IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Beazley v. Suzuki Motor Corporation,***
Spehar v. Suzuki Motor Corporation,
2008 BCSC 13

Date: 20080103
Docket: S043377
Registry: Vancouver

2008 BCSC 13 (CanLII)

Between:

Jason Beazley, Laurel Beazley and William Beazley and Insurance Corporation of British Columbia

Plaintiffs

And

Suzuki Motor Corporation, General Motors Corporation, General Motors of Canada Limited – General Motors du Canada Limitee, CAMI-Automotive, Inc., Stingray Holdings Ltd. formerly known as Sunshine Motors Ltd., Anchors Away Worldwide Cruises Inc. formerly known as Sunshine Motors (1994) Limited, Group Lotus plc, Lotus Cars Limited, and Lotus Engineering Limited

Defendants

And

City of Burnaby

Third Party

Docket: S060519
Registry: Vancouver

Between:

Natalia Spehar, a person under disability, by her Committee, Ann Spehar, and Insurance Corporation of British Columbia

Plaintiffs

And

Suzuki Motor Corporation, General Motors Corporation, General Motors of Canada Limited – General Motors du Canada Limitee, CAMI-Automotive, Inc., Stingray Holdings Ltd. formerly known as Sunshine Motors Ltd., Anchors Away Worldwide Cruises Inc. formerly known as Sunshine Motors (1994) Limited, Group Lotus plc, Lotus Cars Limited, and Lotus Engineering Limited

Defendants

And

City of Burnaby

Third Party

Before: The Honourable Mr. Justice R.B.T. Goepel

Reasons for Judgment

Counsel for Plaintiffs in both actions	G. Tucker and P. Brackstone
Counsel for Group Lotus plc, Lotus Cars Limited and Lotus Engineering Limited	R.B. Lindsay, Q.C. and J. Lamb
Counsel for Suzuki Motor Corporation, General Motors Corporation, General Motors of Canada Limited – General Motors du Canada Limitee, CAMI-Automotive, Inc., Stingray Holdings Ltd. formerly known as Sunshine Motors Ltd. and Anchors Away Worldwide Cruises Inc. formerly known as Sunshine Motors (1994) Limited	G.R. Switzer
Date and Place of Hearing:	November 21, 2007 Vancouver, B.C.

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INTRODUCTION

[1] On August 23, 1994, a 1994 2-door 4x4 Geo Tracker ("the Tracker"), owned by William and Laurel Beazley and driven by their son, Jason (collectively "the Beazleys"), was involved in a single car accident (the "Accident"). The three passengers in the Tracker suffered serious injuries in the Accident and each commenced actions against the Beazleys. Those actions, as will be detailed below, have been resolved.

[2] The focus of the instant actions is the design and safety of the Tracker. The plaintiffs allege that the Tracker was defective in design and manufacture, and was unreasonably dangerous in numerous ways particularized in their Statements of Claim.

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[3] The Statements of Claim allege that the defendants, Suzuki Motor Corporation ("SMC"), General Motors Corporation ("GM"), General Motors of Canada Limited – General Motors du Canada Limitee ("GMC"), CAMI-Automotive Inc. ("CAMI") (collectively the "GM Defendants"), designed, manufactured and sold the Tracker. The Statements of Claim further allege that SMC and/or GM consulted Group Lotus plc, Lotus Cars Limited and Lotus Engineering Limited (collectively "Lotus") regarding the safety and stability of the Tracker. The plaintiffs allege that Lotus gave certain advice and warnings to SMC and GM concerning the Tracker that SMC and GM ignored. The plaintiffs allege that in such circumstances Lotus had an obligation to warn users of the Tracker that the Tracker was dangerous and defective. Alternatively, the plaintiffs allege that Lotus failed to properly advise and warn SMC and GM of potential dangers in the Tracker design.

[4] On this application, Lotus applies pursuant to Rule 14(6)(a) for an order that the claims against it be dismissed on the grounds that the Amended Statements of Claim do not allege facts that, if true, establish that the court has jurisdiction over Lotus in respect of these claims. The gist of Lotus' submission is that Lotus does not owe a duty of care to the plaintiffs as alleged. Absent a duty of care, Lotus has committed no tort in British Columbia and the court, accordingly, lacks jurisdiction over them.

