

2006 01 T 2451 CP
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN: DOROTHY ANN SCHEELER
PLAINTIFF

AND: GENERAL MOTORS OF CANADA LIMITED
FIRST DEFENDANT

AND: GENERAL MOTORS CORPORATION
SECOND DEFENDANT

BROUGHT UNDER *THE CLASS ACTIONS ACT*

Before the Honourable Case Management Judge

STATEMENT OF CLAIM

THE PARTIES

The Plaintiff

1. The Plaintiff, Dorothy Ann Scheeler, resides at civic no. 529 Southside Road in the City of St. John's in the Province of Newfoundland and Labrador.
2. The First Defendant, General Motors of Canada Limited, ("GM Canada") is a federally incorporated company which carries on business in the Province of Newfoundland and Labrador and throughout Canada. It is registered as an extra-provincial corporation under the *Corporations Act*, R.S.N.L. 1990 Ch. C-36 . Its head office is situate at 1908 Colonel Sam Drive, Oshawa, Ontario. Its registered office in the the Province is Curtis, Dawe Eleventh Floor, Fortis Building, 139 Water Street in the City of St. John's, Newfoundland and Labrador.
3. The second defendant, General Motors Corporation ("GM USA") is a corporation duly incorporated in the state of Delaware pursuant to the laws of the United States of America. The head office of the second defendant is 300 Renaissance Centre, City of Detroit, Michigan, United States of America.

4. GM USA designs, tests, manufactures and directs the manufacture of the motor vehicles described below.
5. GM USA controls and directs the business of its Canadian subsidiary or affiliate, General Motors of Canada Limited (“GM Canada”) in the design, manufacture, marketing, sales, servicing and export of General Motors (“GM”) motor vehicles.

Proposed Class

6. The Representative Plaintiff brings this action on her own behalf and on behalf of a proposed class of persons defined as follows: persons resident in Newfoundland and Labrador who:
 - (a) currently own or lease vehicles designed, tested, manufactured, marketed, serviced or sold by either of the First Defendant and the Second Defendant (“vehicles”) with an intake manifold gasket (“IMG”);
 - (b) have owned or leased vehicles with an IMG and paid or were charged for the cost of repairing and/or replacing an IMG, or rectifying any failure related to the IMG defect, or performing services to attempt to detect or identify the IMG defect or any failures related to the IMG defect.

THE DESIGN DEFICIENCIES

7. GM USA designed, marketed, tested and/or manufactured in the 1995 through 2003 model-years certain Buick, Chevrolet, Oldsmobile and Pontiac motor vehicles with a 3.1, 3.4, 3.8 or 4.3 litre engine using a specific intake manifold gasket (IMG). These vehicles include those listed in Schedule “A” (the Class Vehicles). The Class Vehicles were supplied by GM USA to GM Canada and sold or leased in Canada through Canadian GM dealerships.
8. Further, or in the alternative, GM Canada designed, marketed, tested and/or manufactured the Class Vehicles, which were sold or leased in Canada through Canadian GM dealerships.

9. The Class Vehicles were designed and manufactured by the defendants such that the IMG degrades prematurely causing coolant to leak. In particular, the material used to manufacture the IMG did not prevent corrosion from the coolant in the coolant system and the IMG did not properly seal the gasket to the engine causing leaks to occur (collectively, the Design Deficiencies). Among other consequences of the Design Deficiencies, the coolant mixes with engine oil making the oil ineffective and damaging the engine. The engines acquire a propensity to overheat and seize completely creating a danger to the operator and occupants which necessitate IMG replacement, extensive engine repair, and /or replacement.
10. The Design Deficiencies were corrected when the defendants introduced a new gasket in 2003 or 2004. This was an implicit admission by the defendants of their negligence described below.

