

AMENDED THIS Aug. 29/2018 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (_____)
☒ THE ORDER OF JUSTICE PERELL
L'ORDONNANCE DU
DATED / FAIT LE MAY 22/2018
.....
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. CV-14-497479 00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PETER SCOTT HARRIS

Plaintiff

- and -

BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT and
BMW CANADA INC.

Defendants

Proceedings under the *Class Proceedings Act, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

Notice of Action issued on January 30, 2014

1. The Plaintiff claims on his own behalf and on behalf of all members of the Class of persons described in paragraph 3 below:
 - (a) an Order pursuant to the *Class Proceedings Act, 1992* certifying this action as a class proceeding and appointing Peter Scott Harris as representative plaintiff for the Class and any appropriate sub-class thereof;
 - (b) damages for repair and replacement of the Class Cars in the amount \$25,000,000 or such other sum as this Honourable Court deems just;
 - (c) damages for property damage and personal injury in an amount to be determined;
 - (d) In the alternative to paragraphs 1(b) and 1(c) above, damages assessed in an amount equal to the gross revenue or, in the alternative, damages assessed in

an amount equal to the net income received by the Defendants as a result of the sale of Class Cars, as established by an accounting if necessary;

- (e) punitive and exemplary damages in the amount \$50,000,000 or such other sum as this Honourable Court deems just;
- (f) the costs of notice and of administering the plan of distribution of the recovery in this action;
- (g) pre-judgment and post-judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (h) the costs of this action on a substantial indemnity basis; and
- (i) such further and other relief as this Honourable Court deems just.

The Plaintiff

2. The Plaintiff Peter Scott Harris is a resident of the Province of Ontario. He is the owner of a 2003 MINI Cooper which he purchased new from MINI Cooper Ottawa East in Ottawa, Ontario.

The Class

3. This action is brought on behalf of the class of persons defined as follows (the “Class”):

All persons or entities in Canada who are or were owners or lessees of:

- (i) a 2002, 2003, 2004, 2005 or 2006 model year MINI Cooper or MINI Cooper S; or
- (ii) a 2005, 2006, 2007 or 2008 model year MINI Cooper Convertible or MINI Cooper S Convertible,

(collectively, the “Class Cars”)

and their estates, executors, successors or assigns.

The Defendants

4. The Defendant Bayerische Motoren Werke Aktiengesellschaft (“**BMW AG**”) is a corporation incorporated under the laws of the Federal Republic of Germany. Its head office is based in Munich, Germany. At all material times, BMW AG was responsible for and maintained control over the design, manufacturing and testing of Class Cars. BMW AG is a publicly traded company.

5. BMW AG distributes and sells Class Cars worldwide through its subsidiaries, including the Defendant BMW Canada Inc. (“**BMW Canada**”) in Canada and BMW of North America, LLC (“**BMW North America**”) in the United States.

6. BMW Canada is a corporation incorporated under the laws of Canada with its principal place of business located in Richmond Hill, Ontario. It is a subsidiary of BMW AG. At all material times, BMW Canada was BMW AG’s agent in Canada, through which BMW AG sold and distributed Class Cars in Canada.

7. MINI Downtown described below and MINI Ottawa East are authorised dealers of BMW AG and BMW Canada.

Harris’ Power Steering Failure

8. In October 2010, Peter Scott Harris (“Scott”) experienced an issue with his power steering in his 2003 MINI Cooper. This issue caused him to experience difficulty steering his vehicle and caused him concern about the vehicle’s safety.

9. Scott replaced the power steering pump cooling fan at his local dealership, MINI Ottawa East, and he was charged for the replacement.

10. Scott has not been reimbursed the costs he incurred for this repair.

Tkach’s 2005 MINI Cooper Car Fire

11. At around 5:00 p.m. on Friday August 9, 2013, a 2005 MINI Cooper owned by John Tkach was parked in the driveway of the Tkach family home in Toronto. The vehicle was

turned off. The key was not in the ignition. John's son, Nicholas, was inside the house, having recently returned home from running errands while driving the car.