BACKGROUND

[5] To put Lotus' application in context, it is first necessary to briefly review the Accident and the actions that have arisen from it.

[6] On August 23, 1994, Jason Beazley lost control of the Tracker and it rolled over several times. His three passengers, Natalia Spehar, David Kusherniuk, and Diana Pozzi were injured, Ms. Spehar most seriously.

[7] On February 15, 1996, Ms. Spehar commenced proceedings against the Beazleys. Mr. Kusherniuk and Ms. Pozzi subsequently commenced their own separate actions against the Beazleys.

[8] In March 2002, Ms. Spehar's claim proceeded to trial. The Beazleys admitted liability. On July 23, 2003, Koenigsberg J. awarded Ms. Spehar damages against the Beazleys totalling $7,478,825 (2002 BCSC 1718). On May 26, 2004, the Court of Appeal upheld the award (2004 BCCA 290).

[9] In September 2003, the Insurance Company of British Columbia ("ICBC") settled the claims of Mr. Kusherniuk and Ms. Pozzi. ICBC paid $810,958.91 to settle Mr. Kusherniuk's claim and $235,252.19 to settle Ms. Pozzi's claim. As a result of those payments, ICBC claims that it has acquired a statutory right of subrogation pursuant to s. 26 of the ***Insurance (Vehicle) Act***, R.S.B.C. 1996 c. 231 (formerly titled the ***Insurance (Motor Vehicle) Act***).

[10] The Beazleys had $1 Million in third party liability coverage with ICBC. Prior to trial, Ms. Spehar had issued a formal offer to settle her claims for $1.7 million.

[11] In December 2002, the Beazleys commenced proceedings against ICBC, the lawyers ICBC had appointed to defend them and their personal counsel who they

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had retained (the "Bad Faith Action"). Trial of the Bad Faith Action was scheduled to commence on September 20, 2004.

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[12] On June 17, 2004, ICBC commenced in its own name and in the name of the Beazleys Action S04337 (the "Beazley Action"), which is one of the actions presently before me. The Beazley Action alleges that the Tracker was defectively designed and manufactured, rendering it unsafe. The Beazley Action, as originally constituted, was only brought against the GM Defendants. The plaintiffs in the Beazley Action seek contribution to the extent it is found that the fault or negligence of the defendants caused the Accident, resulting in the settlement of the Kusherniuk and Pozzi claims and the Spehar judgment against the Beazleys.

[13] Shortly before the scheduled start of the Bad Faith Action, ICBC applied for an order that the Bad Faith Action, the Beazley Action and a further claim Ms. Spehar had brought against ICBC in relation to Part VII benefits be tried together. On August 12, 2004, Kirkpatrick J. (as she then was) dismissed that application, at least in part because of her concern that the Beazley Action would not be ready for trial until at least 2007 (2004 BCSC 1091). Shortly thereafter, the Bad Faith Action was settled.

[14] On January 26, 2006, Ms. Spehar and ICBC commenced Action F060519 (the "Spehar Action") against the GM and Lotus Defendants for damages for injuries suffered by Ms. Spehar in the Accident. ICBC sues as the assignee of Ms. Spehar pursuant to the terms of a written agreement dated September 9, 2004. The Spehar

Action, like the Beazley Action, alleges that the Tracker was defectively designed and manufactured, rendering it unsafe.

CLAIMS AGAINST LOTUS

[15] The Beazley Action was amended on September 29, 2006 to add Lotus as defendants. The allegations in the Beazley Action and the Spehar Action are now identical, although the paragraph numbering differs. Paragraph references hereafter will be taken from the Further Amended Statement of Claim in the Spehar Action. Unless otherwise stated, references to the plaintiffs hereafter will refer collectively to the plaintiffs in both the Beazley and Spehar actions.

