SUPREME COURT OF NOVA SCOTIA

Citation: Johansson v. General Motors of Canada Ltd., 2011 NSSC 352

Date: 20110511
Docket: Hfx No. 230488
Registry: Halifax

Between:

Maria Johansson, Steven Johansson and Jody Johansson

Plaintiffs

v.

General Motors of Canada Limited

Defendant

Judge:	The Honourable Justice John D. Murphy
Heard:	April 26, 27, 28; May 2, 3, 4, 5; 9, 2011, in Halifax, Nova Scotia
Written Decision:	September 23, 2011 *{Oral decision rendered May 11, 2011}*
Counsel:	Nicolle Snow and Ali Raja, for the plaintiff Michelle Awad, Q.C. and Jeff Aucoin, for the defendant

By the Court:

[1] This is a nonsuit motion by the defendant, pursuant to *Rule 51.06(1)* of the *Nova Scotia Civil Procedure Rules*, for an order dismissing the claim of the plaintiff Maria Johansson, on the ground that there is no evidence on which a properly-instructed jury could find that her claim should succeed. The claims of the other plaintiffs were previously dismissed by Summary Judgment Order following a pre-trial motion brought by the defendant.

[2] The remaining plaintiff, Maria Johansson, was badly injured in an automobile accident, which she alleges was caused by a defective part in the

vehicle provided by the defendant. The plaintiffs chose to limit their claim to negligence rather than also claiming a breach of contract.

[3] Ms. Johansson established a *prima facie* case that the automobile was defective, that the defect caused the accident, and that her injuries resulted from the accident; however, the plaintiff provided the Court with no evidence respecting the appropriate standard of care or the defendant's alleged breach of that standard of care. Accordingly, this motion is granted, and the action is dismissed.

BACKGROUND

[4] During the afternoon of October 25, 1998, Maria Johansson was driving a 1997 Chevrolet Lumina in Saint John, New Brunswick. The plaintiff's husband was the original purchaser and registered owner of the Lumina, which had been used as the family vehicle. Her son, and daughter-in-law were passengers in the back seat of the car.

[5] While Mrs. Johansson was navigating a slight left turn in the road, the Lumina continued straight rather than turning, left the roadway, and crashed into a ditch. The accident caused injuries to all occupants of the vehicle, but Mrs. Johansson's injuries were particularly severe and permanent.

[6] Mrs. Johansson suffered a serious head injury that included a basal skull fracture. She was hospitalized in the intensive care unit for approximately five days. Although she recovered, Mrs. Johansson suffered permanent hearing loss and permanent facial palsy. She continues to experience posttraumatic headaches and problems with cognitive functioning (such as memory loss) that significantly affect her everyday life.

[7] At the time of the accident, there was no clear indication of the cause of the crash. The road conditions were normal and Mrs. Johansson was obeying the posted speed limit. The Lumina was written off by the plaintiffs' insurer, sold to an auto salvage company, and then purchased by a private individual. It was not subjected to testing for any potential defect.

[8] In February 2004, more than five years after the accident, the defendant, General Motors of Canada Limited, sent the plaintiff's husband a Recall Notice that included the 1997 Chevrolet Lumina. The Recall Notice read:

> General Motors has decided that a defect, which relates to motor vehicle safety, exists in certain 1996, 1997, and 1998 model year Buick Regal; 1997 and 1998 model year Chevrolet Lumina, Malibu, and Monte Carlo; 1997 and 1998 model year Oldsmobile Cutlass; 1996 and 1997 model year Oldsmobile Cutlass Supreme; 1998 model year Oldsmobile Intrigue; and 1996 model year Pontiac Grand Prix vehicles. Some of these vehicles have a condition where the lower pinion bearing in the power steering gear may separate. Most reports indicate the driver experienced an intermittent loss of power steering assist when making left turns, usually at low speeds. Power assist is normal in right hand turns. When trying to turn left, some drivers could experience higher resistance or, in a few cases, assist towards the right. If this happens while the vehicle is moving, a crash could result.

[9] Upon receiving the Recall Notice, the plaintiff and her family formed the view that a defective part in their 1997 Lumina must have been the cause of the crash, because they were turning left at the time of the accident and unexplainably went straight into the ditch. On September 13, 2004, the plaintiffs filed a Statement of Claim alleging that the accident "was the result of the carelessness and negligent actions of General Motors." It is notable that the plaintiffs did not claim a breach of contract for an implied condition of fitness for purpose.