**DUTIES OF CARE OWED BY THE DEFENDANTS TO THE PLAINTIFF
AND THE CLASS (AS DEFINED BELOW)**

11. The plaintiff pleads that the defendants owed to the plaintiff and the Class the following duties of care to avoid the acts and omissions described in paragraph 12 and more generally:
 - (a) to ensure that the IMG was designed, marketed, tested, and/or manufactured safely, properly and in a good and workmanlike manner so that it would not degrade prematurely;
 - (b) to warn the plaintiff and the Class of the Design Deficiencies once it became aware (or through reasonable due diligence could have become aware) of its existence;
 - (c) to remedy the Design Deficiencies upon discovering them through the recall and repair of the Class vehicles.

NEGLIGENCE OF THE DEFENDANTS

12. The defendants breached their duty of care to the plaintiff and to the Class by negligently designing, marketing, testing and manufacturing the Class Vehicles. The particulars include the following:
- (a) the IMG was designed in a manner which, under normal conditions, usage and applications causes it to degrade and fail, which in turn causes the engine to overheat and fail;
 - (b) the IMG was manufactured in a manner which, under normal conditions, usage and applications would overheat and fail;
 - (c) the IMG was not properly or adequately tested to avoid the Design Deficiencies;
 - (d) the Class Vehicles were marketed in such a manner as not to reveal the Design Deficiencies and its consequences;
 - (e) the Class Vehicles failed to perform at their optimal level because of premature degradation and the defendants' failure to rectify the Design Deficiencies;
 - (f) the Design Deficiencies were not altered to avoid premature degradation;
 - (g) the IMG design was not changed promptly once the defendants knew the IMG was subject to premature degradation;
 - (h) inadequate testing was carried out to ensure a proper design and to ensure proper and prompt modifications to the IMG to eliminate the foreseeable risks;
 - (i) the defendants consciously accepted the risk of the Design Deficiencies ;

- (j) the defendants failed to attach a warning or warning label to the IMG or the owners' manuals alerting users and mechanics to the risk of the premature failure;
- (k) the defendants failed to develop any appropriate method for testing the IMG before they were manufactured, assembled, distributed and sold;
- (l) the defendants failed to establish any adequate procedures to educate their distributors, sales and service representatives or the ultimate users;
- (m) the defendants failed to establish any adequate procedure to ensure that possible design defects in the IMG were discovered and users' complaints were transmitted from them to the customers, sales representatives or distributors;
- (n) the defendants failed to establish any or any adequate procedure for evaluating customers' complaints with respect to the IMG;
- (o) the defendants failed to recall and repair or to ensure the repair of Class Vehicles that Class members gave to the defendants or the defendants' agents for servicing;
- (p) the defendants failed to accurately, candidly, promptly and truthfully disclose the defective nature of the IMG;
- (q) the defendants failed to identify, implement and verify that procedures were in place to address design problems, complaint handling or timely notification of IMG failures or complaints;
- (r) the defendants failed to implement adequate performance specifications for the IMG;
- (s) the defendants failed to conduct in-process and finished device testing to ensure performance specifications for the IMG were met;

- (t) the defendants failed to adequately define or control written manufacturing specifications, processes, procedures and controls for the IMG;
- (u) the defendants failed to conform with good manufacturing and distribution practices;
- (v) the defendants failed to introduce proper quality assurance programs to identify, recommend or provide adequate solutions for the Design Deficiencies;
- (w) the defendants failed to change their design, manufacturing and assembly process with respect to the IMG in a reasonable and timely manner;
- (x) the defendants hired incompetent personnel and appointed incompetent officers and directors;
- (y) the defendants failed to properly supervise their employees, their subsidiaries and associated and affiliated corporations;
- (z) the defendants failed to advise the plaintiff and the Class that the IMG was defective and needed to be replaced;
- (aa) the defendants knew or ought to have known of the abnormal wear and tear and risk of damage to vehicles if the IMG was not replaced;
- (bb) the defendants failed to conduct adequate testing and research regarding the risk of using the IMG;
- (cc) the defendants failed to engage in adequate pre-market and production testing of the vehicles in respect of the IMG;