[16] The plaintiffs allege that the Tracker was originally designed, manufactured and sold by the GM Defendants (para. 18). The plaintiffs allege that Lotus was retained by SMC to assess and review the Tracker. It is alleged that Lotus recommended certain design changes and knew that if the design defects were not corrected, then the Tracker would be unsafe, inherently dangerous and risky for users (para. 34-37).

[17] The Further Amended Statement of Claim continues:

> 38. In those circumstances, the Lotus Companies owed a duty to all potential users of the Tracker to advise and warn SMC and GM, clearly and specifically, that if the changes recommended by the Lotus Companies were not implemented, the Tracker would have inadequate directional stability, inadequate ability to resist rollover and inadequate handling during limit and emergency manoeuvring situations, and that the Tracker would be unsafe and that the Tracker would be inherently dangerous.

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> 39. The Plaintiffs say that the Lotus Companies gave that advice and warning to SMC and GM and that all advice and warnings given by the Lotus Companies to SMC and GM were ignored by SMC and GM.
>
> 40. In the alternative, if the Lotus Companies did not give that advice and warning to SMC and GM the Lotus Companies breached their duties to potential users of the Tracker and that breach was a proximate cause of the Accident and the injuries to Natalia Spehar.
>
> 41. Further, and in any event, the Lotus Companies knew, or should have known, that notwithstanding acceptance by SMC and GM of the Lotus Companies' recommendations and advice concerning necessary changes to the design of the Tracker, SMC and GM failed to implement any of those changes. The Lotus Companies knew or should have known that none of those changes were implemented until in or about 1996, when all of those changes were implemented.
>
> 42. Knowing that neither SMC nor GM was making any of the changes to design of the Tracker recommended by the Lotus Companies, and knowing that the Defendants would manufacture, distribute, market and sell the Tracker, the Lotus Companies owed a duty to all potential users of the Tracker to warn those users that the Tracker was dangerous and defective in that the Tracker had inadequate directional stability, inadequate handling in emergency and limit manoeuvring situations, and an unacceptably high risk of roll over. The Lotus Companies breached that duty. That breach was a proximate cause of the Accident and the injuries to Natalia Spehar.
>
> 43. Further, the Lotus Companies, by virtue of their role in design of the Tracker are jointly and severally liable with SMC, GM, GMC for loss and damage flowing from defects in the Tracker, including all loss and damage suffered by Natalia Spehar.
>
> 44. For clarity, the claim against the Lotus Companies set out at paragraph 40 is made in the alternative to the claims made against the remaining defendants.

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THE APPLICATION

[18] Lotus submits that the duty of care alleged in these proceedings has not been previously recognised by Canadian courts and does not satisfy the test for novel claims. Lotus says that even if the facts alleged by the plaintiffs are proven true, the

duty to warn does not extend to relationships such as that between the plaintiffs and Lotus.

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[19] Lotus now applies pursuant to Rules 14(6)(a) and 14(6)(b) to dismiss the plaintiffs' action. Rules 14(6)(a) and (b) read:

> 14(6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,
>
> > (a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding;
> >
> > (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding,

[20] This hearing was limited to the relief sought under Rule 14(6)(a). If Lotus is unsuccessful in regards to its submission under Rule 14(6)(a), a further hearing may take place in relation to Rule 14(6)(b). Lotus' submissions under Rule 14(6)(b) are based in part on an affidavit of Roger Becker, a Lotus employee who resides in England. The parties agreed that the plaintiffs are entitled to cross-examine Mr. Becker on his affidavit. Given the expense involved in arranging for that cross-examination, I directed at a Case Management Conference that Lotus' application proceed in two stages.

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THE LEGAL TEST

[21] Before turning to the merits of the application, it is first necessary to determine the appropriate test by which the application will be judged. The foundation of Lotus' application is that even if the facts alleged by the plaintiffs in their respective Statements of Claim are true, Lotus does not owe a duty of care to the plaintiffs as alleged, or at all. Lotus submits that the relationship between the plaintiffs and Lotus does not fall within a recognized class that gives rise to a duty of care and there is no proximity between the plaintiffs and Lotus sufficient to establish a duty of care. Lotus further submits that even if foreseeability and proximity can be established residual policy considerations negative the imposition of a duty of care.

