CITATION: Quenneville v. Robert Bosch GmbH, 2017 ONSC 7422
COURT FILE NO.: CV-16-549639-00CP
DATE: 20171212

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
MATTHEW ROBERT QUENNEVILLE, LUCIAN TAURO, MICHAEL JOSEPH PARE, THERESE H. GADOURY, AMY FITZGERALD, RENEE JAMES, AL-NOOR WISSANJI, JACK MASTROMATTEI, JAY MacDONALD and JUDITH ANNE BECKETT Plaintiffs	*James Sayce* and *Brittany Tovee* for the Plaintiffs
– and –	
ROBERT BOSCH GmbH Defendant	*Robert E. Kwinter* and *Nicole Henderson* for the Defendant
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: December 6, 2017

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In September 2015,[1] in a proposed class action under the *Class Proceedings Act, 1992*,[2] the Plaintiffs[3] sued Volkswagen Group Canada, Inc. Volkswagen Aktiengesellschaft, Volkswagen Group of America, Inc., Audi Canada Inc., Audi Aktiengesellschaft, Audi of America Inc. and VW Credit Canada, Inc. (collectively "Volkswagen") for installing emissions measurement software in diesel engine automobiles sold in Canada in an alleged conspiracy to violate emissions standards.

[2] On March 29, 2016, the Plaintiffs brought the action now before the court against

[1] September 22, 2015 (Windsor), September 23, 2015 (Toronto), and September 29, 2015 (Toronto).
[2] S.O. 1992, c. 6.
[3] Matthew Robert Quenneville, Lucian Tauro, Michael Joseph Pare, Therese H. Gadoury, Amy Fitzgerald, Renee James, Al-Noor Wissanji, Jack Mastromattei, Jay MacDonald and Judith Anne Beckett.

Volkswagen's co-conspirator, Robert Bosch GmbH ("Bosch").

[3] On April 21, 2017, Justice Belobaba, who was case managing both the action against Volkswagen and also the action against Bosch, approved a partial settlement in the Volkswagen action. The settlement provided compensation for some but not all of the Class Members of the action against Volkswagen.

[4] Pursuant to Rule 21, Bosch now moves for an order dismissing the action against it on the basis that the Plaintiffs are estopped by the doctrine of double satisfaction or on the basis that the Plaintiffs' action is an abuse of process. In the further alternative, Bosch seeks an order striking the Plaintiffs' causes of action for negligence and for predominant purpose conspiracy without leave to amend, on the basis that the Plaintiffs' pleadings do not disclose legally tenable causes of action for negligence or for a predominant purpose conspiracy.

[5] For the reasons that follow, I strike the negligence claim without leave to amend, but I otherwise dismiss Bosch's motion. Given the divided success on the motion, I order costs in the cause.

B. Factual and Procedural Background

[6] In the fall of 2015, the Plaintiffs, represented by the same Class Counsel as proposed in the case at bar, commenced an action against Volkswagen.[4] The crux of the action was that Volkswagen conspired with Bosch (Robert Bosch GmbH and Robert Bosch LLC) to install in Volkswagen's diesel vehicles a software program designed to turn off the vehicles' emissions controls in certain conditions and to produce false test reports of the quantity of the vehicles' emissions during operations.

[7] In the spring of 2016, the Plaintiffs commenced a separate conspiracy action against Bosch. In addition to pleading a conspiracy, the Plaintiffs plead that Bosch was negligent in the course of engineering, designing, developing, testing, manufacturing, supplying, and selling the software to Volkswagen.

[8] Both the action against Volkswagen and the action against Bosch sought recovery of the diminution in value of the subject vehicles and the value of lost time, lost income, and inconvenience for time spent having the vehicles repaired. Neither action advanced claims for damages for personal injury.

[9] The Volkswagen action and the Bosch action were brought on behalf of a proposed class consisting of all persons in Canada (with certain exclusions) who own, owned, lease or leased one of the Volkswagen's diesel vehicles.

