CITATION: Balpinar (Estate) v. Economical Mutual Insurance Company et. al, 2024 ONSC 7239
COURT FILE NO.: CV-18-76493
DATE: 2024 12 30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE ESTATE OF ERCAN BALPINAR, BY ITS LITIGATION ADMINISTRATOR, SAFINUR BALPINAR, Plaintiff

AND:

THE ECONOMICAL MUTUAL INSURANCE COMPANY and 1457927 ONTARIO LTD. c.o.b. as HIGHLAND AUTO BODY, Defendants

BEFORE: C. MacLeod RSJ

COUNSEL: Elise J. Hallewick & Carmen Baru, for the Plaintiff

Ainsley Shannon, for the Defendant Economical

No one appearing for the Defendant 1457927 Ontario Ltd.

HEARD: December 9 - 12, 2024

DECISION AND REASONS

[1] This was the trial of an insurance claim. The insured vehicle was a cargo van damaged in an accident on May 19, 2017. The insurer, Economical, elected to repair the vehicle and a dispute about the adequacy of the repairs gave rise to this litigation. Whether or not Economical is obliged to pay further compensation to the Plaintiff was the only issue at the trial because the Plaintiff has settled with the other Defendant under a form of *Pierrenger* Agreement.[1]

[2] The trial took place pursuant to Rule 76 of the *Rules of Civil Procedure*, which is to say a "summary trial". As I will discuss in describing the evidence, a summary trial provides for a compressed process in which affidavit evidence is combined with *viva voce* cross examination and re examination.[2] The trial was also a hybrid trial with several of the witnesses appearing in the court room by videoconference.

[3] For the reasons that follow, I find that the repairs were not adequately completed but I also find that it was entirely reasonable for Economical to reach the conclusion it did. There was no bad

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[1] Agreements with one of the defendants in a lawsuit which end that party's participation in the lawsuit change the litigation landscape and (except for the amount of the settlement) must be disclosed. See *CHU de Québec-Université Laval v. Tree of Knowledge International Corp*., 2022 ONCA 467 (CanLII) and *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234 (CanLII)

[2] Rule 76.12 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 as amended.

faith. The Plaintiff is entitled to reimbursement for the full cost of the repairs but not to the multiple years of storage charges, vehicle replacement or other damages. This is not a case for punitive damages.

BACKGROUND FACTS & FRAMEWORK FOR THE DISPUTE

[4] The late Ercan Balpinar was the owner of Ercan's Natural Gas and Air Conditioning Service Inc. and was the registered owner of a 2016 Nissan NV 2500 cargo van. The vehicle had been purchased new in June of 2016 for $35,949.35 (before tax). It was used in the corporation's business and was insured under a fleet contract of motor vehicle insurance issued by Economical.

[5] The vehicle had been driven a total of 32,683 kilometres when on May 19, 2017, it was involved in an accident. The driver, an employee of the corporation, was not at fault. The damage included significant deformation of the front end of the vehicle. In particular the chrome bumper on the front passenger side was pushed in, disfigured and displaced. The grill, bumper, headlight, fender and other parts of the cab were also damaged.

[6] The collision was duly reported to Economical. Coverage is not in dispute. In addition to collision coverage under the standard motor vehicle policy, the vehicle was also covered under certain endorsements. These included the OPCF 20, 23 and 43.[3] The latter provides coverage for the undepreciated value of the vehicle in case of a total loss.

[7] Ozden Balpinar, the son of Ercan, was the General Manager of the business at the time in question and is now the owner. It was Ozden who dealt with Economical and was the main protagonist in the dispute. Although the Plaintiff is technically the Estate, in these reasons, I refer to Ozden as the Plaintiff. He is the person instructing counsel and was the primary witness. Ozden attended at the scene of the accident, took photographs and was the point of contact with the Defendants.

[8] In Ontario, motor vehicle insurance is strictly regulated. Some coverages are mandatory and others are not but by statute, all policies contain certain standardized conditions.[4] Pursuant to Statutory Condition 6 (5) the policy limit for damage to an automobile is the "actual cash value of the automobile at the time any loss or damage occurs". Normally this is the depreciated value, but the OPCF 43 has the effect of waiving the depreciation. In this case, the policy limit for comprehensive and collision would have been the undepreciated purchase price of $35,949.45.

[9] Although the insurer may pay the actual value pursuant to Statutory Condition 9, the insurer may instead exercise the right to repair the vehicle. Under Statutory Condition 6 (6) the insurer has the right to "repair, rebuild or replace the property that is damaged or lost" instead of paying the cash value providing the insurer elects to do so and gives notice that is exercising that right. If the insurer pays out the cash value of the vehicle, then the damaged vehicle vests in the insurer. This is known as "writing off" the vehicle. In that case, the insured gets the value of the vehicle and the insurer

[3] "Ontario Policy Change Forms" – are approved forms of extensions or modification of standard coverage.
[4] *Insurance Act*, RSO 1990, c. I.8 as amended, Part VI, s. 234 and O.Reg. 777/93 (Version in force Sept 1, 2010 – October 13, 2021)

takes the "wreck". If the insurer repairs the vehicle, it must cause it to be properly repaired but the vehicle remains the property of the insured.

