Les Cahiers de droit

Vente

Volume 14, Number 3, 1973

URI: https://id.erudit.org/iderudit/041770ar
DOI: https://doi.org/10.7202/041770ar

See table of contents

Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this note

(1973). Vente. *Les Cahiers de droit*, *14*(3), 529–534.
https://doi.org/10.7202/041770ar

Vente

Louis Lazanik et *Peter Lazanik*, demandeurs, v.
Ford Motor Co. of Canada et
Latimer Motors Ltd., défenderesses, et
Traders Finance Corporation Ltd., mis-en-cause.
C.S. Montréal, nº 623504 *
Juge en chef adjoint George S. CHALLIES.

Garantie des vices — Vice grave (oui) — Exécution en nature de la garantie (non) — Négligence de l'acheteur dans l'usage du véhicule (non) — Droit de l'acheteur à des dommages-intérêts (oui) — Présomption de connaissance du vice par le vendeur — Preuve contraire — Vendeur professionnel — Faute professionnelle — Recours extra-contractuel en dommages-intérêts contre le fabricant (oui) — Recours contractuel en dommages-intérêts et en rédhibition contre le vendeur-distributeur (oui) — Solidarité (oui) — Délai d'exercice de l'action (respecté) — Appréciation du préjudice réparable.

Action rédhibitoire contre le vendeur et en dommages-intérêts contre le vendeur et le fabricant solidairement, accueillie.

JUGEMENT

THE COURT has heard the parties by their respective attorneys, has heard the witnesses, has examines the proceedings and the exhibits filed and thereon deliberated:

Plaintiffs allege that in 1963 by Exhibit P-2 they purchased from defendant Latimer Motors Ltd. (hereinafter sometimes referred to as "Latimer"), for a price of $5,224.90, a Ford Galaxie 500 XL Convertible for the year 1963 manufactured by defendant Ford Company of Canada Ltd. (hereinafter sometimes referred to as "defendant Ford"), which car was represented by defendant Ford in advertising to be of the highest quality. The price was allegedly paid by plaintiffs to Latimer less $1,800 which was financed through the *mis-en-cause*. It is alleged that the automobile was purchased in the name of Louis Lazanik and registered by defendant Latimer with the Province of Quebec Licence Bureau in the name of Peter Lazanik.

Plaintiffs sue both under legal warranty and under the conventional warranty which attaches to every automobile during a certain length of time or number of miles, and allege that between the month of May 1963 and the date of institution of action the car was on at least 20 occasions as listed in paragraph 11 of the declaration brought to Latimer to repair the accelerator, carburetor, clutch, transmission and

* Décision citée par la Cour d'appel dans *Gougeon* v. *Peugeot Canada Ltée* et *Gaston Bellehumeur*, C.A. Montréal, nº 12736, 20 juillet 1973.

generator, as well as certain other minor repairs; that even after the repairs were made the car still functioned improperly, and that finally plaintiff Peter Lazanik left the automobile in the possession of Latimer on the 4th November, 1963, where it was at the time of the trial; and that plaintiffs tendered the car to Latimer and claimed the price and damages. It is added that the automobile is defective and it has not been possible to repair it, that both defendants have failed to remedy the defects although put in default to do so, and that the automobile was unfit for the use for which it was intended and purchased. Plaintiffs, praying act of their tender, conclude that the sale Exhibit P-2 be cancelled for all legal purposes and that defendants be condemned to pay a total of $10,534.90, being the purchase price, the cost of the licence, the amount paid for insurance, and damages for inconvenience in the amount of $5,000.

The defendants Latimer and Ford pleaded separately by almost identical pleas which admit paragraphs 1 and 2 of the declaration and deny or ignore substantially all of the remainder of the declaration. For further plea it is added that the automobile purchased by plaintiff Louis Lazanik was at all times driven by Peter Lazanik who was an imprudent and reckless driver, as set forth in paragraph 13 of the plea, participating in drag racing, snap shifting, and other abuses of the automobile which caused the damages which are complained of. It is further alleged that the automobile was manufactured according to the best standards and was in perfect running condition when plaintiff Peter Lazanik took possession of it, and that the defects were caused by him, and that alternatively if the automobile was defective, which is not admitted but denied, the defects were remedied. The pleas conclude that the plaintiffs' action is unfounded in fact and in law.

