

Case Name:

Oxford v. 1231766 Ontario Inc. (c.o.b. Active Green & Ross)

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**Between
Andrew Oxford, Plaintiff, and
1231766 Ontario Inc. o/a Active Green & Ross, Defendant**

[2008] O.J. No. 5710

Court File No. 66810/06

**Ontario Superior Court of Justice
Small Claims Court - Richmond Hill, Ontario**

P. Gollom Deputy J.

Heard: March 4 and November 4, 2008.

Judgment: May 11, 2008.

(76 paras.)

Counsel:

Andrew Oxford, self-represented.

K.T. Duong and Jay Skukowski, Counsel for the defendant.

REASONS FOR JUDGMENT

1 P. GOLLOM DEPUTY J.:— The plaintiff is the owner of a 2000 Volkswagen Jetta TDI (referred to as the "Jetta"). The defendant operates an automobile service facility located at 2900 Steeles Avenue East, Thornhill, Ontario. This claim relates to a lubrication and oil change performed on the Jetta, on December 19, 2005. The plaintiff alleges that the work was performed negligently by the defendant's employees and seeks damages against the defendant in the amount of \$9,267.34. The defendant denies the claim on the basis that it was not negligent; that any damages to the Jetta resulted from the plaintiff's failure to maintain the vehicle; that the plaintiff failed to mitigate his damages subsequent to January 26, 2006; that the damages claimed are too remote; and that the damages arose as a result of independent acts or other incidents unknown to the defendant.

BACKGROUND

2 This claim was reached for trial on March 4, 2008. On December 18, 2007, an order was granted by the Honourable Mr. Justice Salmers (referred to as the "Salmer's Order") whereby it was ordered that part of the plaintiff's amended claim against two other defendants was stayed

pending further court order; that the trial scheduled for March 4, 2008 will be with respect to the plaintiff's claim against the defendant, 1231766 Ontario Inc. o/a Active Green & Ross only; and that at the trial, the evidence of all witnesses shall be by affidavit only but witnesses must be present at trial for cross-examination and re-examination. Justice Salmers is the local administrative Superior Court Judge for the Small Claims Court - Central East division. Due to problems encountered with the trial on October 17, 2007, and other matters, the defendant brought a motion on December 18, 2007, to seek directions with respect to the conduct of the trial. The Salmer's Order established the ground rules for the trial which was scheduled for March 4, 2008.

3 At the commencement of the trial on March 4, 2008, the plaintiff submitted that the trial should not proceed as he required further clarification from Mr. Justice Salmers regarding the conduct of the trial. The plaintiff did not appeal the Salmer's Order nor seek clarification of the Order prior to March 4, 2008. After hearing submissions from the parties I ruled that the trial would proceed in accordance with the terms set out in the Salmer's Order.

FACTS

Chronology

4 The chronology of events is not disputed. The plaintiff purchased the Jetta in mid May 2005. The Jetta was purchased as a mechanically certified used car with an odometer reading in excess of 200,000 kilometres. On May 27, 2005 the Jetta underwent a lubrication and oil change at Mr. Lube at which time the odometer read 210,457 km. The next lubrication and oil change took place on December 19, 2005, at the defendant's facility located in Thornhill, Ontario. The odometer read 218,891 km. The defendant conducted a 30 point preventative maintenance inspection and lube, oil and filter change for a total cost of \$28.14.

5 During the Christmas holidays the plaintiff drove the Jetta to Québec City. He testified that snow tires may have been fitted on the Jetta during this time period. On January 26, 2006, he took the car to Mittler Motors to check the air flow meter and the brakes. Mittler Motors invoice number 19030 states, the "oil drain plug blew out on test drive". A new drain plug was installed. In addition 6.5 litres of oil were added. The Jetta ordinarily required 4.0 litres of oil during an oil change. During the 38 days between December 19, 2005 and January 26, 2006, no other work was done on the car and there was no indication of any problem. The Jetta was driven 3578 kilometres during this period.

6 On March 16, 2006 the plaintiff took the Jetta to Richmond Hill Volkswagen to investigate a problem with poor acceleration and the emission of smoke from the exhaust. The odometer reading was 224,616 km. By this time the Jetta was driven a total of 5,725 kilometres since December 19, 2005. According to notes on the Richmond Hill Volkswagen invoice it was determined that oil leaked into the intercooler from internal turbocharger seals. The Turbo was damaged due to overheating of oil lubrication. A new turbocharger was recommended but it was not installed.

7 On May 1, 2006 the plaintiff contacted Carmen Sturino of Precision Motors, by telephone, to request an estimate of the cost to repair the Jetta. An estimate was prepared for \$6,785.00, which is relied upon by the plaintiff. The defendant obtained an affidavit from Mr Sturino pursuant to the Salmer's Order. Mr. Sturino's affidavit, sworn on February 21, 2008, stated as follows:

"On or about May 1, 2006, I was contacted by Mr. Andrew Oxford, by telephone to prepare an estimate for his 2000 Volkswagen Jetta. I prepared an estimate regarding engine rebuilding, according to information as provided by Mr. Oxford ... At no time did I view or examine Mr. Oxford's vehicle's engine in the preparation of the estimate. Further, at no time after having prepared the estimate for Mr. Oxford did I, or any other employee at Precision Engine Rebuilders conduct work on Mr. Oxford's vehicle

and/or engine. As of the date of swearing this my affidavit, I have not personally viewed or examined the subject 2000 Volkswagen Jetta."