[10] In the standard "plain English" insurance policy "OAP1", coverage is described as follows under the headings "Our Right to Replace or Rebuild the Automobile" and "What we will pay":

> **7.6 Our Right to Repair, Replace or Rebuild the Automobile**
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> We have the right to repair, replace or rebuild the automobile rather than pay for the damage. If we choose to do this, we will let you or other insured persons know in writing within seven days of receiving notice of the claim. We will complete the work within a reasonable time using parts of similar kind and quality.
>
> **7.7 What We Will Pay**
>
> We will not pay more for the automobile than its actual cash value at the time it was damaged or stolen, less the deductible shown in your Certificate of Automobile Insurance. The value of the loss or damage is also based on actual cash value after taking into account depreciation. We will not pay more to repair the automobile than its actual cash value at the time it was damaged or stolen, less the deductible. We will pay the lower of the following:
>
> the cost to repair the loss or damage, less the deductible;
>
> or the actual cash value of the automobile at the time it was damaged or stolen, less the deductible.

[11] The insurer elected to repair the vehicle. According to the evidence, Economical will ordinarily repair a vehicle if the cost of the repairs does not exceed 80% of the value.

[12] The Plaintiff's evidence is that he was worried about the frame from the start. He deposes that he told Economical he was worried about structural damage and wanted it assessed. In his affidavit he states that he told Economical he wanted a frame inspection report before repairs were done and "if there was frame damage to the vehicle, we would be insisting that it be written off and declared a total loss".

[13] Economical does not agree that this statement about frame damage was made by the Plaintiff but even if it was, the contract does not require Economical to write off any vehicle. Under the contract, it is clearly the choice of the insurer whether to repair, replace or rebuild a vehicle that can be repaired rather than writing it off and paying the "actual cash value at the time it was lost or stolen".[5]

[14] It is not disputed that Economical advised the Plaintiff it would repair the vehicle and the adjuster provided the Plaintiff with the names of preferred and certified repair shops. It is also not disputed that Economical permitted the Plaintiff to choose the repair facility. Although he was not required to use one of Economical' s preferred facilities, he was encouraged to do so. The adjuster

[5] As mentioned above, with the benefit of the OPCF 35 removing the reference to depreciation, that value was $35,949.35.

advised the Plaintiff that if he used a certified repair shop, the repair work would be guaranteed by Economical.

[15] The other advantage of authorized or preferred repair shops is speed and efficiency. An authorized shop is pre-authorized to effect repairs in the manner they see fit without having to wait for inspection and approval by an Economical appraiser.[6] The Plaintiff felt it would be prudent to use one of the recommended facilities.

[16] The Plaintiff selected Highland Auto Body because it was a repair facility recommended, approved and certified by Economical. Highland was also part of a network of repair shops operating under the "CSN Collision" banner as CSN Highland.[7] According to the Plaintiff, he also selected Highland because he was told by Highland that it was capable of doing frame inspection and measurements. The Plaintiff states that he was very clear with Highland that the frame may have been damaged and he wanted a frame inspection.[8] Highland disputes this but in any event, Highland proceeded with repairs and did not note any frame damage. [9]

[17] Whatever the Plaintiff told Highland, there is no dispute that the repairs done by Highland were inadequate. When the Plaintiff was advised that his vehicle had been repaired on June 30, 2017, he went to pick it up. He found it in unacceptable condition. Firstly, the hood was loose and there were large gaps between the hood and the body of the vehicle. The headlights and grill did not line up and one of the headlights was pushed in. The Plaintiff states that he looked under the vehicle and noted that the frame appeared bent, and the bumper brackets were broken. He also took the vehicle for a test drive and found various problems. Highland then undertook to rectify the problems.

[18] It appears that Highland then sent the vehicle to Donnelly Collision Centre where it was determined that there was some damage to the frame of the vehicle. Donnelly advised that the front rail of the frame was bent but could be repaired and Highland authorized the repair. Donnelly subsequently advised Highland that the frame was straightened and repaired and a radiator bracket rewelded. The repair work was significant but not complicated as the total invoice to Highland from Donnelly was only $873.03 including a post repair wheel alignment. Donnelly provided a record of an alignment report showing that all wheels on the vehicle were properly aligned. Based on the Donnelly report and its own inspection, Highland believed that the frame was repaired and did not believe there was any damage to the suspension or suspension mounts.

[19] Further repairs were also completed at Highland and by another mechanic with whom Highland sub-contracted. By July 11, 2027, Highland was satisfied that the vehicle had been properly repaired and it notified both Economical and the Plaintiff the vehicle was ready for pick up.