(...)

The evidence shows that the automobile, which was purchased on the 4th May, 1963, and delivered to plaintiff on or about the 5th May, 1963, was taken by plaintiff to Latimer for repairs on many occasions commencing on or about the 8th May, 1963, and all the repair vouchers or work orders are procuded *en liasse*.

(Étude de la preuve des nombreuses réparations, dont la première a été effectuée le 3 juin 1963, alors que le véhicule avait roulé 92 milles, et la dernière, en octobre 1965.)

To summarize, the generator armature was changed three or four times in six months; the carburetor was changed at least once; the clutch was changed three or four times, and was repaired on many occasions; and the transmission and differential were repaired on numerous occasions. The same complaints and difficulties repeated time after time and were not cured by repair.

(...)

There is a suggestion by witnesses for the defence that the difficulties experienced by plaintiff Peter Lazanik were because he abused the car, accelerating much too quickly, trying to snap shift and using the car for drag racing. The evidence on these points is extremely vague and unsatisfactory. It is true that the rear tires were worn out more quickly than they should have been but there is no definite proof as to what was the specific cause of this. Moreover, the Court is struck by the fact that Latimer repeatedly tried to repair the clutch, transmission, differential and generator and according to the evidence of plaintiff Peter Lazanik, at page 104 of the transcript, "Nobody ever commented that I am driving the car too hard, that I am not handling it properly. They just took the car in to repair". If there were any merit in the defence of abuse of the car by Peter Lazanik one would have thought that the objection would have been raised long before the action was taken and during the year 1963 when there were so many repairs made.

There was the evidence of the expert witness Hastings, a mechanical engineer who had cursorily examined the car but had not taken down either the trasmission or the clutch and was of course not present on any of the occasions when the repairs were made. He listened to the evidence of defendants' other witnesses on the nature of the repairs made and he noted in his examination the fact that three of the four tires on the car (all except the right rear tire) were unusually worn. He conceded that it was most unusual and indeed alarming to replace a clutch four times and a fly-wheel as well. He also noted that the transmission had been over-hauled on at least three occasions and inspected to some degree practically every time that a work order was made out, that the differential had been over-hauled twice, that the rear oil seals had been replaced, and that on two occasions one of the rear wheel bearings was replaced. He also spoke of the significance of the extreme tire wear. He advanced the theory that the damage could have been caused to both the clutch and the transmission by abuse and that the damage to the differential was also possibly caused by abuse as was the damage to the wheel bearings. He also suggested that the generator, which was over-hauled four times, could have been damaged because of excessive speed of rotation, and that pressure shifting or speed shifting, which involved very quick shifting of the gears, would cause damage to the transmission and the clutch. He concluded that the automobile had been subjected to very rough and extreme treatment.

The Court has no hesitation in rejecting this evidence. It is a convenient explanation of the difficulties that plaintiffs experienced with the automobile but it takes more than rather disconnected conjecture to convince the Court and it is not possible to explain why Latimer frequently and repeatedly replaced clutches and transmissions and generators and did hundreds and perhaps thousands of dollards worth of work on this automobile unless there was something the matter with it or unless they thought that there was something the matter with it which was not caused by abusive treatment by the owner. Besides there is the evidence of plaintiff Peter Lazanik that he never speed shifted, if one defines speed shifting as it was defined by defendants' witnesses and particularly by the witness defendant Hastings. He shifted using the tachometer and had it installed in order to help him with the shifting.

On the above facts the Court is satisfied that the automobile, the subject of the present action, was affected by a number of latent defects within the meaning of articles 1522 and following of the *Civil Code*, these latent defects comprising a defective clutch, a defective transmission, a defective differential and a defective generator. Under article 1527 the seller is obliged, if he knew of the defect, not only to restore the price of it but to pay all damages suffered by the buyer and he is similarly obliged to do so when he is legally presumed to know of the defects. The cases when he is legally presumed to know of the defects are set forth very clearly in the judgment of Chief Justice Duff in *Touchette* v. *Pizzagalli* [1]:

> "The special warranty with which we are concerned on this appeal belongs to a class of stipulation commonly found in agreements between sellers and purchasers of automobiles. The validity of such stipulations has been considered by the tribunals in France and, speaking generally, the conclusion has there been reached that they are valid in virtue of the article of the *Code Napoléon* which corresponds to article 1507 *C.C.*; subject to this reservation, that they do not operate to exonerate the seller or the constructor from the consequences of his "*dol*" or his "*faute lourde*" (*Gaz. Trib.* 1929, pp. 219, 220; H. Lalou, *Traité pratique de la responsabilité civile*, nº 209).