- (dd) the defendants continued to fail to fulfill their ongoing obligation to fully disclose the results of their testing and research regarding the damage to GM vehicles arising from the IMG; and
 - (ee) the defendants used and recommended the use of coolants which were too abrasive having regard to the design and manufacture of the IMG.
13. By virtue of the acts and omissions described above, the defendants were negligent and caused damage to the plaintiff and the Class.
14. The plaintiff pleads that by virtue of the acts and omissions described above, the defendants are liable in damages to her and to the Class members and that each defendant is responsible for the acts and omissions of the other defendants for the following reasons:
- (a) each was the agent of the other;
 - (b) each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
 - (c) each company entered into a common advertising and business plan to distribute and sell GM motor vehicles containing the IMG;
 - (d) each defendant owed a duty of care to the other and to each Class member by virtue of the common business plan to manufacture, distribute, market, test and sell GM motor vehicles with the Design Deficiencies;
 - (e) the defendants intended that their businesses be run as one global business organization.

FAILURE TO DISCLOSE AND RECALL

15. The defendants have known about the Design Deficiencies for years but have failed to take any adequate remedial steps. In 2003, in an internal service bulletin, the defendants wrote:
“Some owners may comment on an apparent oil or coolant leak. Additionally, the comments may range from spots on the driveway to having to add fluids.”

[The IMG] may be leaking allowing coolant, oil or both to leak from the engine . . .”
16. Following the manufacture of the Class Vehicles, the defendants were aware that the Class vehicles were experiencing engine failure during operation due to the Design Deficiencies and that such engine failures were occurring with unreasonable frequency and were resulting in considerable expense to owners and lessees of said motor vehicles.
17. From 1995 through to the present, the defendants concealed the nature and scope of the Design Deficiencies from the members of the Class and regulatory bodies in the United States and Canada. Particulars of this concealment include the fact that where any information was provided to such authorities or to the public generally, such information was incomplete or misleading in that it sought to attribute any problems to issues other than the Design Deficiencies.
18. The defendants had a duty to recall the Class Vehicles and rectify the Design Deficiencies. As pleaded above, the defendants became aware following the manufacture of the Class Vehicles of the existence of the Design Deficiencies and its dangers and in breach of said duty failed to recall the Class Vehicles to correct the Design Deficiencies.

STATUTORY REMEDIES

19. As used below “Representation” means the defendants’ failure to state any or all of the following material facts:

- (a) the IMG was not free of defects;
 - (b) the IMG was not fit for the purpose intended;
 - (c) the IMG was designed in a manner which under normal conditions, usage and applications would cause it to degrade prematurely; or
 - (d) the IMG was manufactured in a manner which under normal conditions, usage and applications would cause it to degrade prematurely.
20. The plaintiff states that the Representation deceived or tended to deceive the plaintiff and the Class and that the Representation constituted an unfair trade practice which induced the plaintiff and the Class to purchase the Class Vehicles as a result of which they are entitled to damages pursuant to the *Trade Practices Act* R.S.N.L. 1990 Ch T-7
21. The plaintiff and the other Class members are consumers within the meaning of the *Trade Practices Act*.
22. The purchases and/or leases of Class Vehicles by the plaintiff and the other Class members are consumer transactions within the meaning of the *Trade Practices Act*.
23. The defendants are suppliers to the consumer transactions within the meaning of the *Trade Practices Act*.
24. The defendants have engaged in unfair practices within the meaning of ss. 5(1) of the *Trade Practices Act* as follows:
- (a) failing to disclose the material facts comprising the Representation described above;
 - (b) actively concealing the Design Deficiencies;