Damages

8 The plaintiff alleges that the damage to the Jetta resulted from the failure of the defendant's mechanic to properly perform the oil change and lubrication. More specifically, he alleges that the defendant's mechanic did not correctly reinstall the oil plug with the result that the oil plug loosened over time and ultimately blew out. As a result, the Jetta's engine was oil starved and needs to be replaced. The plaintiff submits that the defendant's negligence is the proximate cause of the all of the damages sustained by him which are comprised as follows:

1. Original oil change on December 19, 2005 - \$28.14;
2. Oil change and replacement at Mittler Motors on January 26, 2006 - \$60.47;
3. Turbo replacement estimate from Volkswagen Richmond Hill on March 16, 2006 - \$2,342.55 + \$51.18 for the estimate;
4. Engine replacement estimate from Precision Engine Re-Builders on May 1, 2006 - \$6,785.00; and,
5. Parking, facsimile, and fuel - \$25.00

The damages claimed total \$9,267.34. Neither the turbocharger nor the engine were replaced as of the date of the trial.

Evidence

9 The plaintiff testified that prior to December 19, 2005, he drove the Jetta approximately 8,000 kilometres. The plaintiff drove the Jetta to Quebec during Christmas. On January 26, 2006, he took the car to Mittler Motors to check the air flow meter and brakes. He stated that during the period from December 19th to January 26th he observed no indication of any problem with the Jetta. The plaintiff did not observe any oil drops on his driveway. The Jetta did not have an oil gauge although it was equipped with a red oil warning light. The red light did not light up at any time prior to January 26, 2006. No evidence was led with respect to when and why the red warning light comes on. The plaintiff did not conduct routine oil checks using the dip stick during this period other than one check on December 19, 2005, after the service.

10 During the test drive at Mittler Motors the red oil warning light did come on. The Jetta was examined on the hoist and it was observed that "the oil plug blew out on the test drive." The oil drain plug was replaced. In addition, the air flow meter was checked and replaced. The plaintiff did not call any witnesses from Mittler Motors with the result that no explanation for the events reported on the invoice was provided.

11 After the air flow meter and oil plug were replaced the plaintiff drove the Jetta from January 26th to March 16th. During this period the car was driven an additional 2,146 kilometres. After the attendance at Mittler Motors the plaintiff conducted more frequent checks of the oil. On March 16, 2006, the plaintiff took the Jetta to Volkswagen Richmond Hill as he had observed blue smoke coming out of the exhaust; the engine was noisy; and the red oil indicator light had come on. An invoice issued by Volkswagen Richmond Hill recorded:

"Diagnosed, performed oil pressure test, inspected and found oil that has leaked into the intercooler from internal turbocharger seals leaking. Turbo damaged due to overheating/lack of oil lubrication. Also found oil leaking from the turbo in to exhaust system causing excessive blue smoke to come out exhaust. Requires turbocharger to be replaced and retested. Parts and labour to replace turbocharger = \$2,037 + tax. Diagnosis only."

The plaintiff did not replace the turbocharger and continued to drive the Jetta. No witness was called from Volkswagen Richmond Hill by the plaintiff to explain the comments on the invoice.

12 The plaintiff testified that as to the date of trial he still owns the Jetta but rarely drives it as he finds it embarrassing to operate the car with the engine noise and emission of blue smoke. The Jetta continues to be licensed and insured.

13 The plaintiff summonsed 4 witnesses after the completion of the first day of trial. These witnesses included Dr. Nadio Toffoli-Zadra, Kirkan Kumar, Ralph Chiodo, and Michael Rochon. An issue was raised as to whether the calling of these witnesses constituted an abuse of the power to summons a witness pursuant to rule 18.03(8) of the *Rules of the Small Claims Court*. This issue will be dealt with below.

14 The plaintiff called Kirkan Kumar (referred to as "Kumar"), the mechanic employed by the defendant, who serviced the Jetta on December 19, 2005. Kumar's evidence was relevant and necessary. Although an affidavit was not submitted by Kumar, pursuant to the Salmer's Order, he was permitted to testify. The Salmer's Order provided that the affidavits of the witnesses were to be filed by the plaintiff on or before February 8, 2008, and by the defendant on or before February 22, 2008. Reply affidavits, if any, by the plaintiff to be filed on or before February 29, 2008. Paragraph 4 of the Salmer's Order provided that "the evidence in chief of all witnesses shall be by affidavit only." The plaintiff did not file an affidavit by Kumar. In addition, the plaintiff summonsed Kumar to testify shortly before the second day of trial which took place many months after March 4, 2008. Kumar's evidence was important and accordingly, I exercised my discretion to permit him to testify.

15 Kumar attended College to train as a mechanic, and in addition received on the job training from the defendant. In December 2005 he was not a licensed mechanic as he was still in training. He described his job as entry level. The plaintiff brought the oil with him on December 19, 2005. Routinely a computer check is done on every car worked on. The car is put on a hoist then the oil is changed and checked for leaks. To change the oil the oil plug must be removed and then screwed back in on completion. Kumar testified that it is impossible to put the oil plug back in incorrectly as you cannot cross thread the plug. He did acknowledge that an oil plug can be over tightened. He recalled that the only car in the shop being serviced was the Jetta.

16 Kumar testified that he reinstalled the oil plug correctly. The oil plug was reinstalled with a wrench that fit the plug. Kumar testified that he put the plug back in by hand then he tightened it with the wrench. He acknowledged that he did not use a torque wrench to reinstall the oil plug. Kumar did not know how to tell if the oil plug was over tightened. He could not recall if he used a check list but testified that the defendant's location on Steeles Avenue East did have a check list. He acknowledged that he did not possess specific training for Volkswagen Jettas. It is however noted that the defendant did not hold itself out as specializing in Volkswagen Jetta oil changes.