[22] While the application has been brought pursuant to Rule 14(6)(a), Lotus' submission raises considerations that usually arise in the context of a Rule 19(24) application to strike a pleading as disclosing no cause of action.

[23] The plaintiffs concede that, prior to the amendments to Rule 14 in 2003, a defendant could, on a Rule 14(6) application, argue not just whether the pleadings make a claim over which the court will take jurisdiction, but also whether the pleadings allege a cause of action. The plaintiffs suggest that the addition of Rule 14(6.4)(b), which allows a party who has brought a motion under Rule 14(6)(a) or (b) to defend the action on the merits pending determination of the jurisdiction issues, now allows the party in the position of Lotus to bring a Rule 19(24) application where previously such a motion could not be brought without attorning to the court's jurisdiction. The plaintiffs submit that Rule 14(6) should now be restricted to

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arguments concerning jurisdiction alone and if a foreign defendant wishes to argue that a pleading discloses no cause of action, the application should be brought under Rule 19(24).

[24] I do not accept that Rule 14(6) is so limited. While a defendant challenging jurisdiction may now be able to defend an action on the merits while the jurisdictional challenge is pending, Rule 14(6) can still be used to determine whether the Statement of Claim discloses a cause of action. The onus is on the plaintiffs to plead facts that establish that their claim is well-founded in law***: AG Armeno Mines & Minerals Inc. v. PT Pukuafu Indah***, 2000 BCCA 405, 77 B.C.L.R. (3d) 1.

[25] Matters of jurisdiction are determined pursuant to the ***Court Jurisdiction and Proceedings Transfer Act***, S.B.C. 2003, c. 28 (the "***CJPTA***"). Pursuant to s. 3 of the ***CJPTA***, this Court has territorial competence over a non-resident defendant if there is a real and substantial connection between British Columbia and the facts upon which the proceeding against that defendant is based. Pursuant to s. 10 of the ***CJPTA***, a real and substantial connection is presumed to exist if the proceeding concerns a tort committed in British Columbia.

[26] Where damage from a manufacturer's product occurs in British Columbia, the tort of negligence is committed in British Columbia regardless of where the negligent act or omission occurred: ***G.W.L. Properties Ltd. v. W.R. Grace & Co.*** (1990), 50 B.C.L.R. (2d) 260 (C.A.). That proposition of law is not contested by Lotus. What is

contested, however, is whether they have committed a tort at all and that, in turn, depends as to whether or not they owe a duty of care to the plaintiffs.

[27] Lotus submits that for this Court to have jurisdiction the plaintiffs must establish that they have a "good arguable case". The "good arguable case" test applies in circumstances where a defendant has led evidence on the application which would prove fatal to some aspect of the plaintiff's case. In such circumstances, the plaintiff has an obligation to lead sufficient evidence on that issue to show a good arguable case: ***Power Measurement Ltd. v. Ludlum***, 2006 BCSC 157, 33 C.P.C. (6th) 47.

[28] That is not the situation on this application. On this application, the issue is whether the pleadings disclose a cause of action. The plaintiffs submit that on this application the test is that set out in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, where the Court, in considering Rule 19(24(a) said at ¶33:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

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[29] I agree with the plaintiffs' submission. In my opinion, the same test must be applied when a defendant seeks to set aside a writ on jurisdictional grounds on the basis that no tort has been pled as when a party applies to dismiss an action under Rule 19(24) on the basis that the Statement of Claim does not disclose a cause of action. Unless the plaintiffs' claim is certain to fail, the court should not conclude at this stage of the proceedings that the pleading does not allege facts that, if true, would establish that the court has jurisdiction.

ADMISSIBILIBILTY OF EVIDENCE

[30] The parties are not in agreement in regards to the admissibility of evidence on this application. The plaintiffs submit that the issue before the court is whether or not the pleadings disclose a cause of action. They submit that the application should be decided on the same principles as apply in Rule 19(24)(a). On such applications, it is well established that the facts in the Statement of Claim must be accepted as true. Pursuant to Rule 19(27), no evidence is admissible on an application under Rule 19(24)(a).