[10] The defendant defended the action on the basis that its parent company, General Motors Corporation (subsequently in bankruptcy protection), was the designer and manufacturer of the 1997 Lumina. In the alternative, the defendant contended that there was no defect in the design and/or manufacture of the plaintiffs' vehicle, that it was not negligent, and that it was the plaintiffs' negligence that caused the accident. The defendant also relied on the doctrine of spoliation because the plaintiffs' vehicle was not available for inspection.

[11] The plaintiff selected trial with a jury, opened her case on April 26th , and led seven days of evidence. After the close of the plaintiffs' case, the defendant brought this nonsuit motion pursuant to Rule 51.06(1) of the *Nova Scotia Civil Procedure Rules*. Both parties provided the Court with authoritative case law and made oral submissions.

ISSUES

[12] The parties were in agreement on the appropriate test for a nonsuit motion, which is whether the plaintiff has established a *prima facie* case. Put another way, the test is whether "a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff" (**MacDonnell v. M&M Developments Ltd**. (1998), 165 NSR (2d) 115, 1998 CarswellNS 64 at para. 39 (CA)). Establishing a *prima facie* case is a low threshold; however, "evidence upon which an alleged *prima facie* case is based must be sufficient to generate a reasonable prospect of success" (**Morrison v. Muise**, 2010 NSSC 163 at para. 6). Weak evidence may not prevent a nonsuit motion from being granted (**J.W. Cowie Engineering Ltd. v. Allen** (1982), 52 NSR (2d) 321, 1982 CarswellNS 75 at para. 14 (CA)).

[13] On a nonsuit motion, the trial judge must not assess and weigh the evidence that has been presented; rather, the judge must ask: "On the basis of the evidence..., and *if* that evidence was believed, *could* a reasonable jury find some negligence on the part of the respondent, which caused, or contributed to, the appellant's injuries" (**Herman v. Woodworth** (1998) 166 NSR (2d) 174, 1998 CarswellNS 35 at para. 5 (CA)[emphasis in the original])?

[14] Based on this test, the parties agreed (and I concur) that there were three issues that must be determined on this nonsuit motion:

(1) Whether the plaintiff established a *prima facie* case that the Lumina was defective;

(2) Whether the plaintiff established a *prima facie* case that the defect caused the accident on or about October 25, 1998; and

(3) Whether the plaintiff established a *prima facie* case that the defendant's negligence was responsible for the defect in the Lumina?

ANALYSIS

Whether the plaintiff established a *prima facie* case that the 1997 Chevrolet Lumina was defective and that the defect caused the accident?

[15] With respect to the first two issues, I am satisfied that the plaintiff has established a *prima facie* case that the 1997 Lumina was defective and that the defect caused the accident.

[16] Because the plaintiff's vehicle was no longer available, it was not possible to obtain direct evidence on the presence of the defective lower pinion bearing in the power steering gear. The plaintiff's case was entirely circumstantial.
Mrs. Johansson led expert evidence concerning whether the circumstances of the accident—the degree of curvature in the left turn of the road, the speed the vehicle was travelling, and its trajectory into the ditch—were consistent with the defect described in the defendant's Recall Notice.

[17] The defendant cited **Benoit v. General Motors of Canada Ltd**., 2008 ABQB 42 at para. 5 [**Benoit**], and the cases relied on in that case, for the proposition that the plaintiff's circumstantial evidence must be capable of excluding the possibility that the accident was occasioned by any reason other than the alleged defect. I am not convinced that **Benoit** stands for this proposition.

[18] In **Benoit**, the trial judge was making a determination of liability on the merits, not on a nonsuit motion. There, the issue was whether a defective gear shift caused the plaintiff to mistakenly roll into traffic. As I read the decision, and in particular paragraph 5, the trial judge is stating that the burden of proof is on the plaintiff, and that in the case of circumstantial evidence, the inferences that the plaintiff suggests should be drawn from the evidence must be more likely than any other competing theories or inferences; this is what the balance of probabilities standard requires. To suggest that circumstantial evidence must be capable of disproving all other possibilities improperly elevates the standard beyond a balance of probabilities, to a level more akin to proof beyond a reasonable doubt.