17 Kumar could not recall if the Jetta oil plug had a washer but if a washer was missing during the reinstallation then he would obtain one from inventory to replace it. He stated that if the car runs out of oil then the red warning light goes on. He testified that the Jetta left the defendant's facility with the proper amount of oil and that the lube, oil, and filter change were performed correctly. If the oil plug was too loose then oil would leak from the car when it was started. The plaintiff would have observed a puddle of oil on his driveway if a slow leak developed.

18 The plaintiff obtained an affidavit from Sandra Perry, which was sworn on October 24, 2008, being a date long after the February 8, 2008 deadline imposed by the Salmer's Order. Ms. Perry is a claims adjuster employed by Crawford AAS. Crawford was retained by ING Novex to obtain statements from people employed by the defendant who had knowledge of the events surrounding this matter. The Perry affidavit contains several paragraphs relating to an interview with Kumar on June 7, 2006. In addition, she obtained a signed statement from Kumar, dated June 7, 2006. The affidavit does not conform to Salmer's Order. The evidence given by Kumar at

trial is preferable to both the Kumar statement and the Perry Affidavit. The balance of the information set out in the Perry Affidavit has no probative value with respect to the issues to be determined in this action.

19 Victor Kaltakian (referred to as "Kaltakian") was employed by the defendant as a service provider. He swore an affidavit pursuant to the Salmer's Order, dated February 21, 2008, wherein he deposed that he received a telephone call from the plaintiff several months after December 19, 2005 regarding a complaint. The plaintiff advised that he would fax the Mittler Motors invoice to Kaltakian. The plaintiff requested reimbursement for the lube, oil, and filter change. Kaltakian stated that he would forward the Mittler invoices to his manager. Approximately two days later Kaltakian called the plaintiff and advised that "even though it was not our fault" Active Green & Ross would agree to reimburse the plaintiff \$150.00 to cover the cost of the Active Green & Ross oil change and the Mittler oil change. The next contact from the plaintiff was the service of the Claim.

20 Kaltakian was not present at the defendant's location on December 19, 2005. He was employed as a service provider with an expertise in tires. He confirmed Kumar's evidence that the defendant has a 30 point control checklist. The checklist sets out the work to be done but it does not contain a specific reference to tightening the oil plug. No checklist was produced by the defendant. Kaltakian had no personal knowledge of the facts relating to the lube, oil, and filter change conducted on December 19, 2005 by Kumar.

21 The plaintiff submitted a document signed on October 28, 2008, by Sandra Klose. Ms. Klose is employed by Volkswagen Richmond Hill as a service manager. The document is headed "Affidavit of Sandra Klose", but it was signed in front of a witness and not properly sworn. The document was served on the defendant on October 28, 2008, being 7 days prior to the resumption of the trial. The statement does not contain Ms. Klose's telephone number and address as required by rule 18.02(3)(a) of the *Rules of the Small Claims Court*. The document contains opinion evidence but the statement contains no summary of Ms. Klose's qualifications as prescribed by rule 18.02(3)(b).

22 Paragraph 12 of the statement sets out that Ms. Klose did not have access to a Commissioner for Taking Oaths. She undertook to properly swear the affidavit when she attended the trial. The document was never properly sworn. If the plaintiff intended to submit the document as an affidavit then he failed to have it properly sworn and, in addition it was not submitted pursuant to the provisions of the Salmer's Order. Ms. Klose did not attend the trial as she was purportedly on maternity leave. The Klose document was filed without objection by the defendant but for the reasons above it is of no probative value.

23 The plaintiff summonsed three additional witnesses subsequent to the adjournment of the trial on March 4, 2008. These witnesses were Dr. Nadia Toffoli-Zadra; Ralph Chiodo; and Michael Rochon. Dr. Toffoli-Zadra is the treating physician for Mr. Ackerman, a witness who could not attend the trial for medical reasons based upon the medical opinion of Dr. Toffoli-Zadra. The issues relating to Mr. Ackerman's medical condition and the treatment and diagnosis by Dr. Toffoli-Zadra are not relevant to the issues to be determined in this action. The plaintiff was advised of rule 18.08 of the *Rules of the Small Claims Court*. Dr. Toffoli-Zadra was represented by independent counsel. After hearing submissions by the plaintiff and Dr. Toffoli-Zadra's counsel she was excused from testifying.

24 Ralph Chiodo (referred to as "Chiodo") is the founder of Active Green & Ross. He was approached by the plaintiff in October 2008, just prior to the resumption of the trial. The plaintiff did not seek an affidavit from Chiodo prior to February 28, 2008, to ensure compliance with the Salmer's Order. The plaintiff chose to call Chiodo on the understandings that rule 18.03(8) would be considered after the witness completed his testimony. The plaintiff submitted a document headed, "Consolidated Exhibits Reference Book", which contains reference to the exhibits filed at trial along with additional documents that were either not filed at trial or alternatively, not admitted. An e-mail relating to Chiodo was included in this Book that is relevant to Chiodo being

summonsed.

25 Prior to the resumption of the trial, Orlando Rosa, the managing partner at the law firm that acts for the Active Green & Ross' head office sent an e-mail message to the plaintiff, dated October 29, 2008, wherein he advised that the defendant's head office had no information or documentation regarding the work done on the Jetta; that the defendant's dealers are independent and each operate their own repair facility; that the hiring, training and supervision of employees at each facility is the responsibility of the dealer; that it is up to the dealer to ensure that he has competent staff to provide services; and that the training of the employees is up to the dealer. The e-mail concluded by advising that Mr. Chiodo, "has no knowledge of which technician(s) worked on the vehicle as the Dealer is not required to provide this information to Head Office."