[10] Justice Belobaba was assigned to be the case management judge for both actions.

[11] On December 15, 2016, in the Volkswagen action, the Plaintiffs reached a partial settlement agreement in respect of the vehicles known as the "2.0 litre diesel vehicles." The settlement class was a subset of the larger class and, excluded, amongst others, were owners and lessees of vehicles with 3.0 litre engines. The Settlement Class was defined as:

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[4] *Quenneville v. Volkswagen*, Court File No. CV-15-537029-CP.

> All persons (including individuals and entities), except for persons included in the Quebec Settlement Class and Excluded Persons, who (a) on September 18, 2015, were registered owners or lessees of, or, in the case of Non-VW Dealers, held title to or held by bill of sale dated on or before September 18, 2015, an Eligible Vehicle; or (b) after September 18, 2015, but before the Claims Submission Deadline, become registered owners of; or, in the case of Non-VW Dealers, hold title to or hold by bill of sale dated after September 18, 2015, an Eligible Vehicle and continue to be the owners as at the Purchaser Transaction Date.

[12] Under the settlement with Volkswagen, approximately 100,000 owners of 2.0 litre diesel vehicles received compensation using a particular formula and 7,000 lessees of 2.0 litre diesel vehicles received compensation using a different formula.

[13] Bosch was not released in the settlement in the Volkswagen action, and there is nothing in the settlement agreement that implicitly or expressly indicates that the separate Bosch action was not going to proceed.

[14] On December 20, 2016, on consent, Justice Belobaba certified the Volkswagen action as a class action for settlement purposes,[5] and scheduled a settlement approval hearing for March 31, 2017.

[15] At the settlement approval hearing, Justice Belobaba advised the parties that he would not approve the settlement absent evidence that the amounts payable thereunder were "at least equal to the amounts that the class members would receive under the tort approach"—that is, the value of the price Class Members paid for their vehicles, minus the value received. He adjourned the settlement approval hearing to permit the parties an opportunity to address that issue.[6]

[16] Following additional submissions from the parties in the Volkswagen action, the Volkswagen Settlement was approved. In his Reasons for Decision, Justice Belobaba stated he was satisfied that "in the overall, class members could well receive more under the settlement than they would have recovered under the tort approach and that the settlement was fair and reasonable and in the best interests of the class."[7]

[17] For present purposes, the following excerpts from Justice Belobaba's decision are pertinent:

> 6. Over the course of the last two weeks, class and VW counsel responded in detail to my numerous questions with written submissions and email exchanges, culminating with an in-person meeting on April 18. At the end of all of this, I can comfortably say that all of my concerns have been addressed and resolved.
>
> 7. For the reasons set out below, I am now satisfied that, in the overall, class members could well receive more under the Settlement than they would have recovered under the tort approach. The Settlement is therefore fair and reasonable and in the best interests of the class. ....
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> ....
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> 14. Is this fair and reasonable? How does this recovery compare to what Mr. Pare would have recovered under the tort approach?

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[5] *Quenneville v. Volkswagen Group Canada Inc.*, 2016 ONSC 7959.
[6] *Quenneville v. Volkswagen Group Canada Inc.*, 2017 ONSC 2448 at paras. 4–5.
[7] *Quenneville v. Volkswagen Group Canada Inc.*, 2017 ONSC 2448 at para. 7.

What class members would have received under the tort approach

15. Of the approximately 105,000 class members, only 36 opted out of the class action and only a tiny percentage objected to the Settlement. Some 522 class members filed valid pre-hearing objections, 10 spoke at the hearing on March 31, and a further 128 class members (probably including some duplications) forwarded post-hearing letters to my attention. I considered every objection and letter and I am grateful that these class members took the time to voice their concerns. Most of the objections and letters focused on issues that were unique to the class member's personal situation and about which I can do very little, such as not receiving compensation for roof racks or extended warranties. But many of the letters also addressed a more generalized issue and urged me to find that class members were entitled to nothing less than a full refund of their purchase price.