[31] Lotus wishes to put in evidence the contract between itself and SMC. It submits that the confidentiality provisions of the contract demonstrate a policy reason why the duty of care alleged by the plaintiffs should not be recognized.

[32] I have held that this application must be determined on the same basis as an application under Rule 19(24)(a). On such applications, evidence is not admissible. Accordingly, the terms of the contract are not admissible on this application and I

have not considered the contents of the contract between Lotus and SMC in deciding this application.

DUTY OF CARE

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[33] The existence of a duty of care is determined by the two stage analysis first set out in ***Anns v. Merton London Borough Council***, [1978] A.C. 728 (H.L.) and interpreted by the Supreme Court of Canada in a number of decisions including ***Cooper v. Hobart***, [2001] 3 S.C.R. 537. The Court in ***Cooper*** set out the framework for determining the existence of the duty of care at ¶30:

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggest in Yuen Kun Yeu, that such consideration will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

[34] The two-stage ***Anns*** test need only be considered in novel situations. It is only when a case does not clearly fall within a relationship previously recognised as

giving rise to a duty of care, that it is necessary to apply both steps of the ***Anns*** test: ***Childs v. Desormeaux***, [2006] 1 S.C.R. 643.

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[35] The major point of departure between the parties on this application is whether or not there is anything unusual or novel concerning the causes of action brought against Lotus. The plaintiffs submit that the causes of action all fall within recognised categories and there is no need for an ***Anns*** analysis. Lotus submits that the duties of care are novel and that an ***Anns*** analysis is required to determine whether the duty of care alleged is one that should be recognized at law.

[36] The Further Amended Statement of Claim first alleges that Lotus had a duty to all potential users of the Tracker to advise and warn SMC and GM that, if the changes recommended by Lotus were not implemented, the Tracker would be unsafe and inherently dangerous. From that premise, the pleading then proceeds to alternative claims. The first is that Lotus did not give that advice and warning to SMC and GM and, thereby, breached their duty to potential users of the Tracker (the “Advise Claim”). The second is that Lotus, having given the appropriate advice, knew that SMC and GM were not making the appropriate changes to the design and, in such circumstances, Lotus had a duty to warn all potential users that the Tracker was dangerous and defective (the “Duty to Warn Claim”).

[37] The plaintiffs submit that the Advise Claim is analogous to claims that have been long recognized. It cites passages from Klar et. al. ***Remedies in Torts***, (Toronto:Carswell, 1987), Waddams***, Product Liability***, 4th ed. (Toronto:Carswell,

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2002), Wallace, ***Hudson's Building and Engineering Contracts***, 11th ed. (London:Sweet & Maxwell 1995) and Theall et. al., ***Product Liability: Canadian Law and Practise*** (Aurora: Canada Law Book 2001) for the general proposition that anyone involved in the manufacturing and distribution of a product faces potential liability if the product fails or causes harm.

[38] The plaintiffs submit that the Supreme Court of Canada has found that a duty of care existed in analogous situations, most notably in ***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.***, [1995] 1 S.C.R. 85. In that case, La Forest J. held that a general contractor in the construction of an apartment building owed a duty of care to subsequent purchasers to ensure the building was free of dangerous defects. La Forrest J. found that it was reasonably foreseeable to contractors (and others responsible for design and construction) that if a building contained latent defects as a result of their negligence, subsequent purchasers of the building may suffer personal injury or damages. The plaintiffs, while acknowledging that ***Winnipeg Condominium*** dealt only with dangerous defects to a building and the recoverability of pure economic loss, submit that these are not material distinctions.

[39] Similarly, the plaintiffs submit that the Duty to Warn Claim is one that has long been recognized. The law is summarised in ***Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.***, [1997] 3 S.C.R. 1210 at ¶19:

> The law may be simply stated. Manufacturers and suppliers are required to warn all those who may reasonably be affected by potentially dangerous

> products: Lambert v. Lastoplex Chemicals Co., [1972] S.C.R. 569, and Hollis v. Dow Corning Corp., [1995] 4 S.C.R. 634. This duty extends even to those persons who are not party to the contract of sale: Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189. The potential user must be reasonably foreseeable to the manufacturer or supplier - manufacturers and suppliers (including a builder-supplier like SJSL) do not have the duty to warn the entire world about every danger that can result from improper use of their product.