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[6] It is Economical's evidence that repairs were preauthorized providing they did not exceed 80% of the value of the vehicle, assuming manufacturers parts or Original Equipment Manufacturer "OEM" certified equivalents were available. In this case 80% of the value would have been $28,759.00.
[7] Similar repair shop networks in Ontario operating under "banners" are "Fix Auto" and "Car Star".
[8] Paragraph 40 of Mr. Balpinar's affidavit.
[9] Paragraphs 13 & 14 of the affidavit of Brendon Bolduc

[20] The Plaintiff became irate when he learned that the frame had been repaired without his knowledge or his approval. In his view, if there was frame damage, the vehicle should have been written off. In addition, according to his trial testimony, he went to look at the vehicle on the Highland lot and he did not think it looked better than before. He instructed Highland not to do any more work.

[21] Due to the Plaintiff's complaints, CSN and Economical both became involved. In July, 2017 the vehicle was inspected by Doug White, a quality control analyst for CSN. Mr. White found no problem with the vehicle but sent the vehicle to Jim Keay Ford Lincoln which operated a body shop under the "Fix Auto" banner, unaffiliated with CSN or Economical, to have the frame measured on a 3D digital system.[10] On the basis of that test, CSN and Highland believed that the frame had been repaired to manufacturer's specifications and the vehicle was road worthy.

[22] In August, the vehicle was inspected by Claude Roberge, a "red seal" auto body repairer and Economical appraiser. Mr. Roberge found no issue with the frame. On September 13, 2017 based on all of the above, Economical advised the Plaintiff that the vehicle had been properly repaired and would not be written off. The Plaintiff was advised that if he wished, he could take the vehicle to any 3D inspection station of his choice and CSN would pay to have the frame measured and verified. He declined. Instead, the Plaintiff continued to insist that the repairs were not properly done and to challenge the propriety and efficacy of doing a frame repair.

[23] In October of 2017, the vehicle was taken to Tony Graham Lexus for inspection. There is some dispute in the evidence about how this came about or who asked Tony Graham to do what. The Plaintiff alleges that he asked Tony Graham to do a frame inspection but when Tony Graham heard about the Economical dispute, it refused to get involved. Economical states that Tony Graham was to do a complete inspection at the request of Economical and CSN, that Tony Graham "did not identify any frame damage and did not find the vehicle unsafe to drive".

[24] Whether or not Tony Graham inspected the frame is unclear. Tony Graham did identify around $700 of minor repair work that was still required. Notably, however, the necessary repairs included properly installing the tow hooks, repairing the hood latch, aligning and adjusting gaps at the bumper, grill clips, adjusting a headlamp and aligning front sheet metal. The Plaintiff did not authorize Tony Graham to do the work. He remained unsatisfied.

[25] The Plaintiff retrieved the vehicle. I should note that Economical had advised him that if he left the vehicle at Highland, he would be charged storage fees of $60 per day. I heard that this is the going rate in Ottawa for charges levied by repair facilities against insurance companies if vehicles are left at the facility without repair authorizations or after repairs have been completed. I will come back to this later because the Plaintiff seeks to recover similar storage charges against Economical.

[26] The Plaintiff did retrieve the vehicle. Ultimately, he took it to Astra Motors Inc. where the vehicle was inspected on a frame rack and measurements taken using a "tram gauge". Astra does not use electronic measuring systems such as that used at Jim Keay but uses the traditional method of measuring manually with tram gauges. Astra found that after the repairs done at Donnelly, the

[10] A Spanesi Touch 3D measuring system.

diagonal frame measurements were within manufacturers specifications. There was however an issue with the front passenger wheel at the point where the vehicle had been impacted in the collision. Astra found that the vehicle was slightly tilted. The right fender was sitting approximately 7 mm lower than the left fender. Astra suggested there were issues with the frame or the suspension system or both and also that it would be necessary to disassemble the vehicle to properly inspect the frame. A copy of a work order summarizing these findings and a series of photographs were sent to Economical.

[27] Economical did not agree with this finding by Astra largely because the alignment report from Donnelly and the frame measurements taken at Jim Keay did not show any issue. Economical did not believe the methodology used by Astra was appropriate and felt there were many reasons a measurement might be off by 7 mm (roughly ¼ inch). Economical did not agree to pay to disassemble the vehicle and did not send anyone to discuss the findings with Astra or the Plaintiff.

[28] At the request of the Plaintiff, the matter was reviewed by the Economical Ombuds Office. In March of 2018, the Plaintiff was advised that Economical did not accept the findings made by Astra. The Plaintiff was also advised of various options including the appraisal and umpire procedure described in paragraph 7.8 of the policy, mediation, referral to an industry ombudsperson or litigation. He was also informed of the one year limitation period for commencing a court action.

[29] The Plaintiff opted for litigation. This action was commenced on May 17, 2018.

[30] Apparently the vehicle remained at Astra. At some point in 2021, Astra performed a further inspection on the vehicle. This time the vehicle was supported on frame rack stands so that the wheels could hang down. It was noted that the right front passenger wheel did not descend the same distance as the wheel on the driver's side. It was Astra's conclusion that there was suspension damage, frame damage or a combination of the two. Astra recommended that the frame be replaced.

