 inches. He testified that the site photographs confirmed that the overhang was much wider on the right side, where the Sprayer rolled off the Bridge.

The Evidence of Mr. Beaucage

[73] Mr. Beaucage testified that, in his opinion, the cause of the collapse was that the Sprayer had veered right onto the overhang, which could not support it. He attributed this to driver error.

[74] Mr. Beaucage provided evidence that while there was rot in other parts of the wood deck, there was no evidence of rot at the site of the breakage. He testified that he examined the wood where the deck broke and saved pieces of it, which he brought to court. They were entered as exhibits at trial.

[75] Mr. Beaucage testified that even if there had been some rot on the overhang, there would have been no risk of the Bridge collapsing, provided the vehicle was centred over the steel beams. This is because the steel beams would support the weight of the vehicle even if the entire width of the tires was not over the steel beams.

[76] Mr. Beaucage provided evidence that it was very unlikely that the deck of the Bridge had shifted to the right before the accident. Mr. Sutton Senior had just been over the Bridge ten minutes prior to the accident and there were no issues. Furthermore, if the deck had shifted, it would have been curved, which would have been visible to Mr. Denyes. Mr. Denyes denied that there was anything unusual about the Bridge on June 1, 2017.

[77] Mr. Beaucage testified that the reason the wood deck was displaced to the right was that the Sprayer likely caught the heavy steel cable as it was tipping over the edge of the Bridge, taking the deck with it. The evidence to support that proposition was that the steel cable was not attached to the bank when Mr. Beaucage attended the site. He testified that it was likely that the steel cable snapped off the anchor at the south end.

Findings Regarding the Factual Causes of the Accident

[78] I prefer Mr. Beaucage's evidence with respect to whether the wood was weakened by rot at the point where the overhang broke. He was there shortly after the accident to physically observe the Bridge and the broken wood. He remained on site for three days and carefully examined all of the evidence. He collected pieces of wood from the site of the collapse and took them back to the office with him in case there was litigation and he needed to demonstrate what he saw. Mr. Beaucage examined the wood boards at the breakage point and did not see any signs of rot.

[79] Mr. Jay speculated that the rotten pieces of wood must have fallen in the river. Although Mr. Beaucage did not collect the wood that fell in the river, his ability to physically observe and touch the material gave his testimony and opinion more weight than Mr. Jay's observations and speculations, which were based on the photographs.

[80] Furthermore, I find that Mr. Beaucage's opinion regarding the rot was well supported by other observations he made. He noted that right before the breakage point, some of the pieces of wood on the deck showed signs of rot. However, the Bridge did not break at that point. He stated that if rotten boards were the cause of failure, the failure would have happened before the two-thirds point.

[81] Mr. Beaucage further satisfactorily explained why there were some pieces of wood that broke closer to the middle of the Bridge. He stated that when the Sprayer fell to the right, the weight of the falling Sprayer created tension (a "moment") in the wood, causing it to snap where it was weakest – at the point of the rot in the middle of the board. However, that was not the cause of the collapse. The cause of the collapse was that the Sprayer was on the overhang, which could not support it.

[82] It is very significant that in cross-examination, Mr. Jay admitted that if the tires were centred on the beams, the Bridge would not have collapsed, regardless of whether the wood on the overhang was rotten or in pristine condition. Mr. Jay conceded that, assuming that the beams were 10 feet apart and there was a 36-inch overhang on both sides of the beams, the right front tire had

to have been outside of the steel beams to fracture the Bridge. He also conceded that for the right front tire to be over the beam and onto the overhang, some veering or drifting of the Sprayer to the right would have to have occurred. Therefore, the tires of the Sprayer had to have been off-centre of the beams.

[83] I find that there are two possible reasons for the Sprayer to have been off-centre of the steel beams: (1) Mr. Denyes had a moment of inattention and drove over the overhang; or (2) the wood deck had shifted laterally and was not centred on the beams.

