

Court File No. CV-14-497479 00CP

**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**

**STATEMENT OF DEFENCE OF  
BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT  
AND BMW CANADA INC.**

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 6 (with the exception of the phrase, "Class Cars", as defined in paragraph 5 of the statement of claim which the Defendants deny), the first two sentences of paragraph 8 and the first two sentences of paragraph 11 of the statement of claim.
2. The Defendants have no knowledge, or insufficient knowledge for the purpose of pleading, of the allegations contained in paragraphs 2, 3, 4, 13, 14, 15, 16, 17, 20, 21, 22, 23 and 24 of the statement of claim.

- 2 -

3. Except as may be indicated otherwise herein, the Defendants deny all of the other allegations contained in the 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 7 of the 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 11 of the 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.

### **No Jurisdiction over BMW of North America, LLC**

6. The defendant, BMW of North America, LLC (“BMW NA”), is not a proper party to this legal proceeding. There is no real and substantial connection between Ontario and the plaintiffs’ claim against BMW NA. Nor is there any cause of action against BMW NA. Among other things, BMW NA does not have any physical presence in Ontario (or elsewhere in Canada); BMW NA does not conduct business in Ontario (or elsewhere in Canada); contrary to the allegation in paragraphs 8 and 9 of the statement of claim, BMW NA did not distribute or sell in Ontario (or elsewhere in Canada) any of the cars falling within the scope of the so-called “Class Cars”, as defined in paragraph 5 of the statement of claim; and BMW NA did not design or manufacture the plaintiffs’ vehicles or any of the vehicles falling within the scope of the phrase, “Class Cars”, as defined in paragraph 5 of the statement of claim.

- 3 -

7. Consistent with that, if the plaintiff, Dylan Milmine ("**Milmine**"), purchased a 2003 MINI Cooper S in the State of Florida as alleged in paragraph 3 of the statement of claim, Milmine did not purchase it from BMW NA, and BMW NA did not distribute that vehicle in Canada. Similarly, contrary to the allegations in paragraphs 9 and 10 of the statement of claim, BMW NA did not sell any of the "Class Cars" to any of the proposed class members.

#### **Failure to Meet Test for Certification as Class Action**

8. 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**

9. Contrary to the allegations in the statement of claim, the Defendants were not negligent in any respect.

10. All of the relevant parts and workmanship of the vehicles owned or leased by the plaintiffs (the "**Tkach Vehicle**", the "**Harris Vehicle**" and the "**Milmine Vehicle**", respectively) 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.

11. 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 "an issue with his power steering in his 2003 MINI Cooper" in October, 2010, as baldly alleged in

- 4 -

paragraph 24 of the statement of claim, such alleged "issue" was not caused or contributed to by any act or omission of the Defendants.

12. Rather, the alleged fire in the Tkach Vehicle and the alleged "issue" 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;

- 5 -

- (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 13 to 23 the 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

- 6 -

alleged power steering "issue", 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 power steering "issue", 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 power steering "issue", Harris failed to observe the rules of the road prescribed by the *Highway Traffic Act*, R.S.O 1990, c.H-8.

13. 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 power steering "issue" in the Harris Vehicle.

14. In the alternative, if this Honourable Court should find that the alleged fire in the Tkach Vehicle or the alleged "issue" 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.

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

- 7 -

**The “Class Cars” Do Not Contain a Dangerous Defect**

16. Contrary to the allegations in paragraphs 25 to 29 of the statement of claim, neither the plaintiffs’ vehicles nor any of the vehicles falling within the scope of the phrase “Class Cars” contains a “dangerous defect” in the power steering system.

17. In 2011 and 2012, BMW Canada engaged in communications with Transport Canada, the regulator of motor vehicles in Canada, relating to the power steering assist feature 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.

18. 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 statement of claim. The Defendants were not aware of any instance where such condition had resulted in a vehicle fire. Rather, the few instances of heat activity involved, at most, localized smouldering restricted to the area of the power steering pump, connector and associated wiring.

19. If the said condition were to manifest itself, the power steering assist feature 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.

- 8 -

20. BMW Canada determined that the 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

21. 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 vehicles a special extended warranty coverage of 12 years or 200,000 km, whichever occurs first.

22. 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, which would install the redesigned component of the power steering system at no cost to the vehicle owner.

23. Contrary to the allegation in paragraph 35 of the 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 lead to loss of the power steering assist function.

24. 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



- 9 -

the allegations in the statement of claim that the so called "Class Cars" contain a "common dangerous defect".

25. 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**

26. Contrary to the allegations in paragraphs 36-39 of the 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.

27. 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.

28. Similarly, contrary to the allegations in paragraphs 44 to 47 of the 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.

29. 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

- 10 -

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 47 of the statement of claim.

30. Contrary to the allegation in paragraph 49 of the 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 50 of the 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.

31. Similarly, a recall of the vehicles was not warranted in the circumstances, contrary to the allegation in paragraph 52 of the statement of claim.

### **Claims of Putative Class Members Breach Limitation Periods**

32. The claim of each of the plaintiffs 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.

33. 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

- 11 -

claims should be dismissed. 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**

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

35. In the alternative, if the plaintiffs or any other putative class members have suffered any damages, which is denied, the plaintiffs and/or any members of the putative class have not suffered the damages claimed in the statement of claim, and the Defendants put the plaintiffs to the strict proof thereof.

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

- 12 -

37. Further, if any of the putative class members have suffered any injuries as alleged in paragraph 59(c) of the 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.

38. 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.

39. 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.

40. Further, and in any event, if the plaintiffs 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 "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 plaintiffs 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.

41. Further, and in the alternative, if the plaintiffs or any of the putative class members have incurred any legally recoverable damages, which is denied, the plaintiffs and

- 13 -

putative class members have failed to take any and all reasonable and appropriate steps to mitigate their damages.

#### **No Waiver of Tort**

42. The claim for a “waiver of tort” remedy is legally invalid. The plaintiffs have no legal right to the remedy claimed in paragraph 60 of the statement of claim.

#### **No Basis for Plaintiffs’ Claim for Punitive Damages**

43. The allegations contained in paragraphs 61 to 63 of the statement of claim are false and scandalous. As particularized above, the Defendants acted reasonably, appropriately and in compliance with all applicable legal duties 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 63 of the statement of claim. There is no basis, in law or in fact, for an award of punitive damages in this action.

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

- 14 -

July 4, 2014

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Defendants

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