[31] A new frame was eventually ordered from Nissan and installed into the vehicle by Astra. This required removal of the unibody cab from the frame, the removal of the engine, drive components suspension and wheels and then the rebuilding of the vehicle. The price of the frame was $5,702.75 inclusive of tax. The cost of the repair inclusive of the cost of the frame was $13,668.32 inclusive of tax.

[32] The frame replacement was completed at some point in 2023. According to the affidavits of Paul Jadwidzic and of the Plaintiff, once the frame was replaced, the vehicle no longer sagged to the right. Apparently, it has been returned to operation although the Plaintiff had purchased a replacement vehicle in 2018. In his oral evidence, the Plaintiff stated that the delay in performing the work had to do with supply chain issues and inability to locate a frame during Covid. There is nothing to document this and it is not mentioned in his affidavit. A frame was ultimately ordered through Hunt Club Nissan.

[33] The Plaintiff contends that Economical was given an opportunity to inspect the vehicle at Astra, to review Astra's findings and recommendations. He also asserts that Economical was invited to send a representative to view the repairs in progress and to inspect the old frame after it was removed. Economical did not do so. Ultimately the old frame was scrapped.

[34] The original vehicle was financed under a vehicle loan. That loan continued to be paid during the events in question until it was eventually paid off. The Plaintiff also continued to pay for insurance on the vehicle for damage and theft. The Plaintiff also claims reimbursement for towing charges. Finally, he claims for storage charges he says are owing to Astra (at $60 per day) and he claims punitive damages.

[35] Not all of these claims were pled. The Plaintiff moves to amend the Statement of Claim to cover the full amount of any damages the court finds owing. Not surprisingly, those claims are resisted by the Defendant. Economical asserts that its maximum liability under the policy was $35,949.35, that the Defendant had a duty to mitigate and it denies this is an appropriate case for punitive damages. Principally, Economical argues that the vehicle was repaired to the appropriate standard and it fulfilled its contractual obligations.

THE TRIAL AND THE EVIDENCE

[36] The issue is whether Economical fulfilled its obligations under the contract of insurance. If not, the Court must consider the appropriate measure of damages.

[37] It is important to describe the procedures involved in a summary trial, to deal with certain rules of evidence and then to illustrate how the evidence leads to critical findings of fact. This is of general importance because very few summary trials actually proceed and because the Rule has been amended in recent years in an attempt to provide a low cost procedure for modest claims. Rule 76 applies to claims of more than $35,000 and below $200,000 although parties may use the rule for larger claims if they agree to do so. Claims of less than $35,000 proceed in Small Claims Court. Rules of evidence are modified for Small Claims Court but not for Rule 76.

[38] The purpose of the Rule is to provide proportionate and cost effective trials for modest claims that are too large for Small Claims Court. To accomplish this, the Rule requires that the trial be capped at a maximum of five days. Evidence in-chief is to go in by affidavit and the witnesses may be subjected to oral cross examination if the other side gives notice of the intention to do so. Expert evidence is supposed to go in by way of a report annexed to an affidavit. Some allowance must be made for the truncated nature of the trial and the nature of affidavit evidence. Importantly, however, the summary trial process does not oust the normal rules of evidence.

[39] In an ordinary trial, counsel may not “lead” the witness during examination in-chief but in a summary trial the concept of leading is meaningless. The affidavit is the witnesses’ evidence and will presumably have been drafted to focus on the elements of proof relevant to the cause of action and to damages. It is part of the summary trial process that the affidavits are focused and are exchanged in advance. All parties know what the evidence in-chief will be before the trial begins. The affidavits are supposed to contain all the evidence necessary to prove the points in contention.

[40] There are other significant features of a summary trial. As mentioned above, the affidavits must cover all of the evidence the parties wish to present in-chief. Although the witness may be re-examined after cross-examination, the normal rules relating to such re-examination will apply. That is, the questions put to the witness must respond to issues raised in cross-examination and may not introduce new evidence that should have been covered in-chief.

[41] Similarly, although in a regular trial, a Plaintiff may call Reply Evidence after the Defendant's witnesses have testified, Reply Evidence in a summary trial requires leave of the Court because the Plaintiff will have had the Defendant's affidavits in advance of the trial.

[42] Preparing affidavits for a trial requires a different approach from affidavits for motions and applications. In both cases, the affidavit must be the witness's evidence. Counsel cannot put words in the mouth of the witness and the affidavit must not contain omissions or half truths because those will quickly be exposed by cross examination.

[43] There is a more significant difference, however, and that relates to information and belief or hearsay. Rule 76.12 (1) (2) and (5) provide for evidence by affidavit but they do not deal with the contents of the affidavit. Unlike Rule 39.01 (4) which allows statements of a deponent's information and belief on a motion or Rule 39.01 (5) which allows statements of a deponent's information and belief on non contentious matters on an application, there are no such provisions in Rule 76. Thus, affidavits for trial must follow the ordinary rules of evidence.

