

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

JOHN TKACH, PETER SCOTT HARRIS and DYLAN MILMINE

Plaintiffs

- and -

BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT,
BMW OF NORTH AMERICA, LLC and BMW CANADA INC.

Defendants

Proceedings under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM
Notice of Action issued on January 30, 2014**

1. The Plaintiffs claim on their own behalf and on behalf of all members of the Class of persons described in paragraph 5 below:
 - (a) an Order pursuant to the *Class Proceedings Act, 1992* certifying this action as a class proceeding and appointing John Tkach as representative plaintiff or the plaintiffs as representative plaintiffs for the Class and any appropriate sub-class thereof;
 - (b) damages for repair and replacement 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 \$10,000,000 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 Plaintiffs

2. The Plaintiff John Tkach is a resident of the Province of Ontario. He is the owner of a 2005 MINI Cooper which he purchased new for his son, Nicholas Tkach (“**Nicholas**”), from MINI Cooper Downtown in Toronto, Ontario.

3. 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.

4. The Plaintiff Dylan Milmine is a resident of the Province of Alberta. He is the owner of a 2003 MINI Cooper S which he purchased used in the State of Florida in the United States of America in October 2012.

The Class

5. 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: (1) owners; (2) lessees; (3) operators of; and/or (4) passengers in:

- (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 the estates, executors, successors and assigns of them.

The Defendants

6. 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.

7. BMW AG distributes and sells Class Cars worldwide through its subsidiaries, including the Defendants BMW of North America, LLC (“**BMW North America**”) and BMW Canada Inc. (“**BMW Canada**”).

8. BMW North America is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business located in Woodcliff Lake, New Jersey. It is a subsidiary of BMW AG. At all material times, BMW North America was involved in the sale and distribution of Class Cars in Canada and the United States of America.

9. As 2002 and 2003 model year Class Cars were only available for purchase in North America in the United States of America, BMW North America was the exclusive distributor of 2002 and 2003 model year Class Cars purchased by Class Members, who purchased these cars directly from BMW North America’s authorised dealers in the United States of America in 2002 and 2003.

10. BMW North America is also the distributor of Class Cars that Class Members purchased used in the United States of America, either directly from BMW North America’s authorized dealers as part of their “pre-owned” inventory or from third parties.

11. 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.

12. MINI Downtown and MINI Ottawa East are authorised dealers of BMW AG, BMW North America, and BMW Canada.

Tkach's 2005 MINI Cooper Car Fire

13. At around 5:00 p.m. on Friday August 9, 2013, Nicholas' 2005 MINI Cooper was parked in the driveway of the Tkach family home in Toronto. The vehicle was turned off. The key was not in the ignition. Nicholas was inside the house, having recently returned home from running errands in the car.

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

15. Nicholas called "911" and ran outside.

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

17. The fire effectively destroyed the 2005 MINI Cooper.

18. 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.

19. 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

20. 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 manoeuver. None of the warning or indication lights on the dashboard/instrument panel were on.

21. Nicholas pulled the car to the side of the road and contacted MINI Downtown to seek advice and place a service call.

22. 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.

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

Harris' Power Steering Failure

24. In October 2010, Mr. Harris experienced an issue with his power steering in his 2003 MINI Cooper. He attended his dealership, MINI Ottawa East, which replaced the power steering pump cooling fan and charged Mr. Harris for the replacement.

The Class Cars Contain a Dangerous Defect

25. 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.

26. 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.

27. 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.

28. 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.

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

BMW AG Negligently Designed the Class Cars

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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

36. 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.

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

38. 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.

39. 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

40. 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.

41. 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

42. 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 and the United States of America.

43. The Defendants and their authorized dealers negligently distributed and sold the Class Cars containing the dangerous defect throughout Canada and the United States of America, which were purchased by the Class.

The Defendants Failed to Warn the Class

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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 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.

50. 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.

51. 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.

52. 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.

53. The Defendants recklessly or negligently chose to ignore the safety of drivers and the public generally and concealed their knowledge of the defect and the dangers it posed.

54. 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.

55. 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.

56. The Plaintiffs plead and rely 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.

57. 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

58. 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 Plaintiffs and the Class have suffered damages, all of which were reasonably foreseeable.

59. The Plaintiffs claim 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 the dangerously defective parts to make the Class Cars safe for their intended use;
- (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 personal injury and/or property damage arising from the sudden and unexpected loss of power steering and/or a car fire.

Waiver of Tort

60. 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

61. 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.

62. The Defendants concealed from safety authorities worldwide their knowledge and information about reports of power steering failures and fires arising from the defect, acquired directly and indirectly, from their subsidiaries, affiliates, and authorized dealers worldwide.

63. The Defendants' choice 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.

64. 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.

65. The Plaintiffs propose that this action be tried in the City of Toronto as a proceeding under the *Class Proceedings Act, 1992*.

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