12. Without warning, Nicholas heard a loud bang followed by a whoosh. When Nicholas looked outside, the hood of the Tkach MINI Cooper was in flames.

13. Nicholas called "911" and ran outside.

14. In the short time it took the fire crew to arrive, the flames grew and tires exploded.

15. The fire effectively destroyed the 2005 MINI Cooper.

16. The fire also caused property damage. In particular, the fire fused parts of the 2005 MINI Cooper into the driveway of the Tkach home, ruined landscaping, melted a sprinkler, and damaged pipes on the outside of the home. The air conditioning unit attached to the house was also damaged internally by the flames and heat of the fire.

17. The fire crew advised Nicholas that the doors, which would ordinarily unlock by pulling the door handle from the inside of the vehicle, did not unlock. Had Nicholas been in the car at the time of the fire, he would have been trapped inside.

Tkach's Prior Power Steering Failure

18. Earlier that same day, while Nicholas was driving the 2005 MINI Cooper home from running errands, the power steering failed making the vehicle difficult to maneuver. None of the warning or indication lights on the dashboard/instrument panel were on.

19. Nicholas pulled the car to the side of the road and contacted MINI Downtown to seek advice and place a service call. MINI Downtown sold John Tkach the 2005 MINI Cooper and had serviced it since the time it was sold.

20. After hearing Nicholas' explanation of the power steering failure, a representative of MINI Downtown scheduled a service appointment for the following Monday. MINI Downtown did not warn Nicholas that continued operation of the car was dangerous or posed a safety concern.

21. Nicholas proceeded to drive home. Shortly before arriving home the red check battery light came on.

The Class Cars Contain a Dangerous Defect

22. The Class Cars contain a common dangerous defect in the power steering system, which makes the Class Cars dangerous when used for ordinary highway and city driving intended by the Defendants.

23. The power steering defect can cause (1) a sudden and unexpected loss of power steering, making the vehicle difficult to manoeuvre in all driving conditions and potentially resulting in a loss of control, personal injury and property damage; and/or (2) a sudden and unexpected car fire.

24. In the event of a malfunction, dashboard warning lights fail to activate, activate too late to warn drivers of the danger, and/or fail to communicate the gravity of the danger.

25. Consequently, the defect has resulted and is likely to result in injury and damage to the drivers and passengers of the Class Cars, the Class Cars themselves and people and property in their vicinity.

26. The Defendants owed the Plaintiff and the Class a duty of care which they breached, as described more particularly below.

BMW AG Negligently Designed the Class Cars

27. The defect in the Class Cars is the result of BMW AG's negligent design of the power steering system of the Class Cars over which it maintained control.

28. BMW AG knew or ought to have known of the dangerous defect with the power steering system in the Class Cars at the time of manufacture, and the above-noted risks and dangers were reasonably foreseeable consequences of the defect.

29. BMW AG could have reasonably employed safer design alternatives that were/are also economical. The design at issue offers no advantage to outweigh the significant dangers posed by the potential for a sudden loss of power steering and/or car fire.

30. At the time the Class Cars were manufactured, other automobile manufacturers and BMW AG itself designed and built vehicles with power steering systems that did not fail without warning or cause car fires.

31. Moreover, in an attempt to address the defect, BMW AG implemented a re-design in 2005 (the “**2005 Redesign**”). The 2005 Redesign, however, was only applied to newly manufactured Class Cars from sometime in February 2005 onwards or after an owner/lessee experienced a failure in the power steering system (i.e., a manifestation of the defect). Owners/lessees paid for the power steering replacement necessitated by the defect.

32. In any event, the 2005 Redesign was inadequate and is itself defective, such that Class Cars manufactured subsequently contain the same or a similar design defect as described above.