[44] In Small Claims Court, rules of evidence and solemn proof are relaxed. Pursuant to s. 27 of the *Courts of Justice Act*, the Small Claims Court is empowered to admit any relevant evidence, document or thing so long as it is relevant and "whether or not it would be admissible in any other court." Section 27 does not apply to Rule 76 cases. Other than the procedural modifications and the general principle of proportionality that applies to all rules, there is nothing in Rule 76 which modifies the rules of evidence or eliminates the need for formal proof of contested facts.

[45] What is supposed to happen, however, is robust discussion between the parties to ensure trial efficiency. The parties are supposed to agree on a trial management plan which ought to include agreements such as admitted facts, admitted documents and whether or not witnesses have to be called to prove facts.[11] To use the rule efficiently, non-contentious facts should be admitted and theories or claims that cannot be proven should be abandoned.

[46] I take the time to review the above because the decision in this case ultimately turns on the admissibility and probative value of evidence. As an example, the affidavits tendered by the plaintiff question whether the alignment report from Donnelly Collision or the frame readings from Jim Keay are reliable. There is even speculation that perhaps the documents are forged or falsified. The suggestion that there was some kind of wrongdoing is completely without foundation but it is not necessary to make any such finding in order to conclude that the documents do not constitute admissible proof. The challenge to the validity of the reports should have put the defendant on notice they would have to be proven but no witness was called from Donnelly or Jim Keay. Consequently, these reports cannot be accepted for their truth.

[47] Reports attached to the affidavits of defence witnesses who did not perform those tests or witness them being performed are hearsay. No witness was called from Donnelly and no witness from Jim Keay. So, without agreement between the parties or a trial management plan that deals with this question, those reports cannot be admitted for the proof of their contents. There was no notice given

[11] See Rule 76.10 & Rule 76.12

under s. 35 of the *Evidence Act*, so these are not admissible as business records. None of the witnesses who were called witnessed these tests being performed and could not answer who performed the test, whether the machine was calibrated or used properly.

[48] That Mr. Bolduc or Mr. White or Mr. Hupé believe these tests were completed because Highland or Economical asked that the work be done, received reports and received invoices, is admissible. That they relied on these reports in concluding the repairs were completed to manufacturer's standards is admissible. That the tests were actually performed and are accurate is not.

[49] This is most significant in dealing with the alignment report. Mr White testified that there could not have been anything wrong with the suspension system or the frame in the manner suggested by Mr. Jadwidzic or it would have been detected by the alignment tests done by Donnelly. In particular, "caster" measures the forward and rearward perpendicular axis of a wheel and whether the tire has more weight on the back or the front as a result. "Camber" measures the perpendicular axis of a wheel to the left and right and consequently whether a tire is tilting in or out at the top. Mr. White testified that these measurements show that the wheel was neither pushed back nor tilted so he rejected the suggestion there was something wrong with the suspension or the frame where the suspension mounts attach.

[50] The report may explain why Mr. White reached that conclusion but this Court cannot make the same conclusion based on hearsay evidence. Without accepting any of the conspiracy theories that populate the Plaintiff's evidence, the fact is that there is no admissible evidence on this point. I cannot accept the alignment report for the proof of its contents. The same is true of the Jim Keay frame report. These reports exist. They were sent to the defendant. The defendant made conclusions on the basis of these reports. Whether the testing was done properly on the vehicle in question on properly calibrated testing equipment by a qualified technician cannot be proven by attaching the reports to the affidavits of Mr. White or Mr. Hupé.

[51] Mr. Jadwidzic, on the other hand, made direct observations that the vehicle was not sitting properly and that the wheel was not descending properly. Unless I reject that evidence and the conclusions he draws from his observations, the Donnelly alignment report (being hearsay) cannot prove that Mr. Jadwidzic's observations are in error.

[52] The second evidentiary issue is a question of expert testimony. All of the witnesses were experienced in automotive repair and have a great deal of specialized technical knowledge. In appropriate circumstances, they could be qualified as experts but none of them testified in that role. I heard a great deal of evidence about motor vehicle repair, testing, and the steps involved in repairs of frames. The admissibility and weight to be given to such evidence is somewhat nuanced.

[53] The Plaintiff himself is very knowledgeable about motor vehicles. He is a vehicle enthusiast. He testified that he has personally rebuilt several vehicles and currently has more than twenty vehicles registered in his name. While Mr. Balpinar cannot give opinion evidence or act as his own expert witness, I accept that he is a knowledgeable consumer and was in a position to make informed and detailed observations about the vehicle in question. I accept that he had sufficient knowledge to

suspect frame damage. I accept that he knows the parts of a suspension system or the components of a vehicle.

[54] Similarly, Mr. White, Mr. Bolduc and Mr. Hupé are very knowledgeable and experienced in automotive repairs and in the case of Mr. White and Mr. Hupé are experienced in insurance appraisals. None of these individuals were tendered as Rule 53.03 experts because they all played some part in the narrative and were involved in making decisions about the adequacy of the repairs.