[84] With respect to the shifting of the wood surface off centre, I also prefer Mr. Beaucage's evidence that the surface was likely pulled off centre by the tractor pressing down on the steel cable as it fell. The wood deck was not off centre when Mr. Denyes started to cross the Bridge. This evidence is most consistent with other evidence in this case, and particularly that of Mr. Denyes and Mr. Sutton. Mr. Denyes stated that he did not notice anything unusual about the Bridge before he travelled over it. If the deck had shifted to the right before he crossed the Bridge, there would have been a curve in the shape of the Bridge that would have been noticeable. Mr. Sutton testified that his father had used the Bridge 10 minutes before Mr. Denyes, and there was nothing out of the ordinary about it.

[85] Mr. Jaye testified that the position of the cable on the left side of the Bridge was not consistent with Mr. Beaucage's theory that the cable pulled the wood surface off centre when the Sprayer caught it as it rolled over the Bridge. Mr. Jaye also testified that Mr. Beaucage's measurements showed that the overhang at the point of collapse was much wider than 36 inches.

[86] However, I find Mr. Jaye's testimony on this point to be weak. He did not explain why the cable position on the left side disproved Mr. Beaucage's opinion. Mr. Jaye criticized Mr. Beaucage's analysis, but he did not provide much analysis of his own on the lateral shifting issue, and instead couched his comments on the lateral shifting of the wood surface in hypothetical terms. He stated that the wood surface "may" have shifted off centre. Moreover, he did not acknowledge that the steel cable and the wooden boards running down the sides of the overhang could have

minimized the lateral shifting. Mr. Jaye's only evidence of lateral shifting was a photograph in which the overhang is greater on the right side.

[87] I find that the photographic evidence of a larger overhang on the right side after the accident was satisfactorily explained by Mr. Beaucage; the steel cable pulled the whole Bridge deck over to the right when the sprayer fell off of the right side.

[88] In cross-examination, Mr. Jay did concede that the wood deck on the Bridge may have been pulled to the right side during the accident.

[89] Therefore, I conclude, on a balance of probabilities, that Mr. Denyes inadvertently steered to the right when he was travelling over the Bridge, thereby bringing the right front tire of the Sprayer onto the unsupported overhang. This caused the overhang to break and the Sprayer to fall into the river. It is likely that Mr. Denyes was not aware that the Sprayer was drifting onto the overhang.

[90] I turn now to an examination of TCO Agromart's contention that the lack of support for the overhang was one of the causes of the accident.

[91] Mr. Beaucage testified that the cause of the accident was driver error, but he also testified that the Bridge broke because the overhang was not capable of supporting heavy weights. He testified that lighter vehicles and people could stand on the overhang. However, a heavy vehicle, even without a load, would cause the Bridge to break if it drove too far out on the overhang. The further out on the overhang the driver is, the more likely it is to break.

[92] Mr. Jay testified that the unsupported overhang accounted for 38 percent of the Bridge. He thought the overhang should have been supported by steel beams. He said that if a driver veered off the steel beams slightly, the weight would not be supported. He noted that there were no signs warning people of this. Furthermore, in Mr. Jay's view, it was expecting too much of drivers to have their heavy equipment perfectly centred over the steel beams at all times. The overhang should have been supported by steel beams so that it would not break under the weight of heavy equipment.

[93] Mr. Jay's evidence stopped short of establishing that beams supporting the overhang would have prevented the accident. This was not the focus of his testimony because his theory was that it was the presence of rot and/or the displacement of the deck that caused the Bridge to break.

[94] While it seems obvious that steel beams supporting the full width of the overhang would prevent it from breaking, in assessing potential liability, an inference of causation must be based on objective facts, not speculative rationalization; speculative theories are not sufficient to establish liability: *Cannito v. Madison Properties Inc*., 2018 ONSC 6190, at para. 31. Mr. Jay did not provide any objective evidence, other than his statement that the Bridge was poorly designed because the overhang lacked support, to establish that this was the cause of the accident.

[95] Nevertheless, I take note of the Supreme Court of Canada's direction to assess the evidence relevant to factual causation in a robust and common-sense way. Scientific proof of causation is not required; common sense inferences from the facts may suffice.[10] Therefore, I am prepared to find that the absence of steel beams supporting the overhang was another factual cause of the accident.

[96] However, I am not prepared to find that the absence of warnings was a factual cause of the accident. A sign warning Mr. Denyes of the risk of failing to stay in the centre of the Bridge would not have prevented the accident since Mr. Denyes already knew he had to keep the Sprayer centred.[11] Therefore, I find that signs warning of the need to stay in the centre of the Bridge or that the overhang was not supported were not required by s. 3 of the OLA in this case.