[19] Ultimately, in **Benoit**, the trial judge concluded that it was more likely than not that the accident was not caused by a defective automobile. Crucial to this finding was an inconsistency between the plaintiff's testimony of how the accident

happened and the information contained in the relevant Recall Notice about the defect at issue. The Recall Notice stated that foam could obscure the gear shift indicator making it difficult for the driver to determine what gear she was in. The plaintiff testified that she could see the gear shift indicator, and that the vehicle must have slipped from park into drive; this was not a circumstance included in the Recall Notice. On this basis, the trial judge concluded that the plaintiff had not met her onus of establishing that a defect caused the accident.

[20] In the case at bar, a jury, properly instructed on the law could, on the facts adduced, find that the plaintiff's Lumina was defective and that the defect caused the accident. The unexplained nature of the accident, combined with its circumstances, and the nature of the Recall Notice, could support a finding that it is more likely than not that the accident was caused by a defective lower pinion bearing rather than any other competing explanation such as driver error; this is sufficient to satisfy the *prima facie* case threshold on a nonsuit motion.

Whether the plaintiff established a *prima facie* case that the defendant's negligence was responsible for the defect in the Lumina?

[21] Both parties agreed that in addition to establishing that the 1997 Chevrolet Lumina was defective and that the defect caused the accident, the onus was on the plaintiff to establish that she received a defective automobile, wholly or partially, as a result of the defendant's negligence. Product liability negligence is no different than negligence in any other civil case: the plaintiff must establish that the defendant owed her a duty of care, that the defendant breached this duty of care, that it was foreseeable that such a breach could lead to harm, that the breach in fact did lead to harm, and that the defendant suffered damages; these elements are frequently shortened to: (1) duty of care; (2) standard of care; (3) remoteness; (4) causation; and (5) damages.

[22] In this case, an analysis of these elements is complicated by the corporate identity, financial circumstances and actions taken by the defendant, as well as by its parent corporation, General Motors Corporation, and the different corporation which supplied the defective part, Delphi Automotive LLP. The 1997 Chevrolet Lumina was designed and manufactured by General Motors Corporation. The plaintiff's Lumina was assembled in Canada by the defendant General Motors of Canada Limited, which distributed the vehicle exclusively in this country. The defective lower pinion bearing was manufactured by Delphi Automotive LLP, which at the time, was a subsidiary corporation of General Motors Corporation. Since the accident, General Motors Corporation has gone into bankruptcy protection in the United States, and Delphi Automotive LLP repurchased all of its outstanding shares held by General Motors Corporation to emerge as an independent non-subsidiary corporation. General Motors of Canada Limited remains solvent.

[23] As will be seen below, the relationship between the defendant, its parent corporation, and the defective part supplier is not determinative of this motion; however, since product liability analysis depends on the specific role of the defendant in bringing the product to market, it is important to appreciate the corporate arrangements.

[24] In general, manufacturers will be held to different standards than distributors or suppliers. In their Statement of Claim, the plaintiffs failed to distinguish among

the actions of General Motors of Canada Limited (the defendant), General Motors Corporation, and Delphi Automotive LLP, in bringing the 1997 Chevrolet Lumina to market in Canada. Instead, the plaintiff claims that the defendant had committed negligent design, negligent manufacture, and negligent assembly.

[25] Further, the plaintiff did not claim that the defendant and its parent corporation were a single entity at law. Nonetheless, in a pre-trial brief and oral submissions, the plaintiff argued that the corporate veil should be pierced and that the defendant should be treated as though it manufactured the Lumina. The plaintiff cited **Hutton v. General Motors of Canada Ltd**., 2010 ABQB 606, 2010 CarswellAlta 1879 at paras. 153-161, where the Court held, in *obiter dicta*, that General Motors of Canada Ltd. was indecipherable from General Motors Corporation and ought to be held responsible for the negligence of the latter if that could be established. The plaintiff also cited **Phillips v. Ford Motor Co. of Canada**, [1970] 2 OR 714, 1970 CarswellOnt 251 (H Ct J), rev'd on other grounds [1971] 2 OR 637, 1971 CarswellOnt 657 (CA) [**Phillips**], where the trial judge reached a similar conclusion in the context of Ford Motor Co. of Canada Ltd and its American parent corporation.

[26] In addition to these decisions, I also note that the *Motor Vehicle Safety Act*, SC 1993, c. 16 may have implications regarding whether an assembler, such as the defendant, is to be considered a manufacturer. However, I also note that the *Motor Vehicle Safety Act* was not pled by the defendants and was not brought to the attention of the Court by either of the parties.

