CITATION: Singh v. BMW Canada et al, 2025 ONSC 5970
COURT FILE NO.: CV-24-4553
DATE: 2025 10 22

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bikram Singh, Plaintiff

AND:

BMW Canada, Policaro BMW, Skydome Auto & Body Centre, and TD General Insurance Company, Defendants

BEFORE: M.T. Doi J.

COUNSEL: Jessica Kuredjian and Hardeep Dhaliwal, for Moving Defendant Policaro BMW

Siyamson Pathmanathen, for the Plaintiff

HEARD: July 2 and 24, 2025

ENDORSEMENT

Overview

[1] The defendant 191161 Ontario Inc. o/a Policaro BMW ("Policaro") brought this motion to strike the statement of claim against it under rules 21.01(1)(b) and 25.11 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, for disclosing no reasonable cause of action and for being scandalous, frivolous, or an abuse of process.

[2] For the reasons set out below, Policaro's motion to strike is dismissed.

Background

[3] On October 4, 2024, the plaintiff brought this action for $100,000.00 in general damages and for special damages in an amount to be determined as against Policaro and the other defendants BMW Canada, Skydome Auto Body Centre ("Skydome"), and TD General Insurance Company ("TD"), respectively.

[4] The claim arises from damage to the plaintiff's 2020 BMW M8 vehicle (the "vehicle") that TD had insured.

[5] On February 20, 2024, the plaintiff was driving the vehicle when an inattentive driver merged into his lane and caused an accident that damaged the vehicle. Before the accident, the vehicle operated normally without any engine issues.

[6] After the accident, the plaintiff arranged for Skydome to repair the vehicle. Following the repairs, the vehicle began to make unusual noises.

[7] The plaintiff brought the vehicle to Policaro for inspection. Policaro determined that the engine was damaged and needed replacement. A claim for the estimated repairs was submitted to TD for approval as part of the plaintiff's property damage claim for the motor vehicle accident.

[8] TD denied the repair claim after finding that the engine had not been damaged in the motor vehicle accident.

[9] The plaintiff seeks indemnification for the costs to repair the engine. He claims that TD improperly denied the claim as the damage to the engine resulted from the subject accident. In the alternative, he claims that the engine was defective and that BMW Canada is liable to indemnify him under a manufacturer's warranty.

[10] On October 22, 2024, the plaintiff served the statement of claim on Policaro. The claim against Policaro is pleaded in negligence as follows:

> **NEGLIGENCE OF THE DEFENDANT BMW (POLICARO)**
>
> 16. As a direct result of Defendant Policaro's negligence including but not limited to:
>
> (a) Failing to property inspect the vehicle and diagnose issues which arose from the subject accident;
>
> (b) Failing to meet the standard of care expected of a reasonably skilled repair center by improperly diagnosing the necessary repairs;
>
> (c) Failing to promptly disclose known defects to the Plaintiff;

[11] On November 26, 2024, Policaro served a notice of intent to defend the action with a demand for particulars of allegations pleaded in the statement of claim.

[12] On November 28, 2024, the plaintiff, through counsel, refused to provide any particulars and advised of an intention to have Policaro noted in default.

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[13] On December 1, 2024, the plaintiff tried to note Policaro in default by requisition. The court did not accept the requisition for filing.

[14] On December 5, 2024, Policaro delivered a placeholder statement of defence (i.e., to avoid being noted in default) and brought this motion to strike the plaintiff's claim against it.

[15] On January 24, 2025, the plaintiff delivered the responding record for the motion that included a "draft" response to Policaro's demand for particulars that both parties addressed in their submissions. Among other things, the response states that Policaro routinely performed all vehicle service and maintenance before the February 20, 2024 accident, and that the vehicle had a cooling system recall since May 2024 for which Policaro did not perform a warranty service that may have caused the engine failure.

Legal Principles on the Motion to Strike

[16] Pursuant to r. 21.01(1)(b), a judge may strike out a pleading on the ground that it discloses no reasonable cause of action. No evidence is considered on a motion to strike under r. 21.01(1)(b).