[97] The question now is whether the lack of steel beams supporting the overhang was a proximate or legal cause of the accident.

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[10] *Clements v. Clements*, 2012 SCC 32 (CanLII), [2012] 2 S.C.R. 181, at para. 38.

[11] See *Epp v. Ridgetop Builders Ltd.* (1978), 94 D.L.R. (3d) 505, at p. 512-513 (A.B.K.B.) (*Epp*); *Paul Porchak v. Pizza Pizza Limited*, 2016 ONSC 4551, at para. 40.

Findings Regarding The Legal Cause of the Accident

[98] A defendant will not be found liable for damages that were caused by their actions if those damages were not reasonably foreseeable. As stated by the Court of Appeal in *Hemmings*:

> Forseeability is assessed in the circumstances of the particular defendant … As summarized in *Mustapha*, at para. 13, whether the risk of harm satisfies that degree of probability turns on whether the risk is "one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched." [Emphasis in original][12]

[99] I find that it was not reasonably foreseeable that Mr. Denyes would inadvertently drift to the right side of the Bridge. The Bridge was a private bridge used primarily by people who were skilled at operating heavy farm equipment. Its intended use was for heavy farm equipment to travel between the south and north parts of the Sutton Farm.

[100] Since 1980, the Bridge has been used frequently without incident. The evidence of Mr. Sutton, which was unchallenged, established that the Bridge was used multiple times each day. During harvest season, the Bridge was used 40 to 50 times each day by large and heavy farm equipment, having weights from 30,000 to 80,000 pounds. The operator of the farm equipment would drive this equipment over the Bridge, staying centered on the Bridge so that the steel beams supported the weight of the equipment.

[101] Mr. Denyes himself had crossed the Bridge numerous times with the same Sprayer and had not encountered any problems.

[102] I find that it was reasonable for the Suttons to assume that people like Mr. Denyes, who were using the Bridge on their property, had more knowledge, experience, and skill than members

[12] *Hemmings*, at para 68, citing *Brenenstuhl v. Caldwell*, 2020 ABQB 315, at para. 94; *Mustapha*, at para. 13.

of the general public. They were entitled to assume that Mr. Denyes would use that knowledge and experience to drive safely across the Bridge.

[103] The present case bears some similarities to *Epp v. Ridgetop Builders Ltd*.[13] In that case, Mr. Epp, who was an employee of a survey company, undertook a survey of a construction site during a windstorm. As he walked by one of the walls of a building, it blew down on him without any prior indication of failure, injuring him. Laycraft J. held that it was reasonable for the defendant to assume that the plaintiff would make use of his specialized knowledge and experience to avoid the risks of a construction site. In the words of Laycraft J.:

> I am, however, of the opinion that the plaintiff was the author of his own misfortune. He was aware of the danger of going under the wall even for a short interval. A warning of the danger or even an express prohibition against going under the wall would in no way have increased the plaintiff's knowledge of the risk he ran. He already had all the knowledge a warning could have given him, however prominent or vehemently expressed it was. Whatever would have been the position of the defendant had a child or a less knowledgeable person than the plaintiff been injured, the defendant was entitled to assume that persons, such as the plaintiff, who were familiar with construction practices would recognize and avoid the danger.[14]

[104] Similarly, in the present case, I find that a reasonable person in Sutton Farm's position would not reasonably foresee that Mr. Denyes would inadvertently let the Sprayer veer to the right over the overhang, given the lengthy history of Bridge's use by experienced farmers without incident. A reasonable person would assume that an experienced driver like Mr. Denyes would not

[13] *Epp v. Ridgetop Builders Ltd*., 1978 CanLII 752 (AB KB)

[14] *Epp*, at para. 26. I note that in *Epp*, Laycraft J. found that the defendant discharged the duty of care it owed to the plaintiff because the plaintiff could be expected to avoid the danger. Although his conclusion was based on an analysis of the standard of care, I find Laycraft J.'s reasoning applicable to the reasonable foreseeability analysis. Sutton Farms' expectation that Mr. Denyes would use his specialized knowledge and experience to avoid the Sprayer veering off the centre of the Bridge makes the foreseeability of the accident more remote than it would be for a member of the general public.

take his attention off the Bridge, even for a fraction of a second, such that the front right wheel would end up on the overhang.