16. A full refund of the purchase price is a non-starter. It is important to repeat again that under Canadian law, whether consumer protection legislation or tort law, no such recovery of the full purchase price is possible. No class member is entitled in law to rescind the sales agreement and recover his or her full purchase price because, in every case, the affected automobile has been driven and used for many months if not years - both before and after the "defeat device" fraud was publicly disclosed by the American EPA on September 18, 2015.

17. I discussed this matter at length with counsel and I reviewed the applicable legal authorities. I am satisfied that the tort approach requires not only that the residual (CBB) value of the class member's vehicle be deducted from the purchase price but that the balance must then be further reduced to reflect the fact that the car was used, that is driven, over the time period in question.

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26. It is therefore not surprising that in the U.S. the overwhelming majority of American class members are choosing the buyback option. According to a recent letter from VW's American counsel reporting on the progress of the U.S. Settlement Program, VW has thus far completed almost 240,000 buybacks or early lease terminations and has performed emission modifications to just over 6000 vehicles in the 2015 model year.

27. I fully expect the Canadian experience to be similar, with the majority of class members here as well choosing the Buyback because under the Settlement this option provides the class member with a larger recovery than keeping the car and pocketing the Damages Payment or suing under the tort approach.

28. The analysis set out above deals only with one example, but the same analysis will result in similar findings for other owner-class members. I am therefore satisfied that in the overall the Settlement provides a larger recovery for class members, whether owners or lessees, than what would have been recovered under provincial consumer protection legislation or tort.

29. I am pleased to find that the Settlement is fair and reasonable and in the best interests of the class.

[18] In subsequent reasons approving Class Counsel's legal fees, Justice Belobaba noted that that the partial settlement was not only fair and reasonable but was more than would have been recovered in litigation, and he described the settlement as generous to the Settlement Class Members.[8]

[19] After the partial settlement in the Volkswagen action, the Plaintiffs amended their pleading in the Bosch action to plead only several liability; the Plaintiffs pleaded:

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[8] *Quenneville v. Volkswagen,* 2017 ONSC 3594 at paras. 1, 5.

> The Plaintiffs' claim, and the claim of each Class Member, is limited to the amount of the Plaintiffs' or other Class Member's damages that would be apportioned to the Defendants in accordance with the relative degree of fault that is attributable to the Defendants' negligence, their role in the conspiracy and their contribution to the breach of CEPA. The Plaintiffs' claim is against the Defendants for those damages that are attributable to its proportionate degree of fault, and they do not seek, on their own behalf or on behalf of the Class, any damages that are found to be attributable to the fault or negligence of any other person or entity or for which the Defendants could claim contribution or indemnity whether in common law, equity, contract or otherwise.

[20] In their action against Bosch, the Plaintiffs make very serious allegations against Bosch, including allegations that Bosch was responsible for causing respiratory diseases and increased levels of pollutants in diesel exhaust. The Plaintiffs allege that Bosch knowingly, intentionally or negligently designed and sold a device to evade federal and provincial laws and to mislead regulators and consumers. They plead that Bosch's conduct was deliberate, unlawful, arrogant, high-handed, outrageous, reckless, wanton, entirely without care, deliberate, secretive, callous, willful, disgraceful and in contemptuous disregard of the rights and interests of Class Members and the public.

[21] In their Amended Statement of Claim, the Plaintiffs plead in paragraph 61 that Bosch intended to cause harm to the Class Members. This paragraph, which is the basis of Bosch's argument that the predominant purpose conspiracy cause of action should be struck, but which the Plaintiffs submit was borrowed from a Supreme Court of Canada judgment,[9] states:

> 61. The Defendants had as their preponderant motivation and purpose a desire to increase their profits by designing, engineering, supplying and selling the Software, which was installed in the Vehicles, unlawfully imported, unfit for use and harmful to the environment and human health and safety. The Defendants intended to cause harm to the Plaintiffs and the Class Members and to thereby enrich themselves.