BMW AG Negligently Tested the Class Cars

33. BMW AG failed to detect the defect because it was negligent in testing the power steering system prior to distributing the Class Cars for sale.

34. If BMW AG had conducted proper testing, it would have discovered the defect.

35. Following the distribution and sale of the Class Cars, testing of Class Cars by BMW AG, its subsidiaries (including BMW North America and BMW Canada), and/or its dealers revealed several defects with the power steering system.

36. In the alternative, to the extent BMW AG discovered the design defect after manufacturing of the Class Cars had begun, BMW AG ought to have stopped such manufacturing and distribution until such time as the dangerous defect was fully remedied and it could produce cars safe for their intended use.

BMW AG Negligently Manufactured the Class Cars

37. In the alternative, if the design of the power steering system was not inherently defective, BMW AG was negligent in the manufacture of the power steering system. BMW AG's failed to ensure manufacturing of the power steering system was in accordance with the design specifications and sound design principles, resulting in the same dangers noted above.

38. In the further alternative, if BMW AG did not manufacture the defective parts, it did maintain control over the power steering design which included such parts. It failed to ensure that the parts it approved, ordered and installed in Class Cars were manufactured in accordance with its design specifications and did not pose a dangerous defect in the context of the car's overall design.

The Defendants Negligently Distributed and Sold the Class Cars in Canada

39. The Defendants knew or ought to have known of the dangerous defect prior to manufacturing the Class Cars and certainly prior to selling and distributing the Class Cars throughout Canada.

40. The Defendants and their authorized dealers negligently distributed and sold the Class Cars containing the dangerous defect throughout Canada, which were purchased or leased by the Class.

The Defendants Failed to Warn the Class

41. Despite the Defendants' knowledge of the dangerous defect and resulting power steering failures and fires in Class Cars, the Defendants failed to issue an adequate warning to the Class of the defect and the danger it posed to human life and property.

42. The Defendants knew of power steering failures and car fires from:

- (a) reports they received directly and indirectly from their subsidiaries, affiliates and authorized dealers worldwide; and
- (b) the investigation of the power steering system commenced by the National Highway Traffic Safety Administration in the United States of America in 2010, which identified numerous power steering failures and fires in Class Cars.

43. Transport Canada confirmed that the defect "could ultimately result in a crash causing property damage and/or personal injury". Yet, the Defendants stayed silent and failed to adequately warn the Class.

44. By failing to give adequate notice of the defect, the Defendants were and are in breach of their statutory obligations under Section 10(1) of the *Motor Vehicle Safety Act*, S.C. 1993, c. 16.

45. In 2012, BMW AG and BMW Canada issued an extended warranty on the power steering pump and the pump cooling fan of 12 years or 200,000 kilometres from first in-service date of the vehicle.

46. The extended warranty, however, was and is wholly inadequate given the dangers posed by the design defect. In particular:

- (a) the warranty was provided several years after BMW AG implemented its 2005 Redesign - its purported final “fix” to the power steering system;
- (b) the warranty is for repairs, and only applies once a Class Member has already experienced some kind of failure of the power steering system; and
- (c) the danger posed by the defect exists regardless of the age of the car and even if the Class Car has been driven more than 200,000 kilometres.

47. At no time have the Defendants warned or advised the Class that:

- (a) the power steering system should be replaced immediately given the risk of personal injury and/or damage to property; or
- (b) there is a risk of fire arising from the design defect.

48. As manufacturer and distributors of Class Cars, the Defendants ought to have warned the Class of the danger of the sudden loss of power steering and/or car fire and further advised them to have the defective parts replaced immediately.

49. Further and in the alternative, given the inherent dangers caused by the defect, the Defendants ought to have issued a recall of the Class Cars in order to replace the defective part.