[105] While there is always a possibility that a heavy equipment operator could lose focus for a moment and drift onto the overhang, the courts have been clear that mere possibility is not sufficient for a finding of reasonable foreseeability. In the words of the Court of Appeal in *Hemmings*:

> Mere possibility that the harm would occur is not sufficient: "possibility alone does not provide a meaningful standard for the application of reasonable foreseeability": *Mustapha*, at para. 13. Instead, in *Mustapha*, the Supreme Court stated the degree of probability or likelihood that would satisfy the reasonable foreseeability requirement is a "real risk", that is "one which would occur to the mind of a reasonable man in the position of the defendan[t] . . . and which he would not brush aside as far-fetched": *Mustapha*, at para. 13, quoting *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty*., [1967] A.C. 617 (P.C.) ("The Wagon Mound No. 2"), at p. 643.[15]

[106] Given that the accident occurred, it was clearly a possibility. But, seen in the context of nearly 45 years of regular and often heavy use of the Bridge, I find that this possible occurrence was not reasonably foreseeable.

[107] Therefore, I find that the lack of supports under the overhang was not the legal cause of the accident.

Conclusion on Liability

[108] The experts in this case agreed that had Mr. Denyes kept the tires of the Sprayer over the steel beams while driving across the Bridge, the Sprayer would not have broken through the overhang and ended up in the river. The evidence in this case persuades me, on a balance of probabilities, that it was not the presence of rot, the lack of signage or the lateral shifting of the

[15] *Hemmings*, at para. 67.

wooden deck that caused the Sprayer to break through the overhang. Rather, Mr. Denyes inadvertently let the Sprayer drift to the right side of the Bridge, onto the overhang, which could not support the Sprayer's weight. It was not reasonably foreseeable that Mr. Denyes would drive over the overhang and, therefore, the lack of support to the overhang was not the proximate cause of the accident.

[109] In conclusion, the factual and legal causes of the accident were not related to the design, maintenance, or upkeep of the Bridge. Sutton Farms did not breach the standard of care under s. 3(1) of the OLA.

[110] While I find that the Plaintiff's claim must fail because causation has not been established, I nonetheless consider the issue of damages.

Damages

[111] In the recent case of *Kew v. Konarski*, 2024 ONSC 3553 (*Kew*), Leach J. provided the following lengthy, but very useful, summary of the general principles applicable to the assessment of damages for tortious damage to property:[16]

> a. Victims of tortious interference with property interests generally are to be restored to their *status quo ante* in monetary terms. In other words, the basic principle of damage assessment is that the party complaining should be put in as good a position as he or she would have occupied if the wrong had not been done. Indeed, it has been emphasized that the dominant rule of law in this area is that principle of *restitutio in integrum*, and that subsidiary rules can only be justified if they give effect to that rule.
>
> b. In practice, damages for tortious interference with property interests are assessed by reference to diminution in value resulting from the defendant's tort,

[16] In *Kew*, Leach J. credited Professor Elizabeth Adjin-Tettey for her accurate summary of the principles in her article entitled "Measurement of Damages for Interference with Property Interests in Torts and Contracts", (2003) 26:4 Adv Q 391. The references to specific pages in that article in the quote above are deleted for the sake of brevity.

which can sometimes be assessed by the difference in market value of the relevant property before and immediately after the defendant's tortious conduct.

c. Flexibility is nevertheless required in assessing the appropriate value to be used in particular cases, with courts refraining from "slavish adherence" to use of pre-tort market value of damaged property. Indeed, diminution in value is normally assessed by reference to the reasonable cost of restoration necessary to bring damaged property back to its pre-damaged condition, with the cost of restoration often being accepted as the appropriate measure of the plaintiff's loss for damage to property, without any reference to its pre-accident market value. In that regard, courts generally do not have a problem with a plaintiff's insistence on having damaged property restored exactly to its pre-damaged condition, (as opposed to the plaintiff being obliged to accept damages measured by the cost of a supposed replacement), as such a desire is consistent with *restitutio in integrum*.