26 Chiodo testified that he had no personal knowledge of the events in issue in this action. Chiodo works at the defendant's head office and did not possess specific knowledge of the Steeles Avenue East location. He did not know if a checklist was used at the Steeles Avenue East store. Chiodo's testimony was of no assistance with respect to the determination of the issues in this action. Rule 18.03(8) will be discussed below.

27 Michael Rochon (referred to as "Rochon") is the principal of Rochon Engineering Incorporated. A report, dated September 19, 2006, was issued by Rochon Engineering Incorporated which was authored by Neil J. Bigelow and Cecil Ackerman. Mr. Ackerman could not attend the trial for medical reasons as stated above. Mr. Bigelow did attend the trial. The plaintiff raised issues with respect to the qualifications of Mr. Bigelow and as to the medical fitness of Mr. Ackerman. The plaintiff questioned Rochon with respect to how the file was assigned to Bigelow. Rochon stated that Bigelow was hired by Rochon on contract. The plaintiff pressed Rochon regarding Ackerman's status as an engineer. A review of the September 19, 2006 report indicates that Ackerman did not sign the report as an engineer. In his curriculum vitae he refers to himself as a diesel engineer and sets out his education and training. In 1969 he was certified as diesel engineer at Cape Town Technical College in South Africa. Rochon testified that he had no personal knowledge of this matter. Rochon's testimony was of no assistance to the Court. Rule 18.03(8) will be discussed below.

28 The defendant called Neil J. Bigelow (referred to as "Bigelow") to provide expert evidence. An affidavit was submitted by Bigelow, which was sworn on February 21, 2008, pursuant to the provisions of the Salmer's Order. Attached to the affidavit were Bigelow's resume and the September 19, 2006 report issued by Rochon Engineering Incorporated. The report was prepared as an expert's report. It was signed by Neil J. Bigelow, B.Sc., P. Eng. The plaintiff challenged Bigelow's qualifications as an expert witness. It was determined that Bigelow has work experience with motor vehicle accident reconstruction, including accident scene investigation but his engineering training relates to mining. He acknowledged that his qualification and training as a mining engineer did not assist him with issues relating to automobile related engineering issues. He further acknowledged that his knowledge and experience with accident reconstruction does not assist him with respect to the issues to be determined in this action. He did not hesitate to acknowledge that there are better qualified people available to provide opinions regarding the issues to be determined in this case. After hearing submissions I ruled that Bigelow would not be accepted by the Court as an expert witness with respect to the issues to be determined.

29 The defendant was seeking to call Bigelow as an expert witness with respect to the issues of whether the oil change by the defendant on December 19, 2005, was performed negligently; whether the plaintiff's vehicle sustained damages; if the vehicle did sustain damages then were these caused by the defendant?

30 In determining whether to accept Bigelow as an expert witness I considered the guidelines set out in *Dulong v. Merrill Lynch Canada Inc.*, [2006] O.J. No. 1146, and *Koeth v. Slack Lumber & Supplies Ltd.* [2008] O.J. No. 4729 at paragraphs 12 to 23. After considering Bigelow's qualifications and the factors discussed in *Dulong* and *Koeth*, I concluded that Bigelow was not

qualified to testify as an expert witness with respect to the issues above. I concluded that he did not possess the required "special" or "peculiar" knowledge about Jetta engines and problems associated with lubrication, oil, and filter changes. Bigelow has testified as an expert witness in Ontario Courts on a number of occasions but not on the issues to be determined in this action. His area of expertise regarding motor vehicles relates to accident reconstruction. The September 19, 2006, report was admitted into evidence as it contains a number of facts that are not in dispute and accordingly, it assists in understanding the chronology and the events.

31 An examination of the Jetta was to be conducted at Greenbelt Volkswagen on December 21, 2006, pursuant to an Order made by Deputy Judge Bortolussi on December 14, 2006. The examination was cancelled as the defendant sought leave to appeal the Bortolussi Order to seek broader terms for the examination of the vehicle. The appeal was abandoned and the inspection of the Jetta never took place.

32 The plaintiff conducted a cross-examination of Bigelow notwithstanding the ruling that he did not qualify as an expert witness. During the cross-examination Bigelow stated that he had no direct knowledge regarding the damage to the Jetta. According to Bigelow the September 19, 2006 report was written as a preliminary report to be finalized after the inspection. Bigelow testified that an oil plug could loosen or separate by hitting a curb or by vibrations from the car. The plaintiff challenged Bigelow as an expert witness. The challenge was successful and accordingly, any opinion evidence provided by Bigelow on cross-examination is rejected.

PLAINTIFF'S REPLY EVIDENCE

33 At the conclusion of Court on November 4, 2008, the parties were provided with an option to either set a date to continue the trial to permit the plaintiff to enter reply evidence or alternatively, to submit the reply evidence in writing. The plaintiff elected to submit reply evidence in writing to be followed by final submissions in writing to be delivered by the parties. The plaintiff submitted written reply evidence that was to be restricted to issues raised during the his cross-examination.