[55] I accept that these witnesses have experience and expertise and are capable of drawing conclusions from reading technical reports such as the alignment report or the frame measurements, but they are not independent. To the extent that any opinion evidence from these individuals is admissible, it would be as "participant experts". That is, they can testify about conclusions they formed in the ordinary exercise of their skill, knowledge, training and experience based on what they observed during the events in question.[12]

[56] It is not always necessary to qualify a witness as an expert in order to permit the witness to explain the steps the witness took or the opinions the witness formed. A fact witness may describe the steps involved in a procedure and the results obtained from a test without being qualified as an expert. This is common, for example, with the observations of experienced police officers.[13] I would accept the evidence of experienced mechanics or auto body repairers describing the steps to be taken to dismantle, rebuild or repair a vehicle. I would also accept as factual evidence a description of the equipment used to measure or test frames and wheel alignment and what each of the readings describe. I would accept estimates of the cost of repair by experienced appraisers.

[57] It is quite another thing to accept an opinion that the work undertaken by another person is unreliable. It is also problematic if the witness does not have first hand knowledge, is not describing testing done by the witness but testing or observations relayed by someone else. Almost all of these witnesses suffered from this difficulty. Mr. Bolduc is the owner of Highland. He did not himself perform all of the work or hold all the licences necessary to do so. Mr. Hupé is relying in part on information conveyed by Mr. Robichaud who was not a witness.

[58] There are similar problems with the evidence of Mr. Jadwidzic who owns Astra but does not himself hold an auto body repair licence. It is his father who is licenced and he worked with his father when examining the vehicle. Although a licence is not required to take measurements or observations, the evidence is not as precise as I would have liked about who took the measurements and how they were recorded. I do accept that the witness was present, that he was able to make direct observations concerning the way the vehicle was tilted or the fact that the wheel did not hang the same way as the other wheels.

[59] In the case of Mr. Jadwidzic, there was a report and a Form 53 but he could not be treated as an independent expert. In the first place, he is the owner of Astra and was deeply involved in the events in question. It was Astra which recommended the frame be replaced and Mr. Jadwidzic's

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[12] *Westerhof v. Gee*, 2015 ONCA 206 (CanLLII) and see *XPG, A Partnership v Royal Bank of Canada*, 2016 ONSC 3508 (CanLII)

[13] See *R. v. MacKenzie*, 2013 SCC 50 (CanLII) @ para 56

reports and recommendations were originally designed to persuade Economical to reexamine its conclusion that the repairs were completed properly. Furthermore, there is an ongoing economic relationship between the plaintiff and Astra. Astra also has a stake in the outcome of the litigation. There is an invoice for vehicle storage at $60.00 per day generated by Astra but not paid by the plaintiff. It is reasonable to assume that it will only be paid if the plaintiff is successful in recovering from Economical. He is not a neutral witness.

ANALYSIS

[60] I accept the evidence of the plaintiff that he was concerned about frame damage from the beginning. He believed the frame might be bent because of the nature of the damage to the vehicle and his own knowledge of motor vehicle repairs. As it turns out, he was also correct.

[61] As described above, the repairs effected by Highland were completely unsatisfactory. As was subsequently determined, Highland had not noticed the frame damage and the repairs it had completed were not cosmetically or functionally complete. A repaired vehicle may never be perfect, but the insured is entitled to repairs that return the vehicle to manufacturer's specifications and to a vehicle that is completely roadworthy. Certainly, the first round of repairs did not achieve this.

[62] Highland had the frame examined by Donnelly and subsequently authorized Donnelly to proceed with a repair. The manufacturer's specifications were put into evidence. According to Nissan, it is acceptable to straighten a bent frame if it can be done without compromising the tensile strength of the metal and without rendering it more brittle. Minor bending of a frame component may be repaired if it can be done through stretching and straightening. and without heating the metal. There are also pieces such as radiator clips that have to be spot welded to the frame and if they are broken or displaced, these have to be replaced.

[63] Minor frame damage can be repaired and the plaintiff was incorrect to assume that if there was any damage to the frame, the vehicle should be written off. Nevertheless, where a frame is repaired, the owner is entitled to repairs that return the vehicle to a safe, roadworthy condition and one which meets the manufacturer's specifications.

[64] Even the subsequent repairs other than the frame had problems. Given what can only be described as shockingly inadequate repairs the first time, it is surprizing that Highland would not have completed the subsequent repairs to the very best of its ability. Despite this, there remained some cosmetic issues with the placement of the bumper. Mr. White in reviewing the photographs described this as a manufacturer's defect (which is an opinion of course) but agreed it remained noticeable. When the vehicle was inspected by Tony Graham, it was found to still have some significant issues such as a problem with the hood latch. A defective hood latch would be sufficient to fail a motor vehicle inspection even if it is easily repaired.

[65] More importantly, as the measurements and observations completed at Astra disclose, there was an ongoing issue with the suspension on the right wheel. Without qualifying Mr. Jadwidzic as an expert, on this point I have the measurements taken by Astra and the observations of the plaintiff and Mr. Jadwidzic to rely upon. I have no admissible evidence that the wheel alignments were properly tested, or the frame properly measured while the vehicle was under the control of Highland.