d. Difficulties in awarding damages calculated by reference to the cost of restoration may arise, however, in cases where the costs of repair greatly exceed the cost of a supposed replacement. In such cases, courts may limit the plaintiff's damages to the cost of replacement, rather than award damages based on the costs of repair; an approach consistent with a plaintiff's duty to mitigate losses sustained as the result of a defendant's tortious conduct. In other words, in certain cases, the principle of *restitutio in integrum* sometimes may be subordinated to another principle; i.e., that of awarding damages that are reasonable as between the plaintiff and the defendant.[H]owever, courts remain flexible in determining what is fair and just in a given case, and a plaintiff will be entitled to the higher costs of repairs when it is the most reasonable means of achieving *restitutio in integrum*, having regard to all the circumstances of a particular case. Factors to be considered in determining whether to assess damages on that basis, (i.e., the cost of repair/restoration rather than the cost of replacement), include the following:

> i. the uniqueness of the property in question;
>
> ii. the availability of a reasonable replacement on the open market;
>
> iii. the difference between the cost of repair/restoration and the cost of replacement;
>
> iv. the plaintiff's interest in having the item repaired; and
>
> v. the benefits of reinstatement to the plaintiff weighed against the burden imposed on a defendant of having to pay the higher cost of repair/restoration.

e. Where a court exercises its discretion to award damages for tortious damage to property assessed on the basis of cost of repair/restoration rather than

cost of replacements, doing so may give rise to concerns relating to "betterment". In that regard:

> i. It often will be impractical to repair damaged property with old and worn-out material, and it commonly occurs that a plaintiff, in "making good" damage to property, will not be able to restore himself or herself precisely to his or her "pre-loss position" without improving it. For example, substitution of new components for old may enhance the value of the property in question, compared to its pre-damaged state. Plaintiffs awarded damages assessed on the basis of repair/restoration costs therefore might end up with an asset more valuable after such repairs than they had before the defendant's tortious interference with their property. In other words, such plaintiffs may be in a better position after satisfaction of such a judgment than if the damage had not occurred in the first place.
>
> ii. Competing principled views have developed in relation to how the law should approach the "betterment" potentially enjoyed by such plaintiffs in such situations. In particular:
>
> > 1. On the one hand, the principle of *restitutio in integrum* suggests that there should be an allowance or deduction made for such "betterment" in the assessment of damages based on the cost of repair/restoration, in order to ensure that the plaintiff does not obtain a windfall at the defendant's expense. In other words, the damages otherwise awarded to the plaintiff, based on the cost of repair/restoration, arguably should be reduced by the value of the improvement of the plaintiff's position.
> >
> > 2. On the other hand are numerous countervailing concerns that deductions for "betterment" are prejudicial to the interests of plaintiffs who have been wronged, and therefore should be avoided. In particular:
> >
> > > a. the value of an asset is not necessarily enhanced after repairs or reinstatement;
> > >
> > > b. making such a deduction could compromise the plaintiff's ability to carry out repairs and therefore be restored to the state of affairs prior to the defendant's tortious conduct unless the plaintiff can afford to invest in the improvements; and

> c. such an approach raises concerns about plaintiffs effectively being forced to improve their property when they might not have intended to do so but for the defendant's wrong, and/or being forced to invest money in enhancement sooner than they might otherwise have done.
>
> 3. English courts generally are committed to the latter view; i.e., holding that a plaintiff is entitled to recover the full cost of repair/restoration in such cases, irrespective of any improvement in the plaintiff's position. In particular, if a plaintiff incidentally derives a greater benefit than mere indemnification through an award of damages based on the cost of repair/restoration, that is said to arise only from the impossibility of otherwise effecting such indemnification without exposing the innocent plaintiff to the risk of some loss or burden which the law will not place on him or her. Even in cases where a plaintiff thereby obtains "new for old", the defendant wrongdoer is not permitted to diminish the plaintiff's claim on that account.
>
> 4. Canadian courts have not consistently adhered to one approach or the other; i.e., with some holding that "betterment" of the plaintiff's property may be taken into account to reduce damages otherwise awarded on the basis of repair/restoration costs, and some holding that a defendant is not entitled to the benefit of any deduction in respect of betterment where repairs were necessitated solely by the defendant's wrongdoing. In other cases, a compromise has been adopted, with a deduction being viewed as appropriate where repairs will result in a net increase in the value of the plaintiff's asset, but the plaintiff then receiving additional compensation for the losses effectively imposed on the plaintiff in being forced to spend money [he] or she otherwise would not have spent, or as soon as was required by the damages occasioned by the tort, in cases where appropriate evidence is available to make such determinations.

