

e-newsletter e-newsletter

automotive law



Associate Member
of the MDA of AB

mcmillan
lawyers

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fore!

Or four....as in golf, scotch, candy buffet and sun! ...Could there be a better way to spend a Monday? It was an extremely enjoyable day at the MDA of Alberta Golf Tournament. McMillan LLP sponsored the 11th hole, aka the "beat-the-lawyer" contest, which, not surprisingly, many of you did just that! Though my golf game may need some fine-tuning, it was a pleasure getting to meet many of you.

I hope you enjoy the fall edition of the newsletter and feel free to submit any questions for the Q&A section you may have. As well, congratulations to the winners of the "nicer" and "nicest" bottles of Scotch...I'd be happy to do some quality control before we award them. Lastly, I would like to thank Maria and Carlyn for their tireless energy...although I'm not sure how much of that was sugar related or just natural enthusiasm. On behalf of all of us, we wish to extend a special thanks to the MDA of Alberta for organizing such a great tournament. We had a great time and look forward to seeing you again (and maybe even beating a few swings) next year!

Sincerely,

Andrew

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let's talk product liability claims

Our last newsletter explored how a civil suit unfolds. We identified the two main parts of a dispute: liability and damages. We outlined some practical considerations for civil lawsuits.

In this issue we explore one of the most common kinds of claims advanced against dealerships: product liability claims. We will also look at the usual bases for bringing them. A product liability claim (or "products" to those who practice in the area) is based upon a product causing damages for failing to perform as it should. Products claims arise when a consumer purchases a product expecting it to work a certain way, and the product does not. There are a number of ways that this can happen, but four common ones are:

1. a breach of an express term of a contract;
2. a breach of an implied term of a contract;
3. a product's failure to function as intended; and
4. a breach of a legislative requirement.

An easy example of an express term in a contract is an extended warranty. A customer agrees to purchase additional coverage for prescribed parts of a vehicle in the event that they fail to function within the warranty's parameters. The term of the contract calls for the transmission to be free from defects for the first 3 years or 60,000 kilometers, or it will be repaired without cost to the customer. If the transmission fails and the warranty is not honored, the customer can point to the words on a page that give rise to its claim.

A products claim arising from a breach of an implied term can be described as something that is common sense. It is a term that does not appear in the language of the agreement, but that is of such fundamental importance that the agreement does not make commercial sense without it. For example, when you order a pint of draft beer you may not specify that it will come in a glass, but it is likely an implied term, since the alternatives (putting your head under the tap, cupping your hands and trying not to spill) do not make commercial sense. We do not expect most of the things we buy to explode, poison us or wear out immediately. Even if there is not a clear written term in a contract that a chair will not collapse, a flat screen television will stop working about 10 hours of watching, or that a new vehicle will not burst into flames when it is parked in an empty garage, these things are expected. It makes no sense for a consumer to buy a chair that one cannot sit on, a television that does not display programs or a vehicle that burns the owner's house down.

Those are simple examples of breaches of implied terms. They can also be nuanced. Every recent truck commercial contains fine print qualifying what is being portrayed. A truck is not supposed to break, but while it likely makes commercial sense that a truck is sturdy and can handle a day's work, that does not mean it can function as one of the vehicles seen in *The Expendables* franchise. The bigger a leap of common sense an implied term claim takes, the less likely it is to succeed.

Examples of a product's failure to function as intended are a leaky water bottle or a roof rack that rips off if anything is attached to it. Naturally, the roof rack exists so that the driver can affix items to it and the water bottle is intended to store water. That does not mean that the roof rack has to be indestructible, but only that it is capable of functioning as intended. These claims commonly occur when a customer buys a product and the agreement contains certain specifications. If I buy a ladder that expressly states it has a working load of 400 lbs., and the ladder breaks well below that threshold, that gives rise to a product liability claim. This is similar to an express term of the contract, but the key difference is whether the exact specification was mentioned in the contract. When someone goes to a hardware store and buys a ladder, (s)he rarely says "I agree to buy this ladder for the listed price on the condition that it has a working limit of 400 pounds." The customer buys the ladder saying, at most, "I'll take this one." But if the ladder is clearly rated to work a certain way, and it fails to, that likely constitutes a failure to work as intended and gives rise to a products claim.

We saved the easiest one for last. If there is a law in force that requires new vehicles to have a certain safety feature, and after the requirement comes in force a new vehicle is sold without it, that creates potential liability. This is highly unlikely to happen because a manufacturer did not get the memo that seatbelts and airbags are required in new vehicles. It is more likely to happen as a result of after-market modifications. You will face potential liability if your employees install media components that compromise a vehicle's safety features.

this issue's tip!:

As a successful dealership, you enter into various service agreements that make it possible for you to run your business. Pay attention to the termination provisions in these agreements! There is a basic distinction between fixed term contracts (36 months, and then it expires on its terms) and indefinite term (month to month) contracts. As you've likely experienced, sometimes these commercial relationships don't work out. Then what? It's important to be conscious of your right to terminate a service agreement. Industry practices may require that you agree to certain conditions to terminate the agreement, but make sure that you do so consciously.

questions?

Send your questions or topic suggestions for upcoming newsletters to:

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about this newsletter

The McMillan Automotive Law e-newsletter is a quarterly publication designed to keep new vehicle Owners, Presidents, Vice-Presidents, Dealer Principals, General Managers and Sales Managers in the know about legislative changes that may affect your business, as well as updates and developments relevant to your industry, and general legal tips associated with running a busy automobile dealership, such as:

- Litigation matters – what to do when legal issues arise or when faced with a lawsuit.
- Legislation or regulatory changes – to avoid legal pitfalls and minimize your risk.
- Other issues affecting your dealership.

I hope you find this e-newsletter useful. To sign up or if you have any feedback, topic suggestions or questions you'd like to submit in a future issue, please feel free to send me an email at: andrew.stead@mcmillan.ca. As well, feel free to forward this to your friends or colleagues that you think this may interest!

Thanks for reading and have a great fall!

Andrew Stead

about the author



Andrew Stead, Andrew Stead, Partner, is a lawyer at McMillan LLP practicing in commercial dispute resolution and regulatory law. He is a member of McMillan's automotive group and has acted for a number of car dealerships and manufacturers, including contractual disputes, product liability claims and employment matters. McMillan is a national business law firm with considerable experience providing the automotive industry with advice on topics from competition, cross-border trade to financial products, and also dispute resolution.