34 In the reply the plaintiff states that the Jetta was purchased from a licensed used car dealer and was mechanically fit. There is no evidence to dispute this and as such this is not in issue. In addition, there is no evidence to dispute that the Jetta was not properly maintained prior to the problems in issue in this action. The plaintiff drove the Jetta occasionally, and in fact owns three cars, one motorcycle and one van. The plaintiff alleges that Kumar was negligent for failing to use a proper torque wrench to remove and replace the oil plug and he relies on extracts from the Bently Publisher's Service Manual and the Chilton Repair Manual, which state that the torque specification for an oil drain plug for a 2000 1.9 L TDI Jetta is 30 Nm (22 ft-lb). In the written reply the plaintiff sets out his personal opinion regarding the importance of using the correct torque wrench to remove and replace an oil plug. The plaintiff is not an expert and he did not call an expert on the issues regarding torque wrenches. As no evidence was called by the plaintiff to elaborate on the need for a torque wrench there is no basis upon which to find that the failure to use a torque wrench either caused or contributed to the damages sustained by the plaintiff.

35 The written reply contains opinion evidence offered by the plaintiff, regarding the mileage travelled after the December 19, 2005; the oil change; and the discovery of the missing oil plug. The plaintiff did not call any expert evidence regarding the fact that the Jetta, which had an odometer reading of over 210,000 kilometres when purchased, was driven a distance of 3578 kilometres during a period of 38 days before any problems were noted.

36 The plaintiff offered an opinion that the absence of oil drops on his driveway and parking spot can be explained by the fact that the Jetta has a lower sound absorber panel which is located underneath the oil plug. He opined that if oil drips from an improperly tightened plug then it would drip onto the absorber panel as opposed to the vehicle parking spot. He filed photographs as part of his reply evidence to demonstrate the sound absorber panel. The defendant objects to

the filing of these photographs. In considering the defendant's objection it is important to note that the Rochon Report was annexed to the Bigelow affidavit, sworn on February 21, 2008. The Rochon report refers to most of the issues that the plaintiff needed to address in either his evidence in chief or through expert evidence. This includes the "presence of oil staining on surfaces such as a driveway, parking lot or parking garage or other areas where the vehicle was routinely parked." The plaintiff chose not to call evidence on the oil drop issue until the delivery of his reply evidence in spite of the Bigelow Affidavit. Clearly this evidence should have been called as part of the plaintiff's case.

37 The defendant had no opportunity to consider the photographic evidence to prepare a rebuttal. In *Allcock, Laight & Westwood Ltd. v. Patten*, [1966] O.J. No. 1067, Justice Schroeder stated:

It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on prima facie proof, and when this has been shaken by his adversary, adducing confirmatory evidence: *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534. That case was considered by this Court and the principle therein enunciated was applied in *R. v. Michael*, [1954] O.R. 926, 110 C.C.C. 30, 20 C.R. 18. The rule is now so well settled that it requires no further elaboration. It is important in the trial of actions, whether before a jury or a Judge alone, that this rule should be observed. A defendant is entitled to know the case which he has to meet when he presents his defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion.

38 The submission of the photographs violates the Salmer's Order. In addition, the plaintiff failed to follow the proper procedures for the submission of photographic evidence. Professor Paciocco outlines the procedure for the admission of photographic evidence:

The admissibility of photographs or videotapes depends upon (1) their accuracy in truly representing the facts; (2) the fairness and absence of any intention to mislead; and (3) their verification on oath by a person capable of doing so".¹

The photographs should have been submitted to the Court, as part of the plaintiff's case, by an appropriate witness who was competent to explain the significance of the objects depicted. The photographic evidence submitted by the plaintiff as part of his reply evidence is inadmissible. To admit the evidence would deny the defendant the right to properly cross-examine on the evidence. To accept the evidence would enable the plaintiff to submit it as untested and unchallenged.

39 Notwithstanding the rejection of the photographs there is no evidence to suggest that oil was leaking prior to the attendance at Mittler Motors on January 26, 2006, when the oil plug was observed to blow out.

40 The plaintiff did not call witnesses from either Mittler Motors or Richmond Hill Volkswagen. In his final submissions the plaintiff states that Mark Mittler was summonsed twice only to be sent home. The trial was set to proceed on several occasions prior to March 4, 2008, but it did not proceed. It is up to the plaintiff to decide which witnesses to call and to ensure that these witnesses are present in court to testify. By issuing the 4 subpoenas to compel the witnesses to attend at Court on November 4, 2008, the plaintiff demonstrated that he understands the procedure to ensure that a witness attends at Court.

ISSUES

1. Did the defendant negligently remove and reinstall the oil plug on the Jetta during the lube, oil, and filter change on December 19, 2006?
2. If the defendant is found to be negligent then did the negligence cause the damage to the Jetta?
3. Do sections 9(1), and 63(1), (2) of the Consumer Protection Act, 2002 SO. 2002, Chapter 30 apply?
4. If it is found that the defendant's negligence caused the damage then has the plaintiff proven his damages, and if so what is the quantum?

ANALYSIS

41 In the Claim the plaintiff alleges that the defendant negligently failed to re-install the oil drain plug and that this negligent act was the proximate cause of the damage to the Jetta. In the alternative, the plaintiff relies upon sections 9(1), and 63(1), (2) of the *Consumer Protection Act, 2002 SO. 2002, Chapter 30*.

42 The plaintiff submits that the defendant's mechanic was negligent when he conducted the lube, oil, and filter change on the Jetta. He submits that Kumar did not use the proper torque wrench and suggests that a bolt may have been omitted when the oil plug was reinstalled. As a result of the incorrect reinstallation of the oil plug it blew out causing the Jetta to undergo oil starvation and ultimate engine failure. The defendant submits that its mechanic performed the services in a competent manner and is not liable to the plaintiff for any damages. It is not disputed that the Jetta was driven for 38 days and a distance of 3578 kilometres after the services were provided, without any indication of problems arising from the oil change. After a new oil plug was installed the Jetta was driven a further 2146 kilometres before it commenced to exhibit poor acceleration and to emit blue smoke. On March 16, 2006, it was taken to Richmond Hill Volkswagen where it was determined that a new turbocharger was required.