[27] The *Motor Vehicle Safety Act* places safety obligations on companies which manufacture, sell or import vehicles in Canada. Section 2 of the Act states that "'manufacture', in relation to a vehicle, **includes any process of assembling** or altering the vehicle prior to its sale to the first retail purchaser" [emphasis added]. This would appear to bring the defendant within the definition of a company that "manufactures" vehicles. While this may not be enough to pierce the corporate veil, it does suggest that assemblers of automobiles in Canada may be held to more stringent product liability obligations akin to that of manufacturers. Moreover, legislative safety standards may be relevant in determining the appropriate standard of care (See **Canada v. Saskatchewan Wheat Pool**, [1983] 1 SCR 205 at 227-228). However, given my findings below, it is not necessary to resolve this issue.

[28] As an assembler or as a distributer, I am satisfied that the defendant owed the plaintiff a duty of care to take all reasonable precautions in the assembly or distribution of the Lumina. I am also satisfied that it was reasonably foreseeable that failure to take such precautions could lead to a defective automobile being delivered to a consumer, possibly resulting in an injurious accident. I am further satisfied that a *prima facie* case has been established that the plaintiff's Lumina was defective, that the defect caused the accident, and that the plaintiff suffered damages as a result. Where the plaintiff's case falters is the element of negligence requiring establishment of the relevant standard of care and breach of that standard.

[29] Standard of care analysis is of fundamental importance in product liability cases because, "[i]n practice, determining the appropriate standard of care in actions based on an allegation of negligent design or manufacture usually determines the outcome" (Lawrence G Theall, J Scott Maidment, Teresa M Dufor & Jeffrey A Brown, Product Liability: Canadian Law and Practice, looseleaf (Aurora, ON: Canada Law Book, 2010) §2:30.10.2 [Product Liability]). It is an error of law to consider whether a defendant breached the standard of care without first determining and articulating the standard of care that applies in the circumstances (**Fullowka v. Royal Oak Ventures Inc.**, 2010 SCC 5 at para. 80).

[30] In a civil jury trial, attributing responsibility for articulating the standard of care is not straightforward. In **Creager v. Nova Scotia (Provincial Dental Board)**, 2005 NSCA 9 at para. 30, in the context of a professional disciplinary proceeding, the Court of Appeal stated:

> The application of a standard of care is a mixed question of law and fact. The definition of the standard is a question of law. The determination of whether the evidence establishes a breach of, or compliance with, that definition is a question of fact [citations omitted].

[31] More recently, in **Krawchuk v. Scherbak**, 2011 ONCA 352 at para. 125 [**Krawchuk**], in the context of professional negligence, the Ontario Court of Appeal stated:

> To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence. see **Wong v. 407527 Ontario Ltd.** (1999), 179 D.L.R. (4th) 38 (Ont.

> S.C.), at para. 23, **Fellowes, McNeil v. Kansa General International Insurance Co.** (2000), 138 O.A.C. 28 (C.A), at para. 11. The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact (**Wong** at para. 23, **Fellowes** at para. 11). External indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.

[32] In the context of product liability, it is clear that the trial judge is responsible for informing the trier-of-fact that the applicable legal standard of care on the defendant was "to use reasonable care in the circumstances and nothing more" (**Phillips** at para. 49). In my view, it is irrelevant whether the translation or application of that standard to the facts is characterized during trial as a question of mixed fact and law or as a question of fact, because in either case, the responsibility for this translation falls on the trier-of-fact. The trial judge may instruct the trier-of-fact on the appropriate factors that may be considered—for example, the defendant's expertise, the riskiness of the product, the defendant's knowledge of that risk, industry standards, et cetera—but it is ultimately for the trier-of-fact to apply the standard of care in the circumstances and determine whether the defendant's conduct breached that standard.

[33] For example, in the context of medical malpractice, a classic articulation of the legal standard of care can be found in **Crits v. Sylvester** (1956) 1 DLR (2d) 502 at 508 (Ont CA), where the Court stated:

> The legal principles involved are plain enough but it is not always easy to apply them to particular circumstances. Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability.

From this legal standard, the trier-of-fact must then hear evidence on what a "prudent practitioner" would mean in the particular circumstances, and assess whether the defendant met that standard.

