

AMENDED THIS 04-Sep-19 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☒ RULE/LA RÈGLE 26.02 (B)
☐ THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE

Court File No. CV-14-497479 00CP

REGISTRAR
SUPERIOR COURT OF JUSTICE

GREFFIER
COUR SUPÉRIEURE DE JUSTICE

"P. Scott Harris"

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 DEFENCE

1. The defendants, Bayerische Motoren Werke Aktiengesellschaft ("**BMW AG**") and BMW Canada Inc. ("**BMW Canada**") (collectively, BMW AG and BMW Canada will be referred to herein as the "**Defendants**"), admit the allegations contained in paragraphs 4 (with the exception of the phrase, "Class Cars", as defined in paragraph 3 of the Fresh as Amended Statement of Claim, which the Defendants deny), paragraph 30 (with the exception of the implication that the so-called "Class Cars" "fail without warning or cause fires", which is denied), paragraph 45, paragraph 50, paragraph 53, and paragraph 72 of the Fresh as Amended Statement of Claim.

2. The Defendants have no knowledge, or insufficient knowledge for the purpose of pleading, of the allegations contained in paragraphs 2, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, and 21 of the Fresh as Amended Statement of Claim.

3. Except as may be indicated otherwise herein, the Defendants deny all of the other allegations contained in the Fresh as Amended Statement of Claim.

The Defendants

4. BMW AG designs and manufactures various models of motor vehicles with the BMW brand and the MINI brand, among others. Contrary to the allegations in paragraph 5 of the Fresh as Amended Statement of Claim, BMW AG does not sell cars worldwide “through its subsidiaries”.

5. BMW Canada is a corporation incorporated under the laws of Canada and is a separate legal entity from BMW AG. BMW Canada distributes motor vehicles in Canada. Contrary to the allegations in paragraph 6 of the Fresh as Amended Statement of Claim, BMW Canada is not an “agent” of BMW AG. BMW Canada purchases said vehicles from BMW AG. BMW Canada then sells the vehicles to motor vehicle dealerships in Canada.

Failure to Meet Test for Certification as Class Action

6. This action does not meet the test for certification of a class action under the *Class Proceedings Act*, 1992 S.O. 1992, C.6.

Defendants Not Negligent

7. Contrary to the allegations in the Fresh as Amended Statement of Claim, the Defendants were not negligent in any respect.

8. All of the relevant parts and workmanship of the vehicles owned or leased by Peter Scott Harris (the “**Harris Vehicle**”) and John Tkach (the “**Tkach Vehicle**”) met or surpassed all Canadian Motor Vehicle Safety Standards and were reasonable, appropriately safe and fit for their intended purposes. Similarly, the vehicles falling within the scope of the term “Class Cars” met or surpassed all Canadian Motor Vehicle Safety Standards and were reasonable, appropriately safe and fit for their intended purposes.

9. The alleged fire in the Tkach Vehicle was not caused or contributed to by any aspect of the design, manufacture or assembly of the Tkach Vehicle, or by any act or omission of the Defendants. Similarly, if the plaintiff, Peter Scott Harris (“**Harris**”), experienced difficulty steering the Harris Vehicle in October, 2010, as alleged in paragraph 8 of the Fresh as Amended Statement of Claim, such alleged difficulty was not caused or contributed to by any act or omission of the Defendants.

10. Rather, the alleged fire in the Tkach Vehicle and the alleged steering difficulty in the Harris Vehicle were caused or contributed to by acts or omissions of John Tkach (“**Tkach**”) and Harris respectively, or by other persons for whom the Defendants are not responsible. Particulars of their negligence include, among other things, the following acts and omissions:

Tkach

- (a) Tkach and others for whom he is responsible including his son, Nicholas, failed to take necessary and proper steps to maintain the Tkach Vehicle in good working order and condition at all times material to this action;

- (b) Tkach and others for whom Tkach is responsible including his son, Nicholas, failed to check and service the parts and operation of the Tkach Vehicle properly or at all;
- (c) Tkach or others for whom Tkach is responsible including his son, Nicholas, treated the Tkach Vehicle in a negligent and abusive manner during the course of their ownership, possession and use of the Tkach Vehicle;
- (d) Tkach altered or permitted others, for whose conduct he is responsible, to alter the power steering system in the Tkach Vehicle such that on the date of the alleged fire the power steering system was not in the same state as it was at the time the Tkach Vehicle left the possession of the Defendants;
- (e) Tkach and his son, Nicholas, failed to exercise due care and skill in their operation of the Tkach Vehicle;
- (f) Tkach knowingly permitted his son, Nicholas, to drive the Tkach Vehicle regularly despite actual or constructive knowledge that Nicholas was an incompetent driver lacking in reasonable care, skill and ability;
- (g) At the time of the events preceding the alleged fire, described in paragraphs 11 and 18 to 21 of the Fresh as Amended Statement of Claim, Tkach's son, Nicholas, was operating the Tkach Vehicle while his ability to do so was impaired by alcohol, drugs, fatigue, stress, extraneous objects and other substances, conditions and factors.