43 The defendant owes the plaintiff a duty of care to perform the lube, oil and filter change in a reasonable and competent manner. The burden of proof is on the plaintiff to establish that the defendant breached this duty and that the breach caused the damage.

44 Kumar testified that he correctly reinstalled the oil plug and checked for leaks. He used a wrench that fit the oil plug to tighten it after he screwed it back in by hand. He suggested that if the oil plug was loose then the red oil indicator light would come on and that he would expect to observe the oil leaking once the engine was turned on. If a bolt or washer was missing then he would obtain a new one from inventory. He acknowledged that he did not know how to tell if an oil plug was over tightened.

45 Prior to providing the service to the plaintiff Kumar had conducted many oil, lube, and filter changes and accordingly, gained experience as to how to properly provide this type of service. Did the plaintiff establish that the failure to use a torque wrench caused the damage to the Jetta?

46 The plaintiff has the general onus to establish causation. The test is set out in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at page 326, and has been elaborated upon in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para 14. The primary test for establishing causation in negligence is the "but for" test. This was affirmed recently in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333. At paragraphs 22 and 23 the Court stated:

This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the but for test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in *Blackwater v. Plint*, [2005] 3

S.C.R. 3 at para. 78, "[t]he rules of causation consider generally whether but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, per Sopinka J.

47 There are exceptions to the "but for" test but these do not apply in this action. The court stated at paragraph 33 of *Snell v. Farrell* supra:

Causation need not be determined by scientific precision. It is ... essentially a practical question of fact which is best answered by ordinary common sense rather than abstract metaphysical theory.

48 The plaintiff must provide an evidentiary foundation for finding that there is a substantial connection between the damage and the defendant's conduct. The Ontario Court of Appeal stated in *Fisher v. Atack*, [2008] O.J. No. 4481, that even though it is always for the judge rather than the expert witness to determine matters of fact, the judge must do so on the basis of evidence, including expert evidence. The mere application of "common sense" cannot conjure up a proper basis for inferring that an injury must have been caused in one way rather than another.

49 *Kang v. Sam Petrella Haulage Limited*, [2007] O.J. No. 2027 is a case with facts similar to the case at bar. The plaintiff's car underwent an oil change at the defendant's facility. After being driven 3,716 kilometres the oil plug came off and the vehicle ran out of oil. The plaintiff pursued a claim against the defendant for negligence alleging that the oil plug was not properly reinstalled. As in this case, the plaintiff did not observe any oil dripping from the car following the oil change and was not aware of the oil loss until the oil warning light came on. At the conclusion of the decision Mr. Justice Tulloch stated, "*I am not convinced on a balance of probabilities that the defendant was in fact negligent, nor that the defendant was the cause of the damage to the plaintiff's vehicle.*" The negligence in the Kang case was premised upon the failure of the defendant's mechanic to properly tighten the oil plug as opposed to the oil plug allegedly being over tightened.

50 In cases involving technical issues it is often necessary for the parties to call expert witnesses to assist the court in understanding the evidence. The plaintiff did not call any expert evidence. In his submissions he relies upon the evidence of Bigelow notwithstanding that he successfully challenged Bigelow's credentials as an expert witness. As a result, Bigelow's opinion evidence was rejected. No expert evidence was tendered to assist the court to determine how a normally competent mechanic would have conducted a lube, oil, and filter change. The reasonable standard of care was not established. No expert evidence was called to explain the consequences of incorrectly reinstalling an oil drain plug.

51 The only evidence with respect to the possible effect of over tightening an oil plug is found in one of the documents, at tab 18, of the plaintiff's, "Consolidated Exhibits Reference Book", which was filed with his submissions without formal proof. No expert witness was called by the plaintiff to assist the court with respect to understanding the potential problems associated with over tightening an oil plug. The plaintiff called no expert evidence to explain how a car can be driven for a period of 38 days and travel a distance of 3578 kilometres prior to demonstrating any evidence of a problem with the oil system. Without the opinion evidence of an expert on the above issues I am unable to determine the standard of care; to determine whether there was a breach of the standard of care; to determine causation; or to determine whether the damages claimed resulted from the breach.

52 The Jetta was not examined to determine the condition of the engine to either rule out other possible causes of the oil leak and associated problems or alternatively to establish what probably caused the problems. The vehicle had travelled 218,891 kilometres when it underwent the oil change at the defendant's. There was no impediment to prevent the plaintiff from submitting the Jetta to an examination prior to the trial.

53 Applying common sense, it is reasonable to assume that the Jetta would have demonstrated some indication of oil loss prior to the January 26, 2006, attendance at Mittler Motors if the oil plug was too loose. The plaintiff called no expert evidence to establish what would occur if the oil plug was reinstalled too tightly other than the reference in his "Consolidated Exhibits Reference Book". Kumar testified that he conducted the lube, oil, and filter change properly. The fact that he did not use a torque wrench or have experience with Jettas does not negate the fact that he was trained to conduct lube, oil, and filter changes and had conducted many such services prior to December 19, 2005. Whether he reinstalled the oil plug too tightly or not tightly enough is mere speculation.

54 If the defendant was negligent then the plaintiff must establish that the breach by the defendant caused the plaintiff's loss. It must be established that the connection between the plaintiff's damage and the alleged breach by the defendant are not too remote. The Jetta travelled to Quebec during the Christmas holidays. Over a period of 38 days it was driven 3578 kilometres with no apparent evidence of oil seepage. After the Jetta received a new oil plug at Mittler Motors on January 26, 2006, it travelled a further 2146 kilometres before the acceleration decreased and it emitted blue smoke. One can imagine a number of intervening acts which could have caused the damage to the Jetta during the 38 day period prior to the attendance at Mittler Motors and the 49 days before the attendance at Richmond Hill Volkswagen.