The Recall Conducted in the United States of America

50. Similar to what was done in Canada, in May 2013, BMW North America extended the warranty on the affected parts for the same model cars that were sold in the United States for up to thirteen (13) years and 150,000 miles (the “**US Extended Warranty Program**”)

51. In December 2015, however, BMW issued a safety recall, No. 15V-660, for 86,018 vehicles bearing model year 2002-2005 MINI Cooper and MINI Cooper S vehicles (produced between September 2001 and February 2005) as well as model year 2005 MINI Cooper and MINI Cooper S Convertibles (produced between March 2004 and February 2005). This recall applied only to vehicles sold in the United States of America, and not in Canada

52. The basis for the recall was that the electro-hydraulic power steering system in the vehicles may experience temporary or permanent loss of the power steering assist function in vehicles “that have not received an appropriate repair”.

53. Following the initial written recall notice sent to owners in the United States in December 2015, BMW North America sent a second written notice to American owners, beginning in March 2016, which stated in part (**emphasis in original**):

PRECAUTIONS FOR YOUR SAFETY

1. **CONTACT YOUR AUTHORIZED MINI DEALER IMMEDIATELY TO HAVE THE NECESSARY FREE REPAIR PERFORMED AS SOON AS POSSIBLE. You can find your nearest dealer at www.miniusa.com/dealer.**
2. **if you detect any of the following conditions, your MINI may have this problem:**
 - **An increase in steering effort may be needed at low vehicle speeds,**
 - **An increase in steering effort may be noticed at the start of the driving cycle,**
 - **A decrease in power assist steering may be noticed during driving, and/or**
 - **A low battery warning message may illuminate in the instrument cluster at engine start.**
3. **If you are not the only driver of this vehicle, please advise all other drivers and passengers of this important information.**

54. The vehicles recalled in the United States are the same models forming part of the Class Cars. They have the same design, same electro-hydraulic power steering system, and were manufactured in the same facility.

55. The recall in the United States occurred after the US National Highway Traffic Safety Administration (“NHTSA”) launched Investigation EA11005. NHTSA’s Office of Defects concluded that a recall was warranted for safety reasons and that the US Extended Warranty Program did not adequately resolve the loss of steering assist failures.

56. The Defendants have not issued a similar recall for the same models sold in Canada, although the Class Cars are subject to the same design defects.

57. At no time have the Defendants notified Class Members to attend at a dealer to have the repair of the affected parts performed, nor have they provided any warning to other drivers and passengers of Class Cars.

58. The Defendants recklessly or negligently chose to ignore the safety of Canadian drivers and the public generally and concealed their knowledge of the defect and the dangers it posed. As described further below, this followed BMW AG’s pattern of conduct of deliberately failing to report vehicle safety issues to authorities and affected members of the public.

59. As a result of the Defendants’ failure to adequately warn, Class Members were exposed and continue to be exposed to potential harm from the design defect.

60. Class Members did not know and could not have known to take precautionary measures against the risk of sudden power steering loss or a car fire.

61. The Plaintiff pleads and relies on the doctrine of discoverability. None of the Class Members knew or could have known of their claim against the Defendants, because the Defendants’ failure to warn made it impossible for the Class to know their Class Cars contained a hidden dangerous defect.

62. Even if a Class Member suffered a loss of power steering or a car fire, Class Members would have had no way of knowing that the cause was the result of a defective design that the Defendants concealed.

Damages

63. As a result of the negligent design, testing, manufacturing, and distribution of the Class Cars, and the ongoing failure to adequately warn the Class, the Plaintiff and the Class have suffered damages, all of which were reasonably foreseeable.

64. The Plaintiff claims the following on behalf of the Class:

- (a) with respect to current owners and lessees of Class Cars, the cost to repair and/or replace (i) the dangerously defective parts to make the Class Cars safe for their intended use; or (ii) the Class Cars that have been damaged or destroyed as a result of a car fire;
- (b) with respect to past and current owners and lessees of Class Cars, the actual monetary expense incurred in connection with repairing or replacing the dangerously defective parts in Class Cars; and
- (c) with respect to all Class Members, the loss suffered as a result of any property damage arising from the sudden and unexpected loss of power steering and/or a car fire.