[34] In this case, the plaintiff presented no evidence addressing the standard industry practice of an automobile manufacturer, assembler or distributor with respect to parts supplied by other parties. Such evidence might include answers to the following questions: Is it industry practice for a manufacturer, assembler or distributor to test such parts? If so, what kind of testing is normally performed? Does the testing depend on the type of part and the level of risk posed by a failure of the part? Would a standard manufacturer, assembler or distributor be expected to discover an improperly-crimped lower pinion bearing, such as the alleged defect in this case?

[35] Further, the plaintiff presented no evidence in the context of the regulatory regime that applies to the defendant's automobiles. The *Motor Vehicle Safety Act* creates safety standards that all Canadian automobile manufacturers must satisfy. Such standards provide a regulatory benchmark of what is expected of normal manufacturers, assemblers or distributors. Nonetheless, the plaintiff provided no evidence of what the Act required of the defendant, or of how the defendant performed in the circumstances of the case.

[36] Failure to produce this type of evidence is not always fatal to a plaintiff's claim. In **Krawchuk**, the Ontario Court of Appeal outlined two exceptions to the general rule that expert evidence is required in the articulation of a professional's standard of care. The first exception is where the matters are non-technical and therefore within the ordinary knowledge of the trier-of-fact (**Krawchuk** at para. 133). The second exception is where the defendant's conduct is so egregious that it would be obvious to an ordinary person that the "conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard" (**Krawchuk** at para. 135).

[37] Neither of these exceptions was argued by the plaintiffs. In my view, neither exception applies to this case. The defendant's manufacture, assembly and/or distribution of the 1997 Chevrolet Lumina is not of a non-technical nature. Further, as will be seen below, no evidence was presented to suggest that the defendant's conduct was egregious. As such, it was necessary for the plaintiff to present evidence on the applicable standard of care in the circumstances.

[38] Without this type of evidence, a jury, properly instructed on the law, would not be able to translate or apply the standard of care to the circumstances of the case; a jury would not be able to determine what "reasonable care" means in the

circumstances of a Canadian automobile manufacturer, assembler or distributor. As such, a jury would not be able to determine whether the defendant's conduct breached that relevant standard; this is determinative of the defendant's nonsuit motion.

[39] Even if I am wrong on the issue of establishing and applying the standard of care, the defendant's nonsuit motion must still succeed on the basis that the plaintiff has not established a *prima facie* case of a breach of the appropriate standard of care.

[40] Both parties agree that strict liability is not the law in Canada and that the plaintiff must establish a breach of the relevant standard of care. As the Ontario Court of Appeal stated in **Phillip**s, at para. 49:

> [O]ur Courts do not, in product liability cases, impose upon manufacturers, distributors or repairers, as is done in some of the States of the American union, what is virtually strict liability. The standard of care exacted of them under our law is the duty to use reasonable care in the circumstances and nothing more.

[41] Both parties also agree that the legal maxim *res ipsa loquitur* no longer applies in Canada. As the Supreme Court of Canada held in **Fontaine v. British Columbia (Official Administrator)**, [1998] 1 SCR 424 at 435:

> It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[42] Nonetheless, the plaintiff argued that the defendant's recall of the 1997 Chevrolet Lumina, for safety reasons, is evidence of a breach of the standard of care in and of itself. The plaintiff relied principally on two cases in support of this proposition, **Hollis v. Birch**, [1989] BCJ No 2261 (QL) (BC SC) [**Hollis**] and **Farro v. Nutone Electrical Ltd.** (1990), 72 OR (2d) 637, [1990] OJ No 492 (QL) (CA) [**Farro**].

[43] In **Hollis**, which was a product liability case dealing with the rupture of a silicone breast implant, the trial judge cited American case law for the proposition that negligence could be inferred from the existence of a product that did not function properly. In my view, this reasoning falls precisely within the definition of strict liability: the defendant's liability flows immediately from the fact that the product was defective, and not from the actions or omissions that the defendant took in bringing the product to market. Strict liability is not the law in Canada. On this basis, I am not prepared to follow the decision in **Hollis**.

[44] In **Farro**, like the plaintiff alleges in this case, the damages were caused by a defective part supplied by a third party to the defendant manufacturer. As in this case, the part was unavailable for testing. The trial judge dismissed the plaintiffs' action on the basis that they had not established that the defendant's negligence was responsible for the defect, only that a part in the defendant's product was defective and that the defect caused the plaintiffs' damages.