[17] A claim should only be struck under r. 21.01(1)(b) where it is plain and obvious that it has no reasonable prospect of success: *Hunt v. Carey Canada Inc.,* [1990] 2 SCR 959 at 980; *Rivard v. Ontario,* 2025 ONCA 100 at para 22. All facts pleaded in the statement of claim are assumed to be true unless patently ridiculous or incapable of proof: *Hunt* at 977-979. The bar for striking out a pleading is very high: *PMC York Properties Inc. v. Siudak,* 2022 ONCA 635 at paras 30-32, leave to appeal refused 2023 CanLII 31576 (SCC). The court is to consider whether the pleadings as they stand or may reasonably be amended disclose a question that is not doomed to fail: *Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19 at para 90.

[18] Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: *Ibid; R. v. Imperial Tobacco Ltd.,* 2011 SCC 42 at para 21. Pleadings are read generously to accommodate drafting deficiencies to allow a case with merit to be decided on its merits: *PMC* at para 31. A pleading in a statement of claim is deficient where it fails to plead material facts required to sustain a particular cause of action: *Apotex Inc. v. Eli Lilly and Co.,* 2015 ONCA 305 at para 21, leave to appeal refused, [2015] SCCA No 291; *Abbasbayli v. Fiera Foods Company,* 2021 ONCA 95 at para 20; *PMC* at para 31; *Avagyan v. Gasparyan,* 2024 ONSC 2154 at paras 11-12.

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[19] The court may also strike a pleading that is frivolous, vexatious, or an abuse of process under rr. 21.01(3)(d) and 25.11(b) and (c), respectively. Extrinsic evidence is allowed on a motion under r. 21.01(3)(d) and may be admitted on a motion under r. 25.11: *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company),* 2021 ONCA 141 at para 28; *10313033 Canada Inc. v. Kechichian*, 2020 ONSC 1990 at para 32.

[20] The same "*plain and obvious*" test to strike a pleading under r. 21.01(1)(b) for failing to show a reasonable cause of action is also used to decide whether a pleading is frivolous, vexatious, or an abuse of the court's process under r. 25.11: *Resolute Forest Products Inc. v. 2471256 Canada Inc. (Cob Greenpeace Canada),* 2016 ONSC 5398 (Div Ct) at para 17; *Del Giudice v. Thompson,* 2021 ONSC 5379 at para 56, affirmed 2024 ONCA 70, leave to appeal refused 2024 CanLII 88330 (SCC); *2766264 Ontario Inc. v. Garik Gevorkian*, 2025 ONSC 5727 at para 6. A claim may be frivolous, vexatious, or an abuse of process by asserting untenable pleas or lacking sufficient material facts to support its assertions: *Del Giudice (SCJ)* at para 57; *Howell v. Cullen*, 2025 ONSC 1449 at para 8. The abuse of process doctrine engages the inherent power of the court to prevent the misuse of its procedure in a way that would be manifestly unfair to a party to litigation: *SIF Solar Energy Income & Growth Fund v. Aird & Berlis LLP*, 2024 ONCA 946 at para 31.

Leave is Not Required to Bring the Motion

[21] I am satisfied that Policaro did not require leave to bring this motion to strike the claim after delivering its statement of defence.

[22] Rule 2.02(b) provides that a motion to attack an irregularity shall not be brought, except with leave of the court, if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity.

[23] Normally, the proper time for a defendant to move to strike a statement of claim is before delivering a statement of defence which usually signals that a legally sufficient claim was advanced for which the defendant can respond: *Brozmanova v. Tarshis*, 2018 ONCA 523 at para 26; *Sigma Convector Enclosure Corp. v. Fluid Hose & Coupling Inc.*, 2022 ONSC 4371 at para 30; *10379875 Canada Inc. v. TIW Industries Ltd./Les Industries TIW Ltee*, 2024 ONSC 4922 at para 42. That said, a defendant may bring a motion to strike a claim without leave after delivering a defence where it is obvious that the defendant takes issue with the sufficiency of the claim: *Arsenijevich v.*

Ontario (Provincial Police), 2019 ONCA 150 at para 7; *Potis Holdings Ltd. v. The Law Society of Upper Canada*, 2019 ONCA 618 at para 14.