1. [1938] R.C.S. 433 à 438.

> Generally speaking, where the "*vice*" of construction is to be attributed to "*faute professionnelle*", there is "*faute lourde*" within the meaning of this rule. It is material to observe the terms of article 1527 *C.C.* They are as follows:
>
> > 'If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer. He is obliged in like manner in all cases, in which he is legally presumed to know the defect.'
>
> The *Civil Code* of Quebec contains no provision defining the conditions under which the presumption referred to in the second sentence is constituted. The subject is discussed in Mignault, *Le droit civil canadien*, t. 7, at pp. 111, 112, 113. If is now settled that the seller is responsible in respect of all damages sustained by the purchaser by reason of latent defect where the seller is either a manufacturer or a person who deals in, as merchant, articles of the same kind as that which was the subject of the sale. Unless he can establish that the defect was such that it could not have been discovered by the most competent and diligent person in his position, his ignorance is no excuse, because it is conclusively presumed (in the absence of such proof) to be the result of negligence or of incompetence in the calling which he publicly practises and in respect of which he thereby professes himself to be competent. The principle is *spondet peritiam artis*.
>
> The general principle is stated by Pothier and has been often applied by the French tribunals. For example, *Sirey*, 1925, 1,198. It should be observed, however, that the recourse of the purchaser in respect of damages under article 1527 *C.C.* is not subject to the restrictions which govern the French tribunals. The *Code Napoléon* contains no express provision corresponding to that embodied in the second paragraph of article 1527 *C.C.*
>
> The Quebec judges have unanimously agreed that there was here latent defect within the meaning of the articles of the Code: therefore, it would appear that, applying the principles accepted in France by *la jurisprudence*, this special stipulation would afford no protection to the appelant.
>
> But this conclusion may be based upon another ground. Manifestly this stipulation ought not to be read as contemplating such conduct as that described in the *considérant* quoted above. In other words, the appellant ought not to be permitted, under cover of the stipulation, to repudiate all responsiblity in warranty, even the obligation to perform the stipulation itself: and I agree with the judges of the Court of King's Bench that by reason of this repudiation the respondent is entitled, by force of article 1065 *C.C.*, to be relieved of his agreement to substitute the obligations under this stipulation for the legal warranty which, in the absence of such an agreement, would bind the appellant. It follows that the respondent is entitled to invoke the provisions of articles 1522–1529 *C.C.* in which the reciprocal rights of seller and purchaser are stated in respect of warranty against latent defects."

One should also refer to the judgment of Mr. Justice Taschereau, as he then was, of the Supreme Court of Canada, in *Modern Motor Sales Ltd.* v. *Masoud et al.*[2]:

> "Il faut donc prendre pour acquis, comme l'a trouvé le juge au procès, que la cause de cet accident est la défectuosité des freins du camion acheté par Masoud de l'appelante. Cette dernière est commerçante en automobiles et camions usagés, et comme telle, elle est présumée connaître les défauts de la chose qu'elle vend; dans le cas de dommages subis comme résultat de ces vices, elle est tenue d'indemniser

2. [1953] 1 R.C.S. 149 à 156.

l'acheteur (art. 1527 du *C.c.*). La preuve démontre surabondamment que le défaut aux freins, cause de l'accident, était un vice caché et la responsabilité de l'appelante vis-à-vis de Masoud se trouve conséquemment engagée. Elle résulte de sa "faute professionnelle". *"Spondet peritiam artis"*, et on peut ajouter avec Ulpien, *"Imperitia culpæ annumeratur". Vide: Ross* v. *Dunstall et al.*[3]; *Samson* v. *Davie Shipbuilding & Repairing Co.*[4]; L. Guillouard, *La Vente*, n° 463, *in Droit civil; Lajoie* v. *Robert*[5]; *Touchette* v. *Pizzagalli*[6]".