Harris

- (h) Harris, or others for whom Harris is responsible, failed to take necessary and proper steps to maintain the Harris Vehicle in good working order and condition at all times material to this action;
- (i) Harris, or others for whom Harris is responsible, failed to check and service the parts and operation of the Harris Vehicle properly or at all;
- (j) Harris, or others for whom Harris is responsible, treated the Harris Vehicle in a negligent and abusive manner during the course of their ownership, possession and use of the Harris Vehicle;
- (k) Harris altered or permitted others, for whose conduct Harris is responsible, to alter the power steering system in the Harris Vehicle such that on the date of the alleged steering difficulty, the power steering system was not in the same state as it was at the time the Harris Vehicle left the possession of the Defendants.
- (l) At the time of the alleged steering difficulty, Harris was driving the Harris Vehicle while his ability to do so was impaired by alcohol, drugs, fatigue, stress, extraneous objects and other substances, conditions and factors; and
- (m) At the time of the alleged steering difficulty, Harris failed to observe the rules of the road prescribed by the *Highway Traffic Act*, R.S.O 1990, c.H-8.

11. Therefore, the Defendants are not liable for any damages which may have been caused by the alleged fire in the Tkach Vehicle or the alleged steering difficulty in the Harris Vehicle.

12. In the alternative, if this Honourable Court should find that the alleged fire in the Tkach Vehicle or the alleged steering difficulty in the Harris Vehicle were caused or contributed to by any acts or omissions of the Defendants, which is denied, the extent of liability of the Defendants should be reduced in accordance with the degree of fault which may be attributable to Tkach, Harris and any other person. Any liability of the Defendants is limited to any degree of fault which this Honourable Court may apportion to their acts and omissions only.

13. The Defendants plead and rely upon the provisions of the *Negligence Act*, R.S.O. 1990, c.N-1.

The “Class Cars” Do Not Contain a Dangerous or Common Defect

14. Contrary to the allegations in paragraphs 22 to 26 of the Fresh as Amended Statement of Claim, neither the Tkach Vehicle, the Harris Vehicle, nor any of the vehicles falling within the scope of the phrase “Class Cars”, contains a “dangerous defect” in the power steering system.

15. In 2011 and 2012, BMW Canada engaged in communications with Transport Canada, the safety regulator of motor vehicles in Canada, relating to the power steering assist function in certain MINI Cooper vehicles from the 2002 to 2005 model years. The matter which BMW Canada investigated related to the potential for some vehicles to possibly lose the power steering assist function. BMW Canada became aware of this through its internal quality control analyses and processes. BMW had received a small number of consumer reports about the loss of power steering assist. Only one report involved an alleged accident related to the loss of power steering assist, and the alleged accident was minor in nature. Moreover, none of the reports involved any injuries or fatalities associated with the loss of power steering assist.

16. The potential condition of certain components identified by the Defendants through their investigation did not present a fire risk or an unreasonable risk to safety, contrary to the allegations in the Fresh as Amended Statement of Claim. The Defendants were not aware of any verified instance where such condition had resulted in a vehicle fire. Rather, the few instances of heat activity involved, at most, localized smouldering or possibly a small flame restricted to the area of the power steering pump, connector and associated wiring.

17. If the said condition were to manifest itself, the power steering assist function would no longer be available, but the driver would still be able to maintain steering control, as the vehicle would revert to a manual steering mode, which simply requires increased driver effort.

18. BMW Canada determined that this condition potentially existed in some, but not all, 2002-2005 MINI Cooper Hatch and MINI Cooper Convertible vehicles assembled during the following date range:

2002-2005 MINI Cooper Hatch, assembled December 17, 2001-February 9, 2005
2005 MINI Cooper Convertible, assembled February 19, 2004-February 9, 2005

19. As a result of this investigation, BMW Canada initiated a consumer notification and special extended warranty program. BMW Canada contacted the registered owners/lessees of the vehicles in the above-noted range to inform them of this matter and to offer the owners/lessees of the vehicles a special extended warranty coverage of 12 years or 200,000 km, whichever occurs first.

20. If a vehicle falling within the scope of the extended warranty program were to experience a loss of power steering assist, the owner would be entitled to take his/her vehicle to

an authorized MINI retailer for diagnosis and applicable repairs under this special extended warranty at no cost to the vehicle owner.