[24] In this case, Policaro delivered a placeholder statement of defence (i.e., expressly to avoid being noted in default after the plaintiff tried to requisition them in default) that pleaded the same deficiencies raised on its motion to strike. As Policaro obviously took issue with the sufficiency of the claim against it, I am satisfied that leave to bring its motion is not required.

[25] In any event, I would have granted leave for Policaro to bring the motion. Trial efficiency was not impacted by the motion as the action is still at the pleadings stage. Moreover, given the nature of Policaro's challenge to the negligence claim, I would have granted leave for the motion to be heard to allow for a just and expeditious determination of the matter: r. 1.04.

Analysis

[26] As explained below, I am satisfied that the plaintiff sufficiently pleaded material facts to properly ground the required elements of his cause of action in negligence against Policaro.

[27] To plead a case in negligence, the plaintiff must plead sufficient facts to establish the four elements of the tort of negligence as follows:

a. the defendant owed the plaintiff a duty of care;

b. the defendant's behaviour breached the standard of care;

c. the plaintiff sustained damage; and

d. the damages was caused, in fact and in law, by the defendant's breach.

> *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27 at para 3; *Rankin (Rankin's Garage & Sales) v. JJ,* 2019 SCC 19 at para 71; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.,* 2020 SCC 35 at para 18.

[28] I am satisfied that the statement of claim pleads sufficient facts to show that Policaro owed a duty of care to the plaintiff. The claim states that the plaintiff had Policaro inspect the vehicle to diagnose the repairs required to resolve unusual engine noises. Based on this, I accept that the

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claim sufficiently pleads interactions between the parties that created a duty of care as the client-service provider relationship in this case fell within an established duty of care category: *Mustapha* at para 5; *2599475 Ontario Inc. v 2549445 Ontario Inc.*, 2023 ONSC 3508 at para 60; *Zhang v. No. 1 Collision (1993) Inc.*, 2018 BCCRT 703 at para 17; *Stein v. PS Motors Ltd.*, 2024 BCCRT 315 at para 17; *Hiebert (dba Alberni Mobile Mechanic) v. Chapman*, 2024 BCCRT 1088 at para 21; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.,* [1992] 3 SCR 299 at 407-408.

[29] In any event, I would have found that a duty of care should be recognized. Both parties were in a "*close and direct*" relationship of proximity to make it "*just and fair*" to impose a duty of care on Policaro given its alleged failure to take reasonable care by improperly diagnosing the repairs for restoring the vehicle to good working order or otherwise not disclosing known defects with the vehicle that might foreseeably have caused the plaintiff loss or harm: *Cooper v. Hobart,* 2001 SCC 79 at paras 32 and 34; *Nelson (City) v. Marchi,* 2021 SCC 41 at para 17. On the facts of this case, I would have found no countervailing policy concerns to negate the duty of care: *Cooper* at para 30; *Marchi* at para 18.

[30] I accept that the statement of claim sufficiently pleads that Policaro's conduct breached the applicable standard of care. The claim pleads that Policaro acted negligently by failing to properly inspect the vehicle and diagnose issues from the accident, by improperly diagnosing the repairs needed to return the vehicle to good working order, and by failing to disclose its known defects. The response to particulars also states that Policaro failed to perform a warranty service under a manufacturer's recall. Given these alleged failures, and on a generous and liberal reading of the claim, I accept that the claim sufficiently pleads that Policaro did not meet the standard of care expected of a reasonably skilled repair center.

[31] I am satisfied that the claim sufficiently pleads that the plaintiff suffered damages caused by Policaro's improper inspection or diagnosis of the repairs for the vehicle, or by its failure to disclose known defects with the vehicle.