In the absence of that evidence, the observations taken at Astra are effectively uncontradicted. Unless I reject that evidence as fabricated, there is no basis to find that the observations of Mr. Jadwidzic must be in error. The Defendants argued that the use of a measuring tape to check the bumper height was unreliable but in cross examination, Mr. Jadwidzic explained they had checked the measurement with the tram gauge. The measuring tape was only used in the photographs for illustration purposes.

[66] The measurements taken at Astra did show that the frame had been made square. After the repairs that were apparently made at Donnelly under direction from Highland, the diagonal measurements of the frame were found to be within manufacturer's specifications. Despite this, the vehicle sat with the passenger side of the cab 7 mm (approx. ¼ inch) lower than the driver's side. Minor as this might be, it was an indication that the repairs had not corrected all of the problems. A virtually identical vehicle that had not been in an accident was found to be the same height on both sides. A new vehicle would not have had this discrepancy. The manufacturer does not have a specification for height, but it does have a specification of symmetry.

[67] The suggestions by the defendant that the discrepancy could be explained by tire tread, tire inflation, vehicle load or other factors are hypotheticals not supported by any evidence. No one from Economical or Highland or CNS went to Astra to see if the measurements were correct or could be duplicated. The second set of measurements taken when the vehicle was suspended did not suffer from the same issues because those measurements would not have been affected by tire tread, tire inflation or vehicle loading.

[68] The significance of the problem with the right wheel was further revealed when the van was suspended and the wheels allowed to hang. When that was done, it was found that the right wheel did not move with the same fluidity as the left. It did not hang down as far and the difference was significant. Astra recommended a frame replacement. It was the evidence of the plaintiff and Mr. Jadwidzic that after the frame was replaced, these problems disappeared, and the vehicle functioned normally. There is no evidence to the contrary. The frame replacement corrected the problem.

[69] Mr Jadwidzic's evidence is not perfect. His affidavit, for example, did not mention certain facts he provided when cross examined. As an example, his affidavit did not mention the use of the tram gauge to measure the height of the bumper although he did mention it in connection with the frame. That affidavit also mixes advocacy with evidence and it specifically describes his role as having "been retained as a participant expert". The affidavit does not specify who took what measurements. His evidence that he "advised Ozden that the frame of the vehicle had been damaged beyond repair … as it would not pass … vehicle inspection as it was unsafe to drive and to have on the road" is not situated in time. It is also an opinion that he himself is not qualified to give. His observation that "parts had been welded onto the front right corner of the frame" exaggerates the significance of that issue and gives the impression that spot welding a radiator clip is problematic. In one of the photographs, the old frame is being supported off the ground by a forklift or other device under the trailer hitch but that is not explained.

[70] I mention this to make the point that Mr. Jadwidzic's evidence cannot be accepted uncritically. Yet, he was subjected to extensive cross examination and I had an opportunity to ask him questions myself. While his evidence was coloured by his belief that Economical should have taken the

Plaintiff's concerns more seriously, on the critical question of the measurements and observations, I accept Mr. Jadwidzic's evidence.

[71] By contrast, I found the evidence of Mr. Bolduc to be unpersuasive. Highland made a complete hash of the original repairs. I simply do not believe Mr. Boduc when he declares that the Plaintiff never raised the issue of the frame until after the first set of repairs. I accept the Plaintiff's evidence that he was almost obsessively concerned with the state of the vehicle frame from the moment he saw the damage. Highland and Economical were both on notice that the plaintiff was concerned about the frame.

[72] Mr. White and Mr. Hupé I found to be very credible and sincere witnesses. It is entirely understandable that based on the information they received from Highland and the reports that Highland provided from Donnelly, the report subsequently received from Jim Keay and the fact that the Plaintiff ceased cooperating with them, they concluded that the repairs had been completed properly and the plaintiff would never be satisfied. Their focus, however, was on whether the vehicle was repairable or should be written off as demanded by the Plaintiff. Although they did inspect the vehicle, they relied upon the electronic testing and the report of the wheel alignment. By the time that Economical received the findings from Astra, Economical had effectively closed the file and the claim had been reviewed by the Economical Ombuds office.

[73] I find on the basis of the evidence that the repairs were not completed properly by Highland and I find that there remained a problem with the right front wheel ultimately corrected when the frame was replaced. It follows that Economical should pay for the frame replacement. This does not mean it was reasonable for the plaintiff to store the vehicle at Astra for years and to complete the repairs only in 2023. Even the second test done at Astra was apparently an afterthought performed after the litigation had commenced and after the time when Economical had advised it was closing the claim.

[74] I do not find that Economical acted in bad faith or behaved unreasonably. Economical was acting within its rights under the contract to elect to repair the vehicle. But when an insurer elects to repair the vehicle, the insurer assumes the responsibility to have the repairs completely and competently completed. This is particularly so when the insured, acting on the advice of the insurer, takes the vehicle to an approved facility and where the insurer has advised that the work will be guaranteed. While Economical did perform its own inspection of the vehicle, it primarily relied upon the information provided by Highland in concluding the repairs had been completed satisfactorily.