C. Submissions of the Parties

1. Bosch's Submissions

[22] Bosch argues that given that it is a principle of the law of damages that a plaintiff may not extract a double recovery[10] and given that Justice Belobaba has already found as a fact that the members of the settlement class have been fully compensated (and indeed in some cases overcompensated), it follows that the causes of action of all the settlement class members against Bosch have been discharged[11] and, therefore, their action should be dismissed.

[23] Bosch argues that it follows from the dismissal of the cause of action that there are no residual causes of action or residual claims for punitive damages, which Bosch also submits would not have been awarded in any event having regard to the jurisprudence about when

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[9] *Pro-Sys Consultants Ltd. v. Microsoft* Corporation, 2013 SCC 57 at para. 78.

[10] *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at para. 71; *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (C.A.) at para. 37, additional reasons at 2002 CarswellOnt 3617, leave to appeal to S.C.C. refused, [2003] 1 S.C.R. vii (note); *Cuttell v. Bentz*, [1985] B.C.J. No. 2443; *Pro-Sys Consultants Ltd. v. Microsoft* Corporation, 2013 SCC 57 at paras. 39-41.

[11] *Cassimjee v. Jarrett* (1975), 8 O.R. (2d) 726 (H.C.J.).

punitive damages may and should be awarded.[12]

[24] As an alternative or complimentary argument, Bosch submits that given that the Class Members have been fully compensated, proceeding against Bosch would be an abuse of process[13] and, therefore, the Plaintiffs' action should be dismissed. In other words, Bosch submits that continuing the action against it is an attempt by the Plaintiffs to re-litigate issues decided in the Volkswagen action, and allowing the action to proceed would constitute an abuse of process.

[25] In a mutually exclusive argument, Bosch submits that the Plaintiffs' pleading of a predominant purpose conspiracy does not show a reasonable cause of action because it is plain and obvious that the Plaintiffs have pleaded that the alleged conspiracy had as the "preponderant motivation and purpose a desire to increase their profits by designing, engineering, supplying, and selling the Software." As a matter of law, conduct motivated primarily by economic self-interest cannot constitute a conspiracy for the predominant purpose of injuring the plaintiff, even where the plaintiff suffers damages as a result,[14] and, therefore, Bosch submits that this cause of action is untenable and it should be struck out.

[26] In another mutually exclusive argument, Bosch submits that the Plaintiffs' negligence pleading does not show a reasonable cause of action because the claim is for economic losses arising from a defective non-dangerous consumer product and in *Arora v. Whirlpool Canada LP*,[15] the Ontario Court of Appeal held that there is no cause of action in negligence for pure economic losses for a defective, non-dangerous consumer product.

2. The Plaintiffs' Submissions

[27] The Plaintiffs submit that there is no double recovery because Bosch ignores their claims for punitive damages, their waiver of tort claims, and the fact that in conspiracy and negligence, the Plaintiffs' seek recovery only for Bosch's several liability. The Plaintiffs assert that the class does not seek to be paid twice for tort damages, as Bosch suggests.

[28] The Plaintiffs submit that the conspiracy and negligence claims have been properly pleaded and that it is not plain and obvious that any of the Plaintiffs' claims will fail or that the Class Members have been fully compensated, which they deny was a conclusion drawn by Justice Belobaba and if it was drawn it has little precedential value being an *obiter* comment in a

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[12] *Robinson c. Films Cinar inc*, 2013 SCC 73; *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669; *Keays v. Honda Canada Inc.*, 2008 SCC 39; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Vorvis v. Insurance Corp of British Columbia*, [1989] 1 S.C.R. 1085.

[13] *Toronto (City) v C.U.P.E, Local 79*, 2003 SCC 63; *Canam Enterprises Inc v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), dissenting decision of Goudge, J.A. approved by the S.C.C. 2002 SCC 63; *Reddy v. Oshawa Flying Club* (1992), 11 C.P.C. (3d) 154 (Ont. Gen. Div.); *Donmor Industries Ltd. v. Kremlin Canada Inc* (1991), 6 O.R. (3d) 501 (Gen. Div.); *Solomon v. Smith*, [1987] M.J. No. 502 (C.A.); *Nuco Jewelry Products Inc. v. Lynott*, 2016 ONSC 5532.