55 The concept of remoteness was recently outlined by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.* [2008] S.C.J. No. 27, where Madam Chief Justice McLauglin stated at paragraphs 12 and 13:

The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).

Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant ... and which he would not brush aside as far-fetched" (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617, at p. 643).

56 The plaintiff's damages may possibly have resulted from the defendant's alleged negligence but the plaintiff failed to establish a degree of probability suggesting that the damage was reasonably foreseeable and a real risk. The plaintiff failed to call evidence that would establish that it was probable that an oil plug would suddenly fall out or blow out 38 days and 3578 kilometres after a routine lube, oil, and filter change, and that a turbo charger would fail due to oil starvation 87 days and 5725 kilometres after a lube, oil and filter change.

57 The plaintiff has failed to establish that but for the defendant's negligent acts or omissions the damage would not have occurred. After considering all of the evidence I find that the plaintiff has failed to establish that the defendant was negligent with respect to the services which it provided on December 19, 2005.

THE CONSUMER PROTECTION ACT

58 The plaintiff claims damages for breach of warranty, in the alternative, pursuant to the *Consumer Protection Act* 2002, c. 30. He relies upon the following sections:

9.(1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.

63.(1) On the repair of a vehicle, every repairer shall be deemed to warrant all new or reconditioned parts installed and the labour required to install them for a minimum of 90 days or 5,000 kilometres, whichever comes first, or for such greater minimum as may be prescribed.

(2) The warranty in subsection (1) is in addition to the deemed and implied conditions and warranties set out in section 9.

59 The plaintiff's evidence as discussed above, did not establish any basis for finding that the defendant breached the warranty with respect to the services that it provided. No evidence was provided to establish that the parts installed were defective. There is no basis for the claim pursuant to the Consumer Protection Act.

DAMAGES

60 If I had found that the defendant was liable to the plaintiff for damages then what are the damages? The details of the damages claimed, in the amount of \$9,267.34, are set out above. The turbo replacement estimated at \$2,342.55 and the engine replacement estimated at \$6,785.00 have not been carried out. The plaintiff testified that the Jetta is still plated and insured. He drives it on rare occasions. Witnesses were not called from either Mittler Motors or Precision Engine Rebuilders with respect to the estimates. The defendant submitted an affidavit of Mr. Sturino of Precision Engine Rebuilders whereby he deposed that the Precision estimate was prepared based upon information provided to him by the plaintiff. At no time did he or any of his staff actually view or examine the Jetta. Precision did not conduct any repair work on the Jetta. The Precision Estimate is not reliable.

61 The plaintiff was aware of the oil plug problem as of January 26, 2006. He continued to operate the Jetta until it emitted blue smoke on March 16, 2006, at which time, he took the car to Richmond Hill Volkswagen where the problem with the turbo charger was diagnosed. No evidence was presented by the plaintiff to establish a causal connection between the attendance at Mittler Motors and the problems diagnosed at Richmond Hill Volkswagen on March 16, 2006. As a result it is not possible to determine whether the problems observed after January 26, 2006, resulted from the alleged negligence of the defendant or the fact that the plaintiff continued to drive the Jetta. The plaintiff's proposition is that the defendant was negligent. This negligence caused the oil plug to fall out with the result that the turbocharger was damaged. This ultimately resulted in the need replace the engine. The evidence presented by the plaintiff falls short of establishing the links required to prove the above.

62 Assuming that the plaintiff had successfully established that the defendant's negligence caused the damage to the turbocharger then I would accept the Volkswagen Richmond Hill estimate of \$2,037.00 + tax as accurate, and award this amount. In addition, I would award the

plaintiff the \$28.14 paid for the original oil change; the \$60.47 for the oil change on January 26, 2006; and the \$51.18 for the Mittler estimate.

63 The Precision Motors estimate cannot be relied upon as it is premised upon information provided by the plaintiff to Mr. Sturino who neither saw nor examined the car. The age and mileage of the Jetta were not accounted for and other possible causes were not considered. The Precision Motors estimate to rebuild the engine at a cost of \$6,785 plus tax is rejected. No other evidence as to the estimated cost of rebuilding the engine was offered into evidence. In the circumstances, I cannot guess or speculate the cost.

Rule 18.03(8) of The Rules of the Small Claims Court

64 The Salmer's Order stipulated that the evidence of all witnesses shall be by affidavit only but that the witnesses must be present at trial for cross-examination. Specific timelines were set out for the delivery of the affidavits. The affidavits were to be filed in advance of the trial scheduled for March 4, 2008. Pursuant to the timeline, all affidavits should have been filed no later than February 28, 2008. The plaintiff placed 4 additional witnesses under subpoena shortly before the resumption of the trial on November 4, 2008. He did not file affidavits for Kumar, Chiodo, Dr. Toffoli-Zadra, or Rochon. The plaintiff submitted that it was not possible to obtain affidavits as the witnesses were instructed not to provide them. The defendant counters this by stating that affidavits could not be provided as to do so would breach the Salmer's Order. There is no dispute that the plaintiff did not attempt to obtain affidavits from these witnesses on or before February 28, 2008. The defendant submits that I am bound by the Salmer's Order and accordingly, the evidence of these witnesses cannot be accepted.

65 The parties made written submissions with respect to whether rule 18.03(8) of the Rules of the Small Claims Court should be applied to these witnesses. I have reviewed and considered these submissions and the evidence of the witnesses affected by rule 18.03(8).