DAMAGES

[75] The normal contractual measure of damages is the amount necessary to put the plaintiff in the position it would have been had the contract been fulfilled.[14] Under the insurance contract in question, that is either the cost of repairs or the value of the vehicle. In this case the vehicle was repaired. Economical paid for the original repairs. The Plaintiff is entitled to the cost of replacing the frame.

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[14] *Bank of America Canada v. Mutual Trust Co*., 2002 SCC 43, [2002] 2 SCR 601

That is the sum of $12,095.98 (before tax). The Plaintiff should also be compensated for the towing charges of $1,113.00.

[76] Damages for breach of contract are not necessarily limited to what should have been paid in the first instance, they may include additional costs and damages incurred because the contract was not performed, if those damages would have been in the contemplation of the parties and if they flow naturally from the breach. Additional or consequential damages must be causally connected to the breach, foreseeable and not otherwise excluded. They are also, like other damages, subject to the obligation on the plaintiff to act reasonably in mitigation of those damages.[15]

[77] The Plaintiff seeks reimbursement for the HST. The reason he had to pay the HST in the first place is because he was told that the HST charged to a business is not insured. It is an input credit to the HST account of the business. Although the Plaintiff is not the corporation, the vehicle was insured as a business vehicle and it was not suggested that the HST paid in connection with the repairs could not be deducted by the business. This is not an appropriate head of damage. The Plaintiff testified that he had to pay the HST for the repairs done by Highland. He did not argue that this was unjustified. The HST is not a cost that must be reimbursed by Economical.

[78] The Plaintiff seeks the sum of $137,012.50 for storage costs at $60.00 per day. While, as noted above, this is the going rate charged to insurance companies under certain circumstances and was the amount Economical threatened to charge the plaintiff if he failed to retrieve the vehicle from Highland. The rate might therefore be foreseeable, but it is not reasonable to have stored the vehicle for years before effecting repairs even making some allowance for Covid. Economical is not obligated to pay this amount due to the Plaintiff's decision to leave the vehicle at Astra for almost five years. Firstly, the Plaintiff had an obligation to mitigate his damages. The total value of the vehicle was under $36,000.00.[16] Had the vehicle been scrapped, that is all that Economical would have been obliged to pay. I am not satisfied on the evidence that the Plaintiff was compelled to store the vehicle at Astra or to postpone the frame repairs for so long.

[79] Secondly, I am not convinced on the evidence that this is a real cost or expense. It is clear that the invoice was generated by Astra for use at the trial. It has not been paid. I would allow no more than one month of storage charges which would be $1800.00.

[80] Under the contract, the Plaintiff was entitled to a rental vehicle while repairs were being effected to the vehicle. He was provided with a rental vehicle while the work was being done at Highland. Economical ceased providing a rental vehicle once it determined the repairs were complete. The Plaintiff seeks compensation to cover the cost of the motor vehicle loan for his replacement vehicle between the date he purchased it in 2018 to 2023 when the repairs were completed. As noted above, I am not satisfied that it was reasonable or necessary to postpone the

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[15] *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30, [2006] 2 SCR 3

[16] I note that the cost of the frame replacement even added to the cost of the repairs already covered by Economical is still less than 80% of this amount.

repairs for five years. I would allow two months for vehicle rental at $2,000.00 per month for a total of $4,000.00.

[81] This is not a case for punitive damages. Economical behaved reasonably given the information available to it. The claim was not denied and there was no bad faith in how Economical dealt with the file.[17] The long prolonged analysis of the vehicle at Astra and repairing the vehicle in 2023 is not commercially reasonable. The Plaintiff ceased cooperating with Economical when he removed the vehicle and turned down the various options offered to him. In any event, punitive damages were not pleaded and I would not permit the claim to be amended after trial to encompass such a claim.

[82] In conclusion, the Plaintiff's damages are $18,008.86. He is also entitled to pre-judgment interest which will have to be calculated.

[83] Counsel will have to calculate the amount of prejudgment interest. They will also have to review the amount paid by Highland under the *Pierrenger* agreement and whether it duplicates the damages awarded against Economical. I invite counsel to agree on these points but otherwise I will hear submissions. I will if necessary also hear submissions on costs.

Justice C. MacLeod

Date: December 30, 2024

[17] *Whiten v. Pilot Insurance Co*., 2002 SCC 18 (CanLII), [2002] 1 SCR 595

CITATION: Balpinar (Estate) v. Economical Mutual Insurance Company et. al, 2024 ONSC 7239
COURT FILE NO.: CV-18-76493
DATE: 2024 12 30

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: THE ESTATE OF ERCAN BALPINAR, BY ITS LITIGATION ADMINISTRATOR, SAFINUR BALPINAR
Plaintiff

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY and 1457927 ONTARIO LTD. c.o.b. as HIGHLAND AUTO BODY
Defendant

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Elise J. Hallewick & Carmen Baru, for the Plaintiff

Ainsley Shannon, for the Defendant Economical

No one appearing for the Defendant 1457927 Ontario Ltd.

DECISION AND REASONS

Regional Senior Justice C. MacLeod

Released: December 30, 2024