[14] *Belsat Video Marketing Inc. v. Astral Communications Inc.* (1998), 81 C.P.R. (3d) 1 (Ont. Gen. Div.) at paras. 53–55, additional reasons at (1998), 79 ACWS (3d) 241 (Ont. Gen. Div.), aff'd (1999), 86 C.P.R. (3d) 413 (Ont. C.A.).

[15] 2013 ONCA 657 at para. 116, aff'g 2012 ONSC 4642, leave to appeal to S.C.C. ref'd (2014), 473 NR 387.

settlement approval.[16]

[29] The Plaintiffs submit that in the context of a settlement approval motion under s. 29 of the *Class Proceedings Act, 1992*, where the issue is whether the settlement is in the best interests of the class as a whole, Justice Belobaba did not and could not decide what damages would be available to the class had the action been tried nor could he make a finding that the Class Members have been fully compensated.

[30] The Plaintiffs argue that they have a viable claim for damages for the several liability of Bosch that remains uncompensated by the Volkswagen settlement and that their class action is not an abuse of process.

[31] The Plaintiffs submit that the predominant purpose conspiracy claim has been properly pleaded because given a generous reading it is not plain and obvious that they have not pleaded that Bosch's predominant purpose was to injure the Class Members.

[32] Relying on *Kalra v. Mercedes Benz*,[17] the Plaintiffs submit that the negligence claim has been properly pleaded and the claim is not precluded by *Arora v. Whirlpool Canada LP*,[18] because their Amended Statement of Claim is replete with allegations and particulars that the software designed by Bosch was dangerous and constituted a public health risk with respect to causing respiratory deceases and releasing pollutants that are harmful to humans. The Plaintiffs submit that the negligence pleading is proper as the Plaintiffs have pleaded that the health of hundreds of thousands of Class Members was adversely impacted by Bosch's conspiracy with Volkswagen.

D. Discussion and Analysis

1. The No Double Recovery Principle

[33] The Plaintiffs interpret Justice Belobaba's settlement approval decision as expressly and implicitly leaving it open for the Class Members to pursue Bosch for its several liability for the uncompensated damages. The Plaintiffs' response to Bosch's no double recovery argument is that as a matter of fact, there are uncompensated damages or unresolved causes of actions or unadjudicated quantifications of various heads of damages, including punitive and restitutionary damages, and so the Plaintiffs submit that it cannot be said that any of the settlement Class Members will enjoy a double recovery in pursuing compensation from Bosch.

[34] In my opinion, the Plaintiffs' response of there being more recoverable damages, which may factually be correct, totally misses the point of Bosch's argument, which has a different exegesis of Justice Belobaba's settlement approval decision. Bosch's interpretation is that Justice Belobaba found as a fact that: (a) the Settlement Class Members were recovering more by settlement than they would by trial; (b) *i.e.*, the settlement was not a compromise, but rather was a comprehensive success; and, (c) the Class Members were being fully compensated for their causes of action. Bosch's interpretation is that the consequence of Justice Belobaba's findings of

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[16] *Vivendi Universal Canada Inc. v. Jellinek*, [2006] O.J. No. 3687 (S.C.J.) at para. 5.
[17] 2017 ONSC 3795.
[18] 2013 ONCA 657 at para. 116, aff'g 2012 ONSC 4642, leave to appeal to S.C.C. ref'd (2014), 473 NR 387.

fact are that the Plaintiffs' causes of action against the alleged co-conspirator Bosch are discharged by the settlement.