21. Contrary to the allegation in paragraph 32 of the Fresh as Amended Statement of Claim, MINI Cooper vehicles assembled subsequent to February 9, 2005 (the end date of the date range to which the extended warranty program applies) are not potentially prone to the condition covered by that program. The Tkach Vehicle was assembled on February 10, 2005. As such, the Tkach Vehicle did *not* have the potential condition which could possibly lead to loss of the power steering assist function.

22. Consistent with the Defendants' estimate at the time of initiation of the extended warranty program, only a small number of vehicles have required the warranty repair, contrary to the allegations in the Fresh as Amended Statement of Claim that the so called "Class Cars" contain a "common dangerous defect".

23. Further, the design of the material components of the power steering system of the vehicles assembled subsequent to February 9, 2005 is materially different from that of the vehicles covered by the extended warranty. As such, there is no potential for any commonality among purported "class members" who own vehicles from the 2005 (post-February 9, 2005), 2006, 2007 and 2008 model years.

Reasonable Testing, Investigation and Response by Defendants

24. Contrary to the allegations in paragraphs 33-36 of the Fresh as Amended Statement of Claim, BMW AG's testing of the vehicle models to which this action relates was reasonable, appropriate and in compliance with applicable legal standards.

25. The Defendants discovered the potential condition in the power steering system, described above, through diligent and ongoing post-sale monitoring processes in a reasonably timely manner. Upon determining the potential condition, the Defendants took appropriate, timely and responsible steps to address the situation.

26. Similarly, contrary to the allegations in paragraphs 41 to 44 of the Fresh as Amended Statement of Claim, the Defendants provided reasonable, appropriate and timely notice of the potential condition to owners of the affected vehicles, as well as to Transport Canada.

27. BMW Canada was engaged in close communication with Transport Canada in relation to the development of its consumer notification and extended warranty program. BMW Canada provided the relevant data and facts in its possession to Transport Canada. Transport Canada never opposed BMW Canada's plan to initiate the consumer notification and extended special warranty program. At all times, BMW Canada acted in compliance with the *Motor Vehicle Safety Act*, S.C. 1993 c.16, contrary to the allegation in paragraph 44 of the Fresh as Amended Statement of Claim.

28. Contrary to the allegation in paragraph 46 of the Fresh as Amended Statement of Claim, the content and timing of the consumer notification and extended warranty program was reasonable and appropriate in the circumstances. Among other things, it was not necessary or appropriate to issue a warning about a risk of fire, as alleged in paragraph 47 of the Fresh as Amended Statement of Claim, because, based on the factual data compiled by the Defendants and Transport Canada, there was no reasonably foreseeable risk of fire associated with the potential condition.

29. Similarly, a recall of the vehicles was not warranted in the circumstances, contrary to the allegation in paragraph 49 of the Fresh as Amended Statement of Claim.

Recall in the United States of America

30. Similar to the Defendants, BMW of North America (“**BMW NA**”) has always maintained the view that the potential loss of the power steering assist function, and any potential for localized smouldering in the vicinity of the power steering pump, did not present an unreasonable risk to safety. Accordingly, similar to BMW Canada, in 2013 BMW NA implemented a customer notification and extended warranty program in respect of this matter. National Highway Traffic Safety Administration (“**NHTSA**”) did not disagree with BMW NA’s assessment that the extended warranty program, as opposed to a recall, was the appropriate form of corrective action in the circumstances.

31. Subsequently in 2015, NHTSA changed its mind about that matter and requested that BMW NA conduct a recall of the vehicles to which the extended warranty program applied. In deference to NHTSA’s clearly expressed wish, BMW NA issued a recall of the said vehicles.

32. At that time, BMW Canada notified Transport Canada of BMW NA’s voluntary recall of the said vehicles in the United States. BMW Canada communicated to Transport Canada that it remained of the view that there was no unreasonable risk to motor vehicle safety, and since BMW Canada had disseminated to potentially affected vehicle owners/lessees notice of this matter in 2012, BMW Canada did not intend to change its existing approach for Canada. Transport Canada accepted BMW Canada’s explanation and approach.

Claims of Putative Class Members Breach Limitation Periods

33. The claim of the Plaintiff and each putative class member is subject to the limitation period prescribed by the law respecting limitation periods in his/her province of residence at the time that the event giving rise to his/her claim occurred. The limitation period applicable to the claim by Harris expired before or in October 2012. Therefore, the claim of Harris should be dismissed summarily.

34. Similarly, the claims of all putative class members resident in Ontario who allegedly experienced an issue or failure in the power steering system of their vehicles more than two years prior to the date this action was issued (i.e., alleged failures/issues that occurred on or before January 29, 2012) are time-barred as having been brought after the limitation period prescribed by the *Limitations Act 2002*, S.O. 2002, c. 24, Sch B had expired. Thus, all such claims should be dismissed.