iii. In any event, while a plaintiff bears the burden of demonstrating the expenses associated with repair/restoration, it clearly is up to the defendant to establish the existence of any resulting betterment and its quantification. In other words, the onus is on a defendant to prove not only that repairs have resulted or will result in betterment but also the value of

> an alleged improvement, before any such deduction for betterment will be made from an award of damages based on the cost of repair/restoration.[17]

[112] TCO Agromart claims a loss of either $331,559.49, the assessed cost of repair, or $452,563.29, the replacement cost of a new machine. In addition, TCO Agromart claims a total of $84,803.50 in additional expenses related to the accident, as follows:

> $57,630.00, costs incurred in renting a substitute sprayer,
>
> $18,482.55, other expenses incurred in equipment recovery following the collapse,
>
> $8,690.95, additional invoice of HJV.

[113] While consistently denying liability, Sutton Farms agreed that if liability was found, the cost of renting a substitute sprayer would be an appropriate head of damage. However, Sutton Farms stated that the cost of renting the substitute sprayer was $51,000, not $57,630. Sutton Farms also accepted that TCO Agromart had out of pocket expenses in the amount of $18,482.55.

[114] However, Sutton Farms did not agree that the additional invoice for $8,690.95 would be included in the damage claim. Furthermore, Sutton Farms argued that the amount claimed for repairing the Sprayer ($331,559.49) greatly exceeded the value of the Sprayer just before it fell into the river. In support of this argument, Sutton Farms pointed to the testimony of several witnesses who admitted that the cost of repairing the Sprayer bore no relation to the value of the Sprayer the moment before it fell into the river. Therefore, according to Sutton Farms the true measure of the damages is reflected in the value of the repairs done by Mr. Van Aaken, from Vantayge Farms, after he purchased the Sprayer from Mr. O'Neill.

[115] Sutton Farms argued that if Mr. Van Aaken was able to repair the machine with parts and labour and then sell the machine for $112,500 after purchasing it from Mr. O'Neill for $18,000, it

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[17] *Kew*, at para. 91.

follows that the parts and labour were less than $94,500 (assuming Mr. Van Aaken made some profit). Therefore, the best evidence of the measure of damages, according to Sutton Farms, was that the Sprayer was repairable for less than $94,500.

[116] I do not accept the submissions of Sutton Farms that the damages should be limited to the cost of repairing the Sprayer. Mr. Van Aaken testified that the Sprayer was not of the same quality after he repaired it as it was when it went into the river. It was less valuable because it had been submerged in water. He was required to advise the purchaser of this fact.

[117] Several other witnesses testified that a sprayer that had been submerged in water might develop problems in the future. For example, Ms. Vansteenkiste, who testified on behalf of ClaimsPro, gave evidence that although the Sprayer was repairable, there is always a concern when water is involved that in two or three months, or a year down the road, the electronics might be affected by that water. There might also be rust, corrosion, or electrical issues.

[118] Andrew Timewell, who testified on behalf of HJV Equipment, provided an estimate of the cost of repairing the Sprayer. Mr. Timewell testified that the machine was extensively damaged both structurally and in terms of the electronics. The cabin was crushed and needed rebuilding. The boom was bent and the tubing inside was damaged. All electrical equipment had failed due to submersion in the water while the machine was operating. The engine had ingested water and needed to be rebuilt. The hydraulic system had to be replaced. The command centre had also failed.

[119] Mr. Timewell gave evidence that Vantage repaired and resold the Sprayer on the basis of the “buyer beware” caveat. That is, they had to warn the purchaser that there might be problems with the machine later on as a result of water damage.