[35] Apart from the awkwardness of my deciding which parties' exegesis of my colleague's decision is the correct one, in my opinion, resolving this interpretative debate is not the appropriate or proper way to resolve Bosch's argument about the no double recovery principle. Nor would be it be appropriate for me to decide the merits of the Plaintiffs' argument that as a matter of fact there are more damages to recover.

[36] There are, however, three separate other reasons why Bosch's argument on this Rule 21 motion should be rejected; namely:

- The first reason is that if Justice Belobaba did decide that the Settlement Class Members have been fully compensated or if it would be an abuse of process to relitigate in the Bosch action whether the Class Members have been fully compensated, then, nevertheless, the imposition of an issue estoppel is discretionary and in the immediate case, it is not in the interests of justice to estop the Class Members from advancing their damages claims against Bosch.
- The second reason is that the only factual or legal issue determined on the motion before Justice Belobaba was whether the settlement was in the best interests of the Settlement Class Members, and, thus, Justice Belobaba's decision would not otherwise raise an issue estoppel, unless (a) he expressly indicated that he was making a binding determination of fact; and (b) his finding of fact was expressed in the court's formal order, neither of which occurred in the case at bar.
- The third reason is that assuming that Justice Belobaba did determine that the Class Members were fully compensated, then that determination was binding only as between the Class Members and Volkswagen but was not a binding determination as between the Class Members and Bosch.

[37] With respect to the first reason for rejecting Bosch's argument, *Danyluk v. Ainsworth Technologies Inc.*[19] is a leading case on issue estoppel. It adds an element of discretion to the determination of whether there is an issue estoppel. In this case, the Supreme Court of Canada held that where a party establishes the pre-conditions for an issue estoppel, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. The court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.[20] In *Penner v. Niagara (Regional Police Services Board)*,[21] a majority of the Supreme Court noted that unfairness in applying an issue estoppel may arise from the unfairness of the prior proceedings or the unfairness in the particular circumstances of using the results of the prior proceedings to preclude the subsequent claim.[22]

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[19] [2001] 2 S.C.R. 460.

[20] *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19; *Amtim Capital Inc. v. Appliance Recycling Centres of America*, 2014 ONCA 62.

[21] 2013 SCC 19.

[22] *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at paras. 36-68.

[38] It may be that, on the merits, Bosch will be able to establish that there are no uncompensated damages, but it is unfair and not in the interests of justice that this issue be determined while Bosch sat on the sidelines of the dispute between Volkswagen and the Plaintiffs, who were at least careful enough not to formally release Bosch. In my opinion, standing back and, taking into account the entirety of the circumstances, the application of an issue estoppel in this particular case would work an injustice and I exercise my discretion not to apply an issue estoppel.

[39] With respect to the second reason for rejecting Bosch's argument, an issue estoppel may arise on an interlocutory motion but it is necessary to determine what the subject matter of the motion was; *i.e.* it is necessary to determine what the dispute was and what issues were resolved by the outcome of the interlocutory motion. For example, a successful summary judgment motion will decide the merits of the underlying action but an order dismissing a motion for summary judgment determines only that there is a genuine issue requiring a trial and the underlying issue or issues will not have been finally resolved for that action or others,[23] unless: (a) the judge on the summary judgment motion expressly indicates that he or she is making a binding determination of law or fact; and (b) the determination is expressed in the court's formal order.[24]

[40] The only issue before Justice Belobaba on the settlement approval motion was whether the settlement was in the best interests of the class. In his Reasons for Decision, Justice Belobaba did not indicate that he was making a binding finding of fact that the Settlement Class Members were fully compensated and his formal order (which is in the Motion Record for this Rule 21 motion) is silent in this regard. It follows, once again, that while Bosch may eventually plead and prove that the Settlement Class Members' claims have been discharged by payment, Bosch will require a summary judgment motion or a trial to succeed in this defence.