66 Notwithstanding that I am bound by the Salmer's Order I decided to hear the evidence of Kumar, Chiodo, and Rochon on the understanding that I would consider the application of Rule 18.03(8) after the witnesses testified. The plaintiff was advised of this prior to calling these witnesses. My decision to hear the testimony of these witnesses was based upon Rule 1.03(1) of the *Rules of the Small Claims Court* and the *Courts of Justice Act* which provide;

Rule 1.03(1) of the Rules of the Small Claims Court

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the Courts of Justice Act.

Section 25 of the Courts of Justice Act

The Small Claims Court shall hear and determine in a summary way all questions of law and fact and make such order as is considered just and agreeable to good conscience.

Section 27(1) and (4) of the Courts of Justice Act

- (1) Subject to subsections (3) and (4), the Small Claims Court may admit as evidence at a hearing and act upon oral testimony and any document or other thing so long as the evidence is relevant to the subject-matter of the proceeding, but the court may exclude anything that is unduly repetitious.
- (4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting

the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

67 The final decision to hear and accept evidence at trial must be left to the trial judge. As stated above, I decided to admit the evidence of Kumar as he was the only witness who had direct knowledge of the facts surrounding the events on December 19, 2005. It is also noted the Kumar was on the defendant's list of proposed witnesses. Kumar's evidence was relevant and necessary.

68 Rule 18.03(8) of the *Rules of the Small Claims Court* provides that, "If satisfied that a party has abused the power to summon a witness under this rule, the court may order that the party pay directly to the witness an amount as compensation for inconvenience and expense."

69 The defendant submits that the issuing the summons to Dr. Toffoli-Zadra, Chiodo, and Rochon constituted an abuse of the power to summon a witness. The defendant relies upon *Williams v. Mendez*, [2003] O.J. No. 473, which held at paragraph 16:

The inherent jurisdiction of the court to quash a summons to witness must be used sparingly. Counsel for litigants have a prima facie right to use a summons to compel the attendance of a witness to trial provided the right is not exercised so as to constitute an abuse of the court's process.

The facts in *Williams v. Mendez* are similar with respect to the summons issued to Chiodo and Rochon. The witness under subpoena had no personal knowledge of the matters in issue. At paragraph 18 Mr. Justice Shaughnessy stated:

I find that Mr. Kilroy did not have the requisite knowledge of the relevant information to be adduced at trial. The actions and circumstances underlying the issuance of the summons to witness clearly illustrate a course of action which is an abuse of the court process. All relevant and material evidence relating to the Plaintiff's claim was adduced through a far more knowledgeable witness who had direct contact and supervision over the Plaintiff.

70 Dr. Toffoli-Zadra filed a medical opinion that a witness, Mr. Ackerman, was medically unfit to attend at trial. The summons to Dr. Toffoli-Zadra relates to the plaintiff's questioning the validity of her medical opinion regarding Mr. Ackerman's state of health. The doctor was excused from testifying as there was no basis for her to give evidence. Mr. Ackerman is the co-author with Mr. Bigelow of the Rochon Report. Bigelow attended at trial as stated above.

71 In the case at bar Chiodo did not have any personal knowledge of the matters in issue and the company lawyer informed the plaintiff of this fact in the October 29, 2008 e-mail. The plaintiff received the Rochon report with the Bigelow affidavit sworn on February 21, 2008. Bigelow was called as a witness. Rochon had no personal knowledge of the matters in issue. The testimony of both Chiodo and Rochon was irrelevant with respect to the issues to be determined.

72 The plaintiff's written submissions regarding these witnesses, with the exception of Kumar, disclose no relevance to the issues to be determined as against the defendant, 1231766 Ontario Inc. o/a Active Green & Ross. The submissions seek sanctions against these witnesses and raise matters have no bearing on the issues to be determined.

73 The subpoenas for these witnesses were issued 6 or more months after the commencement of the trial on March 4, 2008. The plaintiff completely disregarded the Salmer's Order. The plaintiff did not appeal the Salmer's Order. The witnesses in question had no direct involvement or knowledge of the issues to be decided. Witnesses were available and were called who had direct evidence of the matters in issue. The issue to be determined is did the defendant negligently

reinstall the oil plug, and was this negligence the proximate cause of the damages sustained by the plaintiff?

74 I find that the plaintiff abused the power to summons these witnesses pursuant to rule 18.03(8). Pursuant to rule 18.03(8) the plaintiff shall pay directly to these witnesses an amount as compensation for inconvenience and expense such amount not to exceed \$300 per witness. This payment is subject to the respective witnesses submitting a formal request for compensation. The request can be filed with the Small Claims Court for review and approval.

CONCLUSION

75 For the reasons set out above the plaintiff's claim is dismissed. The defendant is entitled to costs, which costs are subject to rule 19.04(1) of the *Rules of the Small Claims Court* and section 29 of the *Courts of Justice Act*. In addition the defendant is entitled to its disbursements pursuant to rule 19.01(1).

76 The parties may make written submissions regarding the costs. The defendant's submissions are to be delivered on or before June 15, 2009, and the plaintiff's submissions on or before July 6, 2009. The submissions are to relate only to the costs. Submissions regarding any other issues will not be considered. The cost submissions are to relate to the trial. Any costs incurred prior to the trial will not be considered.

P. GOLLOM DEPUTY J.

cp/e/qlqs/qlmxb/qlmxl

1 Paciocco, David and Strueseer, Lee. *The Law of Evidence*, 4th ed. Irwin Law, Toronto: 2005 at p. 415.

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