[120] The Summary of Loss Options prepared by ClaimsPro provides additional evidence that the repair of the Sprayer would not restore it to its pre-accident state. Under the heading “1. Repair damaged sprayer” the Summary of Loss Options states:

> While deemed possible, downside is concern as to future issues such as may flow from water damage to electronics, hydraulics, etc.

> Future breakdowns due to such failures would never be at a time convenient to insured operation.
>
> Therefore would cause inability or delay of service to clientele and detriment to business.
>
> While a unit such as this would attract some interest, as a used unit, after trade-ins, disclosure of prior damage such as this would diminish such interest and/or value to a potential purchaser.
>
> Loss on this basis:
>
> $ 331,559.49
>
> + costs to date: $ 18,482.55
>
> **$ 350,042.04**
>
> Downsides make this option unrealistic.

[121] Mr. Overveld also testified that the risk of water damage to the Sprayer after repair was real. He testified that there was bound to be problems with the Sprayer in the future as a result of water damage. For this reason, he added a reserve of $10,000 to the repair estimate.

[122] Mr. O'Neill testified that his customers would not accept that a sprayer that had been water-damaged would do an accurate job on custom applications. Custom application of crop products like herbicides and fertilizers requires a reliable machine, he testified. Therefore, he decided not to have the Sprayer repaired, but rather, to use the insurance money towards the purchase of a new John Deere Sprayer.

[123] On the basis of the above-noted evidence, I conclude that the work done by Vantayge Farms to repair the Sprayer does not represent a valid assessment of the cost of returning TCO Agromart to the position they were in before the accident occurred. After the repairs, the Sprayer was no longer as valuable a machine as it was before it went into the river. There was a risk, which was not present before the accident, that the Sprayer would malfunction as a result of water

damage. I am satisfied that the risk of water damage was significant enough that it made the repair of the Sprayer an unrealistic option, as stated by ClaimsPro in the Summary of Loss Options.

[124] Ms. Vansteenkiste testified that ClaimsPro investigated into the availability of a replacement sprayer for the same value as the Sprayer when it went into the river, but none could be found. Mr. O'Neill also testified that a used sprayer with the same capabilities as the Sprayer could not be located. This evidence was uncontested.

[125] Ms. Vansteenkiste was questioned about a document dated August 18, 2017, entitled Summary of Relevant Loss Figures. The document indicates that the actual cash value of the Sprayer before it fell in the river was between $180,000 and $185,000. Ms. Vansteenkiste indicated that Bob Francis, who handled the file for ClaimsPro before she took it over, had provided that estimate without any supporting documentation. She stated that for that number to be a valid estimate, it would have to have been supported by an appraisal.

[126] Mr. Francis was not available to testify. Therefore, I have no idea how he came to his estimate of the actual cash value of $180,000 to $185,000. I accept Ms. Vansteenkiste's evidence that although this was Mr. Francis' determination of the value of the Sprayer before it went into the river, it is not a reliable estimate because it lacks support. Mr. Francis' estimate is speculative. Furthermore, I note that Mr. Francis indicated in the Summary that $180,000 to $185,000 was for the purchase of a used sprayer "if available". The evidence established that a used sprayer with the same capability as the Sprayer was not available.

[127] Given the unavailability of a used replacement sprayer with the same features as the Sprayer, and the risk of water damage if the Sprayer was repaired, I find that the only option for restoring TCO Agromart to its pre-accident state would be to purchase a new sprayer. To address the concerns expressed by Sutton Farms that TCO Agromart should not be put in a better position than it would have been had the accident not occurred, I find that it is appropriate to make a deduction for depreciation.

[128] Mr. O'Neill obtained a quote from HJV Equipment for a 2017 Rogator 1100 demonstration model with the same capabilities as the Sprayer (Exhibit 21). The cost of that sprayer was $605,543.59 (CAD).[18]

[129] Mr. Timewell gave evidence of the depreciated value of the 2017 Rogator 1100 sprayer. I found Mr. Timewell to be a knowledgeable and reliable witness. He is the corporate service manager at HJV Equipment, where he has worked for nine years. He is responsible for the compliance of the six service departments within his area. Mr. Timewell has experience working with the Rogator sprayer as a service technician.