[41] With respect to the third reason for rejecting Bosch's argument, s. 139 (1) of the *Courts of Justice Act,*[25] has statutorily overruled the common law's "judgment bar rule" and the "release bar rule." The judgment bar rule posits that a judgment against one joint tortfeasor bars a judgment against the other joint tortfeasors, and the release bar rule posits that a release of one joint tortfeasor bars an action and a judgment against the other tortfeasors. Section 139 (1) of the *Courts of Justice Act* provides that where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding. A plaintiff can now sue a single joint tortfeasor and obtain a judgment or settle and release that single joint tortfeasor and then proceed against the other tortfeasors. The judgment bar rule and the release bar rule never applied to concurrent several tortfeasors and subject to the qualification that the plaintiff cannot make a double recovery, a plaintiff can sue several tortfeasors in successive actions.[26]

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[23] *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.* (1998), 42 O.R. (3d) 618 (C.A.); *Leone v. University of Toronto Outing Club*, 2007 ONCA 323 (C.A.) at para. 2.

[24] *Ashak v. Ontario (Director, Family Responsibility Office)*, 2013 ONCA 375; *S.(R.) v. H.(R.)* (2000), 52 O.R. (3d) 152 (C.A.) at para. 21; *2441472 Ontario Inc. v. Collicutt Energy Services*, 2017 ONCA 452.

[25] R.S.O. 1990, c. C.43.

[26] *Treaty Group Inc. v. Drake International Inc.*, [2007] O.J. No. 2468 (C.A.), aff'g [2005] O.J. No. 5232 (S.C.J.).

[42] Assuming that Justice Belobaba did determine that the Class Members were fully compensated, then that determination was binding only as between the Class Members and Volkswagen but was not a binding determination as between the Class Members and Bosch.

[43] Before concluding this part of my Reasons for Decision, it should be pointed out that I have not decided the merits of Bosch's argument that the no double recovery principle applies in the circumstances of this case. My decision is without prejudice to Bosch advancing this argument again in its defence of the litigation brought by the Plaintiffs.

2. The Predominant Purpose Conspiracy

[44] The elements of a claim of civil conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants: (a) use some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff, or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and, (4) the plaintiff suffers damages as a result of the defendants' conduct.[27]

[45] The second element of a civil conspiracy cause of action has come to identify two distinct types of civil conspiracy; *i.e.,* the illegal means conspiracy and the predominate purpose of injuring the plaintiff conspiracy. As noted above, Bosch argues that the Plaintiffs' predominate purpose conspiracy is destined to fail because the Plaintiffs have actually pleaded that Bosch had a predominate purpose other than of injuring the putative Class Members.

[46] I disagree with Bosch's argument for two reasons.

[47] First, on a pleadings motion, assessing a cause of action, the court is obliged to read the plaintiff's pleading generously with allowance for inadequacies due to drafting deficiencies.[28] In the case at bar, read generously, the Plaintiffs' pleading is adequate to plead a predominate purpose conspiracy.

[48] Second, were I to strike the ineloquently drafted Amended Statement of Claim for its infelicities, I would, nevertheless, grant leave to amend, and I am confident that the Plaintiffs will be able to properly plead a predominate purpose conspiracy. Then, ironically, Bosch will undoubtedly deny that its predominate purpose was something other than intending to injure the Class Members and thus the parties will join issue just as they would based on the current pleading.

3. The Pure Economic Loss Negligence Claim

[49] They Plaintiffs undoubtedly have a cause of action against Bosch for the tort of civil conspiracy for Bosch's part of a scheme to install deceptive software in Volkswagen's diesel vehicles. The Plaintiffs undoubtedly have a claim for the consequential economic losses arising

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[27] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959; *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.); *Knoch Estate v. John Picken Ltd.* (1991), 4 O.R. (3d) 385 (C.A.).

[28] *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.).

from the conspiracy. The Plaintiffs, however, also sue Bosch for the tort of negligence, and Bosch submits that it is plain and obvious that the negligence cause of action is legally untenable. For the reasons that follow, I agree with Bosch.

