

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA  
Cite as: Gerrard v. Ford Motor Company 2007 NSSM 9

**Claim:** SCCH 272190  
**Registry:** Halifax  
**Date:** 20070326

**Between:**

Barry Chester Gerrard

Claimant

v.

Ford Motor Company of Canada Limited

Defendant

**Adjudicator:** W. Augustus Richardson, QC

**Heard:** February 28, 2007 in Halifax, Nova Scotia.

**Appearances:** Stanley MacDonald for the Claimant  
Alexander Benitah for the Defendant

**By the Court:**

[1] The claimant claims against the defendant on a warranty issued by it in respect of a truck manufactured by it and sold by one of its dealers. The truck was a new Ford F350 pick-up. It had an eight cylinder, direct injection, turbocharged diesel engine. It was purchased by Mr Gerrard in December 2004 “with every option other than the sensors and bumper they [the dealer] forgot to put on.” He also purchased the extended warranty offered by the defendant.

[2] About eight months after he purchased the truck Mr Gerrard installed some modifications to the truck. He installed a stainless steel exhaust system. He also installed an electronic module, manufactured by an U.S. company, called a Banks Six-Gun Diesel Tuner. According to the witnesses, the device (which includes a computer chip) is designed to improve the performance of a diesel engine by controlling and modifying the engine system operations (all of which are in modern engine systems controlled electronically). The intent of the device is to increase the rated horsepower and the rear-wheel power of the engine.

[3] Mr Gerrard testified that the device did increase the power and performance of his truck.

[4] In February 2006, while driving his truck, he noticed white “smoke” coming out of his exhaust. It got worse and worse. He ended up taking it to the dealer. Once there he was told, following inspection, that there had been an Exhaust Gas Recirculation (“EGR”) cooler system

failure, which had allowed water into the exhaust system. He was charged \$1,818,84 for the repair.

[5] The repair was not covered by the defendant's warranty because the defendant took the position that the installation of the Banks Six-Gun chip constituted "damage caused by accident, misuse or alteration" (and in particular, the last), which was excluded under the terms of the warranty: see Ex. D1, Tab 1, p.8. The exclusion provided "examples of items not covered" which included "Non-Ford parts installed after the vehicle leaves Ford of Canada's control and causes a Ford part to fail. Examples include, but are not limited to ... performance enhancing powertrain components."

[6] The claimant accepted the defendant's position at that time at face value. He continued to use the truck in the same way that he had up until that point. However, in July 2006 the same problem manifested itself. As he was driving along the same thing happened "exactly ... as before, smoke coming through the exhaust, it was the same problem." He took the truck to the dealer. The dealer removed and replaced the EGR valve. However, the engine was still overheating. The engine was then disassembled, and the head gaskets were replaced. The engine was reassembled. It worked after that.

[7] Once again, the defendant refused to cover the repairs, for the same reason as before.

[8] The claimant launched this action on the strength of comments that had been made to him by various people that these diesel engines were new models, and that others had experienced similar problems with them. However, no evidence was presented as to the cause of the problems.

[9] The position taken by the claimant was that it was enough to show the existence of a defect; and that once that was done the onus shifted to the defendant to prove that the defect was not caused by a defect in the manufacture or design of its engine.

[10] I would agree with this argument in ordinary course. The truck was new when purchased, and I was satisfied on the evidence that the claimant had not abused it and had used it for the purpose for which it was intended by the defendant to be used. No one would expect the kind of problems to develop with such a truck after such a relatively short period of time absent some defect in design or manufacture. And if those were the facts I would have been satisfied that the claimant had supplied sufficient evidence to warrant a finding in his favour, absent evidence from the defendant proving that the defect was not its fault: see, for example, the comments of Slatter, J in *527353 Alberta Ltd v. Stonehouse Chevrolet Oldsmobile (1975) Ltd* 2001 ABQB 909 at para.19; and of K. E. Swinton, J in *Tetaka v. BMW Canada Inc* [2007] OJ No. 115 (OSC, Div Ct) at para.16.

[11] But those were not the facts. The claimant did install a part that, on the evidence, modified the electronic system that monitored and controlled the various parts of the engine and transmission system. The question then becomes this: were the failures caused by:

- a. defects in the Ford parts or design?

- b. defects in the Banks Six-Gun module?
- c. a mismatch of some sort between the Banks Six-Gun module and the Ford diesel engine? or
- d. defects in the way in which the claimant operated the Banks Six-Gun module.

[12] Only one of these scenarios would give rise to liability on the part of the defendant under the warranty. That being the case I am of the view that the claimant could not rely merely on the existence of the defect (in other words, on what used to be called the doctrine of *res ipsa loquitur*) to establish his case. He had to do more. He had to do more because by modifying the engine—by installing a non-Ford part that interacted with the Ford engine—he had put into issue his own involvement in the matter. By installing the Banks Six-Gun he had raised the possibility that his own actions (or a defect in the part he had installed) had caused the problem. And by doing that he created the burden of having to exclude, on a balance of probabilities, those actions as a cause of the problems he experienced: see *Stonehouse Chevrolet, supra* at paras.20-21; and *Schreiber Brothers Ltd v. Currie Products Ltd* [1980] 2 SCR 78 at pp.86-88.

[13] Had the claimant’s evidence established that the installation of the Banks Six-Gun had not caused or contributed to the problem he would have satisfied the onus on him and he would not have had to prove the cause of the defect in the Ford parts or design: see *Schreiber Brothers, supra*, at p.88. But evidence that the claimant did call did not establish that the Banks Six-Gun was not the cause of the problem. The evidence only went to suggest that some customers in some cases had experienced some problems with this type of diesel engine. Such evidence was not in my mind specific enough to point to a specific defect in a specific part. In the absence of such evidence the claimant was left with the problem of the existence of multiple potential causes, some of which might have been his responsibility. And absent evidence negating the possibility that the Banks Six-Gun had caused the problem, I must dismiss his claim.

[14] I will make an order dismissing the claim.

Dated at Halifax, this 26th day of March, 2007

Original: Court File )  
 Copy: Claimant )  
 Copy: Defendants )

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W. Augustus Richardson, QC  
 ADJUDICATOR