[130] Mr. Timewell testified that depreciation is calculated at 10 percent per year, for a total of 40 percent for the four years between the Sprayer's purchase date and the accident. Based on those numbers, Mr. Timewell testified that the depreciated value of the replacement sprayer is $363,326.15 (CAD).[19]

[131] I find that the depreciated value of the 2017 Rogator 1100 is the best measure of the damages sustained by the accident. While the Sprayer could have been repaired, there was a risk of water damage, which would have affected the Sprayer's reliability and TCO's business operations. Using the depreciated value of a new sprayer addresses the betterment concern, raised by Sutton Farms, that TCO Agromart should not receive "new for old". The cost of putting TCO Agromart into the position it would have been had the accident not occurred is $363,326.15 (CAD).

Additional Expenses

[132] With regard to the additional invoice from HJV Equipment for $8,690.95, dated August 30, 2017, Mr. O'Neill and Ms. Vansteenkiste gave evidence that this was for the work HJV did to

[18] Mr. Timewell testified that new sprayer prices are quoted in US dollars. The base unit price for a 2018 Rogator 1100 was $435,910.00 USD. Using an exchange rate of 1.3%

[19] $605,543.59 - $242,217.44 (40%) = $363,326.15.

take the Sprayer apart to enable them to provide quotes for the repair work as well as to tow the Sprayer from HJV's shop to their yard. Mr. O'Neill testified that he paid the invoice. I find that this was a reasonable expense incurred as a result of the accident and therefore, it is included in the damage award.

[133] Finally, the difference between the amount claimed by TCO Agromart for the rental of a sprayer and the amount that Sutton Farms agreed to include in a damages award represents the H.S.T. that was charged by HJV Equipment for the rental. Counsel for TCO Agromart did not provide submissions on this issue and, therefore, I am not prepared to include the H.S.T. amount in the damage award. It is my understanding that TCO Agromart was entitled to claim an input tax credit for the H.S.T. that it paid, but I refrain from making a finding in that regard, given that no submissions were made on this point. The amount of $51,000 is included in the damage award.

Conclusion Regarding Damages

[134] Although I have concluded that TCO Agromart's claim must fail because they did not establish causation, I have nevertheless provided my analysis of damages. I find that the principle of *restitutio in integrum* would require the replacement of the Sprayer with the 2017 Rogator 1100 demonstration model with the same capabilities as the Sprayer. However, it is appropriate in the present circumstances to deduct $242,217.44 in depreciation costs from the value of the replacement sprayer. The total amount of damages that would be awarded in the event of a finding of liability would be:

- $363,326.15 for the replacement sprayer.
- $51,000 for the rental of a sprayer.
- $8,690.00 for the cost of preparing the Sprayer for the repair estimate and towing it.
- **TOTAL DAMAGES: $423,016.15**

Final Conclusion

[135] The accident that occurred on June 1, 2017, left an indelible mark on the lives of many people, but most especially Colin Denyes. Fortunately, his quick-thinking and physical agility enabled him to escape from life-threatening circumstances. Mr. Denyes is to be commended for his courage, not just in escaping from the Sprayer that day, but also in testifying about this traumatic event during a trial that pitted his former employer against his friends, the Suttons. Although I have found that Mr. Denyes' inadvertent steering of the Sprayer onto the wood overhang was the cause of the accident on June 1, 2017, nothing in this conclusion takes away from the positive regard I have for him.

[136] TCO Agromart's claim against Sutton Farms is dismissed.

[137] Sutton Farms has prevailed and is therefore, presumptively entitled to their costs. I would encourage the parties to reach an agreement on costs. However, if they are unable to agree, they may schedule a date to appear before me to argue costs. Sutton Farms' written submissions will be due seven (7) days prior to the appearance, and TCO Agromart's written submissions will be due three (3) days before the appearance. Written submissions are to be no longer than three (3) pages, including the Bill of Costs.

Justice K.A Jensen

Released: March 31, 2025

CITATION: T.C.O Agromart Ltd. v. Sutton Farms (Nacona) Ltd., 2025 ONSC 1996
COURT FILE NO.: CV-18-00000417-0000
DATE: 2025/03/31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

T.C.O. Agromart Ltd.

Plaintiff

-AND-

Sutton Farms (Nacona) Ltd.

Defendant

REASONS FOR JUDGMENT

Justice K.A. Jensen

Released: March 31, 2025