35. With respect to the putative class members who reside in provinces and territories other than Ontario and who allegedly experienced an issue or failure in the power steering system of their vehicles, the Defendants plead and rely upon the limitations period statutes listed below; the claim of each such putative class member is time-barred if the alleged issue or failure occurred on or before the date listed below in relation to each individual's corresponding jurisdiction of residence. Determining this threshold issue for the putative class will require an individualized assessment of each individual class member's claim.

-Alberta: *Limitations Act*, R.S.A. 2000, c. L-12 (January 29, 2012)
-British Columbia: *Limitation Act*, SBC 2012, c 13 (January 29, 2012)
-Manitoba: *Limitation of Actions Act*, CCSM c L150 (January 29, 2008)
-New Brunswick: *Limitation of Actions Act*, SNB 2009, c L-8.5 (January 29, 2012)
-Newfoundland & Labrador: *Limitations Act*, SNL 1995, c L-16.1 (January 29, 2012)
-Northwest Territories: *Limitation of Actions Act*, RSNWT 1988, c L-8 (January 29, 2008)
-Nova Scotia: *Limitation of Actions Act*, RSNS 1989, c 258 (January 29, 2008)
-Nunavut: *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8 (January 29, 2008)
-Prince Edward Island: *Statute of Limitations*, RSPEI 1988, c S-7 (January 29, 2008)
-Quebec: Civil Code of Québec, LRQ, c C-1991 (January 29, 2011)
-Saskatchewan: *Limitations Act*, SS 2004, c L-16.1 (January 29, 2012)
-Yukon: *Limitation of Actions Act*, RSY 2002, c 139 (January 29, 2008)

Lack of Recoverable Damages

36. Neither the Plaintiff nor any of the other putative class members has suffered any loss or damages as a result of any conduct of the Defendants.

37. In the alternative, if the Plaintiff or any other putative class members have suffered any damages, which is denied, the Plaintiff and/or any members of the putative class have not suffered the damages claimed in the Fresh as Amended Statement of Claim, and the Defendants put the Plaintiff to the strict proof thereof.

38. Any and all damages claimed by the Plaintiff and/or any members of the putative class are excessive, remote and/or otherwise not recoverable at law.

39. Further, if any of the putative class members have suffered any injuries as alleged in paragraph 64(c) of the Fresh as Amended Statement of Claim, any such alleged injuries were temporary in nature and not permanent. Through the passage of time, and with appropriate medical treatment, such injuries have already been fully resolved, or will be fully resolved.

40. Further or in the alternative, any putative class members who have suffered alleged injuries had a history of pre-existing injuries, illnesses or conditions which pre-dated any

event giving rise to the alleged injuries to which this legal proceeding relates. All or some of the injuries alleged in this action arise out of and relate to the said pre-existing injuries, illnesses or conditions.

41. Further or in the alternative, all or some of the alleged injuries incurred by the putative class members are attributable to events, injuries, illnesses or conditions which occurred subsequent to the events to which this legal proceeding relates.

42. Further, and in any event, if the Plaintiff and/or any of the putative class members have suffered any injuries or property damage attributable to any event involving the power steering system of the so-called "Class Cars", they have received, or are entitled to receive, various monetary and other collateral benefits including, among other things, benefits provided for in the insurance legislation of their respective province of residence. Any damages award to which the Plaintiff or any of the putative class members may be entitled in this action should be reduced to the extent of all such benefits that have been paid, or which are available, to them.

43. Further, and in the alternative, if the Plaintiff or any of the putative class members have incurred any legally recoverable damages, which is denied, the Plaintiff and putative class members have failed to take any and all reasonable and appropriate steps to mitigate their damages.

No Waiver of Tort

44. The claim for a "waiver of tort" remedy is legally invalid. The Plaintiff has no legal right to the remedy claimed in paragraph 65 of the Fresh as Amended Statement of Claim.

No Basis for Plaintiff's Claim for Punitive Damages

45. The allegations contained in paragraphs 58 and 66 to 74 of the Fresh as Amended Statement of Claim are false, scandalous and/or irrelevant to this action. As particularized above, the Defendants acted reasonably, appropriately and in compliance with all applicable legal duties, and in accordance with Transport Canada's requirements, at all material times. The Defendants did not choose "to value profits and shareholder return over human lives", contrary to the heinous allegation in paragraph 74 of the Fresh as Amended Statement of Claim. There is no basis, in law or in fact, for an award of punitive damages in this action.

46. Based on the foregoing, this action should be dismissed, with costs to the Defendants. Further, given the unwarranted and egregious allegations in the Plaintiff's claim for punitive damages, which is morally equivalent to an allegation of fraud, the Defendants request an award of their costs from the Plaintiff on a full indemnity basis.

June 3, 2019

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**FRESH AS AMENDED
STATEMENT OF DEFENCE**

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