[45] In allowing the plaintiffs' appeal, the Ontario Court of Appeal noted that "[t]he appellants not only established a *prima facie* case of a defect in the exhaust fan's component but also eliminated all possible extraneous causes of the fire" (**Farro** at para. 15). In my view that is a significant distinction between **Farro** and the present case.

[46] The Court in **Farro** then reviewed two leading texts on Canadian tort law and the use of the doctrine of *res ipsa loquitur* to infer negligence from a manufacturer's defect. The Court stated that the trial judge had placed too great a burden on the plaintiffs to show how the defect occurred. The Court concluded, citing our Court of Appeal, that negligence could be inferred from the presence of a defect:

> It is not necessary, and it is generally impossible for a plaintiff to adduce direct evidence that a defect existed when the manufactured product left the factory. I adopt the language of MacKeigan C.J.N.S. delivering the judgment of the Court in **Smith v. Inglis Ltd.** (1978), 25 N.S.R. (2d) 38, 36 A.P.R. 38, 83 D.L.R. (3d) 215 (C.A.) at p. 218 [D.L.R.]:
>
> > I am very respectfully of the opinion that the appellant's case against the respondent should not be judged by a comparison of likelihoods, a test which imposes a burden on the appellant of

> showing exactly where and how the negligent deed was done, a burden which I do not think the law requires him to assume.
>
> The appellant does, however, have the burden of establishing on a preponderance of probability on the evidence as a whole that the respondent was the agency responsible for the defect which caused him injury. This he may discharge by showing circumstantially that the defect must have been there when the refrigerator left the factory. He can in my opinion do this if he can exclude the probability of some other person having created the hazard after the product left the factory.
>
> In the present appeal there was ample evidence of sufficient weight and cogency to warrant the inference that, on a balance of probabilities, the supplier of the respondent was negligent in omitting to install or improperly installing a defective thermal protection device.

[47] There are two reasons why **Farro** must be approached with caution in the context of this case. Firstly, **Farro** is distinguishable from this case. In **Farro**, the circumstantial evidence excluded all other possible causes of the fire at issue in that case, and it also excluded the possibility that the defect could have arisen after the product left the manufacturer. That is significantly stronger circumstantial evidence than what was presented by the plaintiff in this case. Secondly, and perhaps more importantly, the doctrine of *res ipsa loquitur* was still accepted in law at the time **Farro** was decided. It is clear that *res ipsa loquitur* played a key role in the Court's willingness to infer a breach of the standard of care once it was established that the defect was present when the product left the manufacturer. Without reliance on *res ipsa loquitur* it is uncertain whether the Court would have reached the same result.

[48] In my view, given that *res ipsa loquitur* is now to be treated as expired, in a product liability action based on negligence, it is not enough for a plaintiff to establish that the product was defective when it left the manufacturer, assembler or distributor. The plaintiff must establish that the defendant's actions or inactions, in relation to the part of the process for which it was responsible in bringing the product to the consumer, was below the standard of care expected of that defendant in the circumstances—proof that the product was unsafe and below government safety standards is not sufficient.

[49] In oral submissions, counsel for the plaintiff candidly admitted that the plaintiffs did not lead evidence on the actions or omissions of the defendant during presentation of their case. The plaintiff submitted that this evidence would be brought forward in the cross-examination of the defendant's witnesses. Counsel noted the difficulty that product liability plaintiffs face in establishing what actions or omissions a defendant took in the circumstances.

[50] There may be circumstances where it is appropriate to shift the burden of proof. In **Snell v. Farrell**, [1990] 2 SCR 311 at 321 [**Snell**], a case dealing with professional malpractice, the Supreme Court of Canada held that while the burden of proof in a civil action is usually with the party who asserts a proposition, "where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it." The issue in **Snell** was whether to apply the traditional approach to causation or whether to apply one of the alternative approaches outlined in **McGhee v. National Coal Board**, [1973] 1 WLR 1. The Court held that the traditional approach should be followed. Sopinka J. stated, at 326-327:

> I have examined the alternatives arising out of the **McGhee** case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives [emphasis added].