In the present case there is no doubt that defendant Latimer was a specialized vendor who held himself out to have specialized knowledge and is therefore subject to the presumpton of article 1527 just as the Touchette Automobile Company was in the *Touchette* case. The action must be maintained also against Ford Motor Company because it is bound as the manufacturer of the defective automobile to legal warranty just as is the vendor, and the two are bound jointly and severally. This may be seen in the judgment of the Supreme Court of Canada in *Ross* v. *Dunstall*[7]. The defence failed entirely to make any convincing proof that would permit the Court to conclude that the serious and indeed inexcusable defects in this automobile were due to anything but faulty manufacture. Defendant Ford did not rely upon any written guarantee as limiting their responsibility for latent defects in this case.

It was argued on behalf of the defendants that the action was tardy. It must be remembered that the plaintiff complained repeatedly from the 10th May, 1963, until early November 1963 and left the automobile on innumerable occasions to have varioux repairs made and the defendant Latimer undertook to make these repairs and, as appears clearly from the evidence, failed to do so. Finally, in late October 1963, the automobile was left by plaintiff with Latimer, the plaintiff being disgusted, and the Court in no way blames him. The action was served on the tow defendants on the 15th November, 1963. Far from being taken without reasonable diligence the Court believes that the present case was taken with all possible diligence. Accordingly the objection based on the action being late is dismissed.

It remains to assess the damages.

Plaintiffs are of course entitled to recover the full price paid, namely, $5,224.90, as appears from invoice produced as Exhibit P-1.

The Court awards the $35 for the automobile licence, which turned out to be of very little if any value to plaintiffs in reference to the Ford automobile, the subject of this case. The original cost of the insurance policy was $295 and it was cancelled on the 4th November, 1963 and there was refunded to plaintiffs $35.40 leaving $259.60. Plaintiff Peter Lazanik did use the automobile at times from the 6th May or thereabouts when he insured it until late October or early in November when he left it with Latimer and tendered it back to them. The Court considers that it is fair to ascribe $59.60 of the $259.60 to the period when plaintiff was in fact using the car and to award $200 as damages in respect of the insurance which turned out to be useless because of the defective automobile. There remains the claim for loss of use, inconvenience and depreciation, $5,000 which, in the particulars, has been broken down by plaintiffs into $1,741 for one-third depreciation on a new car during its first

3. (1921) 62 R.C.S. 393 à 419.
4. [1925] R.C.S. 202.
5. (1916) 50 C.S. 395.
6. Précité.
7. Précité, même page.

year, $673.70 for taxi fares and loss of business during a fruitless trip to Rigaud, $2,086 being the cost of rental of an automobile for two years, and $500 for inconvenience.

It is of course impossible to allow anything for depreciation because plaintiff is being awarded the full amount of the purchase price and so he suffers no damage from depreciation. Plaintiff Peter Lazanik has testified without contradiction that during the many occasions when the car was in for repairs he was obliged to take taxis because the nature of his business made it necessary for him to do so. He also claims $200 for the loss of business on a trip to Ottawa when the car broke down at Rigaud and he waited all day for spare parts to be brought to a garage in Rigaud from Latimer and then was obliged to go back to Montreal and he states that he lost $200 in business which he would otherwise have done in Ottawa. The Court awards $300 for the taxis and loss of business on the trip to Rigaud. The Court is unable to award anything for the cost of renting a car during a period of two years. There is no proof that this cost plaintiff more than had he used his own car and while the Court suspects that the costs would be greater the burden was on plaintiff to prove this and by how much, and not having done so nothing can be awarded. There is also the claim of $500 for inconvenience because of not having a car at his disposal, particularly during the summer time. The Court awards $200 in respect of this claim. The damages awarded total $5,959.90.

For the foregoing reasons the plaintiffs' action is well founded and is maintained, act is given to plaintiffs of their tender of Ford Galaxie 500 XL Convertible bearing serial number 575994476B63L, Motor Number Q5808; the sale of the said automobile between plaintiffs and defendant Latimer is cancelled and set aside for all legal purposes; and defendants Latimer and Ford are condemned jointly and severally to pay to plaintiffs the sum of $5,959.90, together with interest from the 15th November, 1963, the whole with costs, the condemnation to costs being also joint and several.