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[40] Lotus submit that they were a consultant to the manufacturer of a vehicle which the plaintiffs owned, drove or travelled in. They submit that this is not a recognised category of relationship that gives rise to a duty of care.

[41] Applying the first stage of the Anns test, they submit that there was no direct connection between the parties. There is no allegation that the plaintiffs relied upon Lotus or that the plaintiffs knew of the existence of Lotus and the role they played in the development of the Tracker. They submit there is no “close and direct relationship” between Lotus and the plaintiffs that would justify imposing a duty of care.

[42] In regard to the Advise Claim, Lotus cite ***Hughes v. Sunbeam Corp. (Canada) Ltd.*** (2002), 61 O.R. (3d) 433 (C.A.) in which the court struck out claims against the tester of the smoke detector. The issue in that case was whether an independent endorser of a product owed a duty of care to the purchasers of the product if the product turned out to be dangerously defective. The court, applying the proximity test, found that even if the harm was foreseeable, it was not proximate and, therefore, the tester did not owe the plaintiff a duty of care. The court further

found that even if a *prima facie* duty of care did exist, the residual policy considerations of the second stage of the Anns test would negate the duty.

[43] In regard to the Duty to Warn Claim, Lotus cite ***Childs*** for the proposition that even if foreseeability is established, no duty of care would arise because alleged failure to warn arose in circumstances where there was no positive duty to act.

[44] Lotus further submit that even if there was sufficient proximity to establish a duty of care, there are residual policy considerations at the second stage of the ***Anns*** test that would negate the duty, the most significant being the spectre of indeterminate liability in an indeterminate amount. Lotus further submit that the proposed duty does not allow Lotus to control its exposure to claims and that the manufacturer is better positioned than Lotus to ensure the safety of its products, a significant policy consideration in the second stage of the ***Anns*** test.

DISCUSSION

[45] The fact that one case may be somewhat similar to another does not necessarily mean that second case is not novel. An example is ***Childs***, where the Court determined that the situation of commercial hosts differed from those of social hosts and decided that claims against social hosts for alcohol-related injuries constituted a new category of claim which required a detailed ***Anns*** analysis.

[46] This case raises for determination the question of whether a consultant to a manufacturer of a mass produced complex product owes a duty of care to the end user of the product and, if such a duty of care is owed, whether it is limited to the

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advice given to the manufacturer, or extends to include a duty to warn the end user of the product that the product may be defective. While there may be some similarities between this situation and decided cases, there are also significant differences. A building is a single structure. An automobile is a mass produced product. No cases have been cited to me in relation to the obligations of a consultant in such circumstances.

[47] Similarly, there have been no cases cited which have considered the duty of an independent consultant to warn the ultimate end user of a product. While the authorities have clearly established that a manufacturer has such a duty, whether a party who has advised the manufacturer in the development of the product is similarly obliged has not previously been determined.

[48] On the facts and submissions before me, I find that the duties of care which the plaintiffs seek to impose on Lotus are novel and the determination of the existence of a duty of care requires a full ***Anns*** analysis.

[49] Accepting that the two claims are novel, the question for determination on this application is whether it can be said at this point in time that they are certain to fail. I am unable to reach such a conclusion.

[50] The case raises important issues concerning the obligations of those who provide advice to manufacturers of products. If a duty of care is found to arise, the finding may have significant commercial implications.

[51] These are, in my view, not questions that should be determined summarily at this stage. Important and novel questions of law should not be decided absent a factual record: ***Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.***, 2002 BCCA 138. A full evidentiary record will allow the court to fully explore the competing policy interests which need to be considered in determining whether a duty of care should be extended to this situation. Important and novel questions of law should not be determined in an evidentiary vacuum.

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[52] Lotus' application pursuant to Rule 14(6)(a) is dismissed. The plaintiffs will be entitled to the costs of this application against Lotus in the cause.

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Mr. Justice R.B.T. Goepel