



Liability of a Highway's Concessionaire for a Traffic Accident.

BY: JORGE PAREDES | ATTORNEY AT LAW | JANUARY 2021

In March 2014 a vehicle was traveling by the highway granted in concession carrying five people (the driver, his mother, father, a sister and her sister's under-age son). A truck that was travelling by the opposite lanes all of a sudden crossed the containment barrier and continued its way through the wrong side of the road. In spite of the fact that the car's driver noticed that the truck was travelling by the wrong side of the road and stopped his car, he was unable to prevent his vehicle from being collided head-on. As a consequence of the serious injuries the car's driver died on the next day.

LEGAL SITUATION

In October 2017, the deceased driver's son, father, mother and sister brought a legal action for compensation for damage against the highway's concessionaire by holding that the highway lacked of proper safety and mitigation measures aimed at preventing events as foreseeable as the one in question. **The sum sought by the plaintiffs amounted to CLP 320,000,000**, broken down in CLP 120,000,000 for pain and suffering for his son, CLP 80,000,000 for each parent and CLP 40,000,000 for the deceased driver's sister.

In March 2019, the lawsuit was totally rejected by the first instance court.

In June 2020 the first instance ruling was upheld by the **Court of Appeals** by rejecting the action brought against the highway's concessionaire.

In November 2020, an appeal of cassation filed by plaintiffs was dismissed by the **Supreme Court**, thus causing the first instance ruling issued in favor of the highway's concessionaire to become final and binding.

ASPECTS OF THE RULING WHICH BEAR RELEVANCE UPON THE LIABILITY SCOPE CRAWFORD - GRAHAM MILLER

TORT NATURE OF THE LIABILITY SET OUT IN THE CONCESSIONS LAW

The above action for compensation for damage was brought pursuant to the tort liability rules. The concessionaire was ascribed an illegal act – lack of exigible diligence as regards the road's safety – which gave rise to damages which, according to plaintiffs, must be compensated because of the cause and effect relationship between the above diligence and the damage. In

this regard, article 35 of the Concessions Law sets out that highway's concessionaires shall pay for damages of any nature whatsoever which, because of the building of a work or operation thereof, are caused to third parties unless they are exclusively ascribable to the Ministry of Public Works. Thus, the concessionaire's liability does not stem from contractual non-compliance between the former and the affected party (parties), but from a duty of care set down in our regulations.

The first instance ruling that was upheld by the Court of Appeals confirms the extra-contractual nature of the concessionaire's liability, which means that the term for filing actions for compensation will expire in four rather than in five years as is the case where contractual liability is involved.

BURDEN OF PROOF. THE CLAIMANT BEARS THE PROOF.

The tort liability general regulations set out that the burden of proof rest upon who claims to have suffered damage, either directly or indirectly, as a consequence of a third party's negligence.

Plaintiffs' position is based upon the fact that the containment barriers, the design of which is established in the Bidding Bases, were unable to mitigate or prevent the truck from crossing the road centerline, which would indicate that the defendant failed to take whatever safety measure was necessary.

The second instance ruling stated that the concessionaire's liability as regards roads or highways should be appraised on the basis of the standard of care that is requested from such concessionaire. In this regard, the applicable regulations set forth that continuity of the service must be ensured and left in absolutely normal conditions by averting any nuisances, discomforts, inconveniences or dangers that may be posed to the users of the works.

The regulations state that highway's concessionaires shall guarantee the user's safety when using the works granted in concession. Concessionaires are obliged to take whatever action is necessary to comply with the safety obligations imposed upon them.

In this particular case the fact that there were containment barriers at the site of accident was not disputed. Based upon the proof furnished during the suit it was established that the barriers installed as road defenses met the requirements of the Bidding Bases as regards design in accordance with the technical standards set forth in the Ministry of Public Works' Road Manual. In addition, the plaintiffs did not furnish any proof indicating that such barriers were in poor condition or that their quality was lower than necessary. Neither the first instance court nor the Court of Appeals found any negligent action or omission by the concessionaire, which renders necessary for determining the defendant's tort liability pursued by the plaintiff. On the contrary, it was established that the concessionaire's obligations stemming from the concession contract when it comes to safety, had been complied with which led the Court of Appeals to rule by upholding the acquittal issued by the first instance court.

In short, anybody who claims infringement of a duty of care must prove it in court by furnishing enough and proper evidence. If this is not done, even in case of damage as was the death of the vehicle's driver, the lawsuit will be dismissed.