[50] Bosch submits that the pith and substance of the Plaintiffs' pure economic loss negligence claim against it is a claim for the manufacturing of a shoddy but non-dangerous product, and it submits, therefore, that although there may be remedies in other areas of the law, the case law is clear that there is no duty of care not to manufacture shoddy products.

[51] In *Arora v. Whirlpool Canada LP*, the case about washing machines that stink, it was alleged that front-loading washing machines were negligently designed because they allowed the collection of dangerous pathogens, but there were no personal injury claims and the plaintiffs' and the putative class members' claims were for pure economic losses, with heads of damages similar to the heads of damages alleged in the case at bar. I agree with Bosch's argument that *Arora v. Whirlpool Canada LP*,[29] governs the case at bar, and it is plain and obvious that the Plaintiffs do not have a legally tenable pure economic loss negligence claim against Bosch.

[52] It is plain and obvious that in the case at bar, the harm to the environment and to living creatures was harm caused by Volkswagen's vehicles emitting hydrocarbons, not by the software installed in the vehicle, which conspiratorially and intentionally was designed to turn off the emissions controls in certain conditions and to produce false test reports of the quantity of the vehicle's emissions during operations. Software does not produce hydrocarbons. Software is not dangerous. Software is not a dangerous product. Software can be used as part of a scheme or a product that is dangerous, but that is not the same thing as being a dangerous product.

[53] From the conspirator's point of view, the software was an effective product to deceive the public and regulators. Since it is alleged by the Plaintiffs that the Bosch software achieved its purpose, it is somewhat of a *non sequitur* to say that the software was a defective product. It is also somewhat of a *non sequitur* to say that Bosch's product was a dangerous good. Bosch manufactured software that was installed in Volkswagen's diesel vehicles. The diesel vehicles, not the software, produced dangerous hydrocarbons.

[54] *Kalra v. Mercedes Benz*,[30] upon which the Plaintiffs in the case at bar rely, does not change my conclusion. The *Kalra* case is a clone of the case at bar involving a different manufacturer of diesel vehicles. The plaintiffs in *Kalra* alleged that software shut off the emission control system of the diesel vehicles in cold weather and the defendant deceived consumers and regulators. Without a claim for personal injuries and with only a claim for pure economic losses, the plaintiffs alleged that the emission of hydrocarbons had a propensity to cause personal injury or death to the putative class members and among numerous other causes of action, the plaintiffs advanced a negligence claim. Justice Belobaba concluded that the plaintiffs' negligence claim satisfied the cause of action but not the other criterion for certification.

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[29] 2013 ONCA 657 at para. 116, aff'g 2012 ONSC 4642, leave to appeal to S.C.C. ref'd (2014), 473 NR 387.
[30] 2017 ONSC 3795.

[55] Justice Belobaba interpreted the Court of Appeal's decision in *Arora v. Whirlpool Canada LP* as leaving the negligence claim on life support with "a slight pulse" so that it could not be struck under s. 5(1)(a) of the *Class Proceedings Act, 1992* for not showing a tenable cause of action. Insofar as the action against Bosch is concerned, I disagree with my colleague. Insofar as the claim against Bosch is concerned, *Arora v. Whirlpool Canada LP* has flat-lined the negligence claim.

E. Conclusion

[56] For the above reasons, I strike the negligence claim without leave to amend but I otherwise dismiss Bosch's motion with costs in the cause.

Perell, J.

Released: December 12, 2017

CITATION: Quenneville v. Robert Bosch GmbH, 2017 ONSC 7422
COURT FILE NO.: CV-16-549639-00CP
DATE: 20171212

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MATTHEW ROBERT QUENNEVILLE, LUCIAN TAURO, MICHAEL JOSEPH PARE, THERESE H. GADOURY, AMY FITZGERALD, RENEE JAMES, AL-NOOR WISSANJI, JACK MASTROMATTEI, JAY MacDONALD and JUDITH ANNE BECKETT

Plaintiffs

– and –

ROBERT BOSCH GH

Defendant

REASONS FOR DECISION

PERELL J.

Released: December 12, 2017