- (c) representing that the Class Vehicles are of high quality when they knew the Design Deficiencies seriously diminished the quality of the vehicles (collectively, the “Unfair Practices”).
25. The damages suffered by the plaintiff and members of the Class as a result of the Unfair Practices and the breach of the *Trade Practices Act* and *Competition Act* are those damages claimed in the prayer for relief below.
26. The plaintiff and each other Class member relied on the Representation.
27. The reliance upon the Representation by the plaintiff and every other Class member is established by his/her purchase and/or use of the Class Vehicle. Had the plaintiff and each Class member known that the Representation was false and misleading he/she would not have purchased and/or used the Class Vehicle.
28. The defendants made the Representation to the public and in so doing breached s. 52 of the *Competition Act* because the Representation:
- (a) was made for the purpose of promoting the business interests of the defendants;
 - (b) was made to the public;
 - (c) was false and misleading in a material respect; and
 - (d) stated a level of performance of the IMG that was not based on adequate and proper testing.
29. The plaintiff and every other Class member relied upon the Representation by buying or using the Class vehicles and suffered damages and loss.
30. Pursuant to s. 36 of the *Competition Act* the defendants are liable to pay the damages which resulted from the breach of s. 52.

31. Pursuant to s. 36 of the *Competition Act* the plaintiff and the other Class members are entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.
32. The plaintiff and other Class members are also entitled to recover, as damages or costs, in accordance with the *Competition Act* the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class member.

DAMAGES

Waiver of Tort and Unjust Enrichment

33. The plaintiff and the other Class members plead the doctrine of the waiver of tort and, due to the negligence and failure to warn of the defendants, are entitled to a restitutionary award of the benefits which accrued to the defendants as a result of their negligence and/or failure to warn.
34. The benefits which accrued to the defendants as a result of their negligence and/or failure to warn include:
 - (a) the saving of costs of recalling the Class Vehicles;
 - (b) the saving of costs of replacing the IMG in the Class Vehicles with a new IMG;
 - (c) the saving of costs of redesigning the IMG in the Class Vehicles to overcome the Design Deficiencies; and
 - (d) revenues from the sale of replacement IMGs or the components thereof.
35. The benefits which accrued to the defendants as a result of their negligence and/or failure to warn were unjust in the circumstances and there is no juristic reason for them.

Compensatory Damages

36. Further, and/or in the alternative, as a result of the breach of the failure to warn, negligence, breach of statutory duties and failure to disclose and recall as pleaded above, the plaintiff and the other members of the Class have suffered loss and damage and have incurred damages, the particulars of which include:
- (a) repair expenses in attempts to identify and/or rectify the Design Deficiencies;
 - (b) resultant damage to persons or property other than the IMG or the Class vehicles;
 - (c) overpayment for Class vehicles, which contained a latent hazardous defect;
 - (d) diminution in the value of the Class Vehicles of the members of the Class and,
 - (e) future costs of repair of the Design Deficiencies;
 - (f) damages for having been put at unreasonable risk of injury;
 - (g) consequential expenses, including the cost of repairs to the emission system and the cost of remedying failed emission control tests.

Punitive, Exemplary and Aggravated Damages

37. The conduct of the defendants in deliberately concealing the Design Deficiencies and deliberately exposing the Class members to considerable expense and inconvenience is highhanded and demonstrates an indifference to the consumers of their products such that it offends the moral standards of the community and warrants the condemnation of the court.

LEGISLATION

38. In addition to the *Competition Act* and the *Trade Practices Act* the plaintiff pleads and relies upon the *Class Proceedings Act*.

REPRESENTATIVE PLAINTIFF

39. The Representative Plaintiff Dorothy Ann Scheeler is the owner of a 2001 Chevrolet Venture in which the IMG has been subject to the IMG defect. She has suffered damages as a result of the IMG defect. The damages include out-of-pocket expenses, repair and replacement costs and diminution of vehicle value.

Service outside of the jurisdiction

40. The following provisions of Rule 6.07(1) permits service of the within Statement of Claim outside of the jurisdiction upon the Second Defendant
- (a) Rule 6.07(1)(h): The Second Defendant committed the torts of negligence and the breach of the duty to warn (disclose and recall) outlined above and, in particular, in paragraphs 12 and 15 to 17 within the jurisdiction;
 - (b) Rule 6.07(1)(j): The Second Defendant is a necessary and proper party to the proceeding against the First Defendant by reason of the facts outlined above and, in particular, in paragraphs 5, 7, 9 to 39;
 - (c) Rule 6.07(1)(o): The proceeding is one by statute which may be commenced against the Second Defendant in the province by reason of the facts outlined above and, in particular, paragraphs 20 to 32.
41. The tort and other breaches by the First and Second Defendants which caused damage to the Representative Plaintiff and members of the class were committed in the jurisdiction. The damages sustained by the Representative Plaintiff and members of the class were suffered in the jurisdiction.