[32] Taking everything into account, I find that the statement of claim sufficiently pleads the elements of the negligence claim against Policaro by stating that it owed the plaintiff a duty to properly diagnose or disclose any damage or defects to the vehicle, that it breached its duty by not identifying the required repairs or defects, and that damages flowed from that failure. On a

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generous reading of the material facts as pleaded, I accept that the cause of action in negligence is viable and should proceed to trial for a determination on its merits: *Mustapha* at para 3; *Imperial Tobacco* at para 21; *PMC* at para 31. I do not find that it is plain and obvious that the negligence claim reveals no reasonable cause of action or is otherwise doomed to fail: *Atlantic* at para 90.

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[33] Reading the negligence claim in its entirety, I accept that Policaro has sufficient particulars of the various allegations and legal conclusions drawn from them to know the case to meet and properly defend the claim. In any event, the discovery phase of the action will enable Policaro to further pinpoint the allegations and evidence supporting the claim, which is a function of discoveries: *Temilini v. Ontario Provincial Police Commissioner* (1990), 73 OR (2d) 664 (CA) at 668; *Miguna v. Toronto Police Services Board*, 2008 ONCA 799 at para 54. If necessary, the plaintiff may amend the negligence claim after discoveries to plead further particulars: *PMC* at para 63; *Catalyst Capital Group Inc. v. Veritas Investment Research Corporation*, 2017 ONCA 85 at para 26.

[34] Having found that the plaintiff has pleaded a viable claim in negligence against Policaro, I decline to strike the claim under rr. 21.01(3)(d) or 25.11 for lacking sufficient material facts or otherwise raising an untenable plea that is frivolous, vexatious, or an abuse of process: *Del Guidice (SCJ)* at para 57; *Resolute* at para 17. I find that the negligence claim has merit and, therefore, is not an abuse of process or manifestly unfair: *SIF Solar* at para 31.

[35] I am not persuaded by Policaro's alternative argument that the plaintiff's negligence claim is barred by ss. 263(5)(a) and/or (a.1) of the *Insurance Act*, RSO 1990, c I.8. In addressing this argument, it is necessary to consider s. 263 that provide as follows:

> **Accidents involving two or more insured automobiles**
> 263. (1) This section applies if,
>
> > (a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles;
> >
> > (b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section; and

(c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section. …

Damage recovery from insured's insurer
(2) If this section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the coverage described in subsection 239 (1) as though the insured were a third party.

Fault-based recovery
(3) Recovery under subsection (2) shall be based on the degree of fault of the insurer's insured as determined under the fault determination rules.

Dispute resolution
(4) An insured may bring an action against the insurer if the insured is not satisfied that the degree of fault established under the fault determination rules accurately reflects the actual degree of fault or the insured is not satisfied with a proposed settlement and the matters in issue shall be determined in accordance with the ordinary rules of law.

Restrictions on other recovery
(5) If this section applies,

(a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;

(a.1) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss;

(b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section. [Emphasis added]

[36] To reduce transaction costs and auto insurance premiums, the Legislature enacted s. 263 to create a no-fault regime for cases where the only claim is for property damage to an automobile arising from a motor vehicle accident. The scheme under s. 263 replaced the prior tort and subrogation claims process that had resolved automobile damages claims by introducing a direct compensation regime by which an insured makes property loss claims against their own insurer to remove transaction costs from the tort system: *Siena-Foods Ltd. v. Old Republic Insurance Co. of Canada*, 2012 ONCA 583 at paras 18-23; *Clarendon National Insurance v. Candow*, 2007 ONCA 680 at paras 7-11; *Straight Forward Auto Service Inc. v. Mead*, 2017 ONSC 5773 at paras 35-37.

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[37] In submissions, Policaro did not refer to any cases that applied ss. 263(5)(a) or (a.1) to bar a claim against a repair shop for negligently or improperly identifying the repairs needed to restore a vehicle after a motor vehicle accident. I found no cases in which either clause was used to bar this sort of claim in comparable circumstances.