[51] I share the plaintiff's concern that the extinguishment of the doctrine of *res ipsa loquitur* may make it quite difficult for product liability plaintiffs to prove their case. Like Sopinka J., if I were convinced that product liability defendants were escaping liability because plaintiffs cannot prove a breach of the standard of care under the traditional approach, I would not hesitate to consider a reverse onus approach. However, in my view, the traditional requirement that the plaintiff prove a breach of the standard of care, in a product liability action for negligence, should not be altered, even considering that the expiry of the doctrine of *res ipsa loquitur* has made this proof substantially more difficult.

[52] There are at least two ways that the plaintiff in this case might have overcome the hurdles posed by the expiry of *res ipsa loquitur*. Firstly, the plaintiff could have considered joining Maria Johansson's husband, with whom the

defendant communicated as purchaser, and who was the registered owner of the Lumina, as a plaintiff and claimed concurrently in tort and contract. It is noteworthy that in a Statement of Facts agreed to by the plaintiff and defendant and filed as Exhibit #1 at trial, the parties agreed that "the Johanssons purchased [the] Lumina..." Secondly, the plaintiff could have conducted a more thorough discovery of the defendant.

[53] It is trite law that a party may sue concurrently in tort and contract unless there is some contractual limit on the remedies a party may pursue: **B.G. Checo International Ltd. v. British Columbia Hydro and Power Authority**, [1993] 1 SCR 12 at 26. This has important ramifications for product liability cases. As the authors of Product Liability (referenced in para. 29) explain, at §1:40.30:

> While lawyers often first think of negligence when considering product liability matters, breach of contract and breach of warranty are equally important areas of the law for the practitioner to consider. These causes of action are available against fewer classes of defendants than causes of action based in negligence. However, where available, they usually are much easier cases to prove. Consequently, it is very important that counsel consider at the outset whether the plaintiff may have a cause of action for breach of warranty in addition to any which may be available in negligence.

[54] One of the reasons why a cause of action may be easier to prove in contract is the availability of consumer protection legislation that includes implied conditions that goods will be of merchantable quality and fit for a particular purpose. This may obviate the need to prove the actions or omissions which the defendant took, and limit the plaintiff's burden to proving only that a contract existed (between the plaintiff and the defendant) and that the product was not of merchantable quality or fit for purpose when it left the defendant's hands.

[55] In her pre-trial brief, the plaintiff identified the *Sale of Goods Act*, RSNS 1989, c. 408, and the implied warranty conditions contained therein, as relevant to the defendant's potential liability, particularly if the defendant's role in the production process was ultimately limited to being a distributor. However, the plaintiff did not plead the *Sale of Goods Act* in the Statement of Claim, nor did she take any steps to amend her pleadings, pursuant to Rule 83. As such, the plaintiff could not rely on that statute. Had the plaintiff pled the *Sale of Goods Act* or made a successful motion to amend her pleadings after the close of pleadings, the

difficulty posed by proving a breach of the standard of care may have been diminished.

[56] The plaintiff made a tactical decision to claim only in tort. Having made this decision, the plaintiff could have provided the Court with at least some evidence about the actions or omissions of the defendant. The plaintiff could have more vigorously discovered the defendant as to its actions or omissions in manufacturing, assembling or distributing the 1997 Chevrolet Lumina. She could then have retained an expert to provide evidence, during her case, of both the applicable standard of care in the circumstances, and the actions or omissions taken by the defendant.

[57] Instead, the plaintiff assumed that evidence of a defect would establish a *prima facie* case of a breach of the standard of care, and that more evidence would emerge during the defendant's case; given that plaintiffs must make their case during their case-in-chief, this assumption exposed the plaintiff to a nonsuit motion.

CONCLUSION

[58] The plaintiff has established a *prima facie* case that the lower pinion bearing in the 1997 Chevrolet Lumina was defective, and that this defect caused the accident at issue in this case. However, evidence of a defect and/or a product recall for safety reasons is not sufficient to establish the applicable standard of care or a breach of that standard.

[59] The plaintiff has not led any evidence to establish the appropriate standard of care in the circumstances, nor has the plaintiff provided any evidence to establish a breach of that standard; accordingly, a jury, properly instructed on the law could not, on the facts adduced by the plaintiff, find in favour of the plaintiff.

[60] Therefore, the defendant's nonsuit motion is granted, and the plaintiff’s action is dismissed in its entirety.

[61] If the parties are unable to agree with respect to costs, they may make written submissions within 30 days, a deadline which, if necessary, may be extended by agreement or upon request.

J.