SCHEDULE "A"

(paragraph 7: Vehicles with defective IMG)

1995-1997 Buick Riviera
1995-1998/2000-2003 Buick LeSabre
2000-2003 Buick Century
2002-2003 Buick Rendezvous
1996/1998-2001 Chevrolet Lumina
1997-2003 Chevrolet Venture
1999-2003 Chevrolet Malibu
1995-1998 Oldsmobile Ninety Eight
1996-2003 Oldsmobile Silhouette
1999 Oldsmobile Cutlass
1999-2003 Oldsmobile Alero
1997-1998/2000-2003 Pontiac Grand Prix
1996-1999 Pontiac Trans Sport
1999-2003 Pontiac Grand Am
1999-2003 Pontiac Montana
2001-2003 Pontiac Aztec
1995-2004 Buick Park Avenue
1996-2004 Buick Regal
1997-2004 Buick LeSabre
1998-2004 Chevrolet Monte Carlo
2000-2004 Chevrolet Impala
1995-1999 Oldsmobile Eighty-Eight
1998-1999 Oldsmobile Intrigue
1995-2004 Pontiac Bonneville
1997-2003 Pontiac Grand Prix with 3.8L V6 Engine

Prayer for relief

42. The Representative Plaintiff on behalf of himself and the Class Members therefore claim against the Defendants jointly and severally:
- (a) an order certifying this proceeding as a class proceeding and appointing the plaintiff as representative plaintiff for the Class (defined below) and any appropriate subclass thereof;
 - (b) a declaration that the benefits which accrued to the defendants as a result of their negligence and failure to warn unjustly enriched the defendants;
 - (c) an accounting of the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;
 - (d) a declaration that the defendants hold in trust for the Class the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;
 - (e) disgorgement of the benefits which accrued to the defendants as a result of their negligence and/or failure to warn;
 - (f) further or alternatively:
 - (i) damages equivalent to the sums they have paid out of their pockets in attempts to identify and repair the Design Deficiencies IMG defect (defined below) or other related failures;
 - (ii) damages equivalent to the costs of rectifying the Design Deficiencies IMG defect or other related failures;
 - (iii) damages equivalent to the resultant damage to property other than the IMG (defined below) or Class Vehicles (defined below);
 - (iv) damages for diminution in the value of their vehicles;
 - (v) damages pursuant to s. 36 of the *Competition Act*;
 - (vi) damages pursuant to s. 14(1) of the *Trade Practices Act*;

- (vii) general damages;
- (g) exemplary, punitive and aggravated damages;
- (h) Pre-judgment and Post-judgment interest pursuant to the *Judgment Interest Act*, R.S.N. 1990, c. J-2; and
- (i) costs of this action:
 - (i) on a substantial indemnity basis
 - (ii) Costs, including the fees and expenses of expert witnesses in attending at discovery and trial;
 - (iii) Such costs as may be allowed under the *Class Actions Act*, SNL2001, C - 18.1.
 - (iv) Cost of providing notice to class members and administering this proposed class action for their benefit;
 - (v) Harmonized Sales Tax; and
- (j) such further relief as this Honourable Court may deem just.

DATED AT the City of St. John's, Province of Newfoundland and Labrador, on May 23 2006.

sgd. G. Aylward

F. Geoffrey Aylward
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ISSUED at the City of St. John's in the Province of Newfoundland and Labrador on May 23, 2006.

sgd. Margaret Williams
Trial Co-ordinator

To: General Motors of Canada Limited
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