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[38] I accept that ss. 263(5)(a) and (a.1) are implicated as the prerequisites in ss. 263(1)(a) to (c) are met to trigger the application of s. 263 to the February 20, 2024 accident. I have adopted the modern textual, contextual, and purposive approach in interpreting these statutory provisions: *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54 at para 11; *RPG Receivables Purchase Group Inc. v. American Pacific Corporation*, 2025 ONCA 371 at para 32.

[39] In my view, ss. 263(5)(a) of the *Insurance Act* does not bar the plaintiff's negligence claim against Policaro. I accept that ss. 263(5)(a) bars an insured from maintaining a cause of action against "*any person <u>involved in the incident</u> other than the insured's insurer for damages to the insured's automobile*" [emphasis added]. Notably, however, Policaro was <u>not</u> involved in the February 20, 2024 incident. Policaro had a post-accident service contract with the plaintiff to identify the repairs needed to return the vehicle to good working order after its engine began to make unusual noises. In view of this, I am not persuaded that ss. 263(5)(a) operates to bar the plaintiff's action in negligence against Policaro: *Brouwer v. Frankel,* [2004] OJ No 5965 (SCJSC) at para 5, cited with approval in *Hafeez v Sunaric*, 2015 ONSC 4065 (Div Ct) at para 26-27.

[40] Turning to ss. 263(5)(a.1), I find that this provision should not bar the plaintiff's negligence action against Policaro on the facts of this case. Writing for the Court of Appeal in *Clarendon National Insurance v. Candow*, 2007 ONCA 680 at para 20, Juriansz J.A. noted that the prohibition under ss. 263(5)(a) is subject to the exception in ss. 263(5)(a.1) that permits a right of action in contract where an action is brought "*under an agreement, other than a contract of automobile insurance.*" By way of example, Juriansz J.A. held in *Clarendon* at para 21 that ss. 263(5)(a.1) allows a lessor to bring an action in contract against a lessee who breaches a lease agreement that requires the vehicle to be returned in an undamaged state, and further allows an action to enforce an oral contract against a defendant who agreed to pay for damage to a plaintiff's vehicle without the parties making insurance claims. To arrive at this, Juriansz J.A. adopted Gollum D.J.'s finding in *Harpreet v. Markham (Town of),* [2006] OJ No 2439 (SCJSC) at para 17 that ss. 263(5)(a.1) "*expands causes of action against a person <u>involved in the incident</u> provided the person has*

entered into a contract, and the person is at fault or negligent" [emphasis added]. As noted above, I find that ss. 263(5)(a) does not bar the plaintiff's claim in negligence against Policaro as it was not involved in the February 20, 2024 incident. In turn, I am not persuaded that the expanded or permissive grounds for bringing an action under ss. 263(5)(a.1) somehow preclude the negligence claim against Policaro as it was not involved in the incident. On this point, I adopt Godfrey D.J.'s *dicta* in *Brouwer* at para 6 that ss. 263(5)(a.1) was not intended to prevent an insured from suing those not involved in an incident: see also *Hafeez* at para 32.

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[41] Based on the foregoing, I find that Policaro has not met the very high bar for striking the negligence claim against it: *Atlantic* at para 90; *PMC* at paras 30-32. In my view, it is not plain and obvious that the plaintiff's claim against Policaro has no reasonable prospect of success or is otherwise doomed to fail: *Hunt* at 980; *Rivard* at para 22. On a liberal reading of the claim, I find that it is sufficiently pleaded and should proceed to trial.

Outcome

[42] Accordingly, the motion is dismissed.

[43] Should the parties be unable to resolve the costs for the motion, the plaintiff may deliver costs submissions of up to 2 pages (excluding any costs outline or offer to settle) within 15 days, and Policaro may deliver responding submissions on the same terms within 15 days thereafter. Reply submissions shall not be delivered without leave.

Date: October 22, 2025

M.T. Doi J.

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