Waiver of Tort

65. As a result of the Defendants' conduct described herein, Class Members are entitled to elect to waive the tort and to have damages assessed in an amount equal to the gross revenue received by the Defendants or, alternatively, the net income received by the Defendants as a result of the sale of Class Cars.

Punitive Damages are Warranted

66. For several years the Defendants have known of the danger to human life and property posed by the defect. Yet, in breach of their statutory and common law duties, the Defendants failed to issue an adequate warning or to recall the Class Cars due to their overarching concern that proper disclosure and a recall would damage the reputation of their brand and negatively affect worldwide sales and BMW AG's share price.

67. As part of an ongoing pattern of conduct described further below, the Defendants concealed from safety authorities worldwide their knowledge and information about reports of power steering failures and fires arising from the defects, acquired directly and indirectly, from their subsidiaries, affiliates, and authorized dealers worldwide and/or failed to report the defects in a timely manner.

68. As described further below, this pattern of conduct by BMW AG, from 2010 onward, has been identified by and NHTSA and BMW has been penalized in the United States as a result.

69. In 2010, NHTSA opened an investigation TQ 10-006 arising from concerns that BMW had failed to comply with the requirements to timely report safety defects and non-compliance to the US Federal Government, owners, purchasers and dealers in connection with a series of recalls in 2010. That investigation was resolved in February 2012 by a Settlement Agreement whereby BMW North America paid a civil penalty of \$3 Million (US) and BMW AG agreed to change its recall decision making process so that NHTSA, Owners, Purchasers and Dealers are more timely informed.

70. BMW AG's pattern of conduct and corporate culture relating to safety did not change.

71. For the second time in three (3) years, on December 21, 2015, BMW was penalized for failing to meet its obligation to launch recalls and inform consumers in a timely fashion when it discovered a safety defect or non-compliance. NHTSA imposed a \$40 Million (US) civil penalty in connection with investigation AQ 15004. Under the terms of a Consent Order issued to BMW, BMW *admitted* that it violated requirements to issue a timely recall of vehicles that did not comply with minimal crash protection standards to notify owners of recalls in a timely fashion, and to provide accurate information about its recalls to NHTSA.

72. NHTSA publicly stated that BMW has been penalized for failing to meet its obligation to launch recalls and inform consumers in a timely fashion when a safety defect or non-compliance is discovered. The Administrator of the NHTSA stated that BMW must take the opportunity under the Consent Order to reform its procedures and culture to put safety at the top of its priority list.

73. BMW AG has not reformed its pattern of conduct or put safety at the top of its priority list. It has not issued a recall for Class Cars in Canada and has not reported the Tkach car fire, which it has investigated, to regulatory authorities.

74. The Defendants' continuing pattern of conduct and decision to continue to value profits and shareholder return over human lives is deserving of this Court's condemnation. They should be censured by this Court through an adequate award of punitive damages aimed at deterring such conduct and modifying behaviour.

75. The Plaintiffs plead and rely on subrules 17.02(a) [personal property in Ontario], 17.02(g) [tort committed in Ontario], 17.02(h) [damage sustained in Ontario], 17.02(o) [necessary and proper party], and 17.02(p) [corporation carrying on business in Ontario] of the *Rules Civil Procedure*, in serving this claim on BMW AG and BMW North America outside of Ontario without a Court order.

76. The Plaintiff proposes that this action be tried in the City of Toronto as a proceeding under the *Class Proceedings Act, 1992*.

May 8, 2018

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Peter Scott Harris

v.

Bayerische Motoren Werke Aktiengesellschaft et al.

Court File No. CV-14-497479 00CP

PLAINTIFF

DEFENDANTS

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FRESH AS AMENDED STATEMENT OF
CLAIM**

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