

spring 2014

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# what happens when you defend a product liability claim?

In last fall's newsletter we explained what gives rise to a product liability claim. When a product liability, breach of contract or negligence claim is served on you, what will you wish you had done to best protect yourself? As a new vehicle dealer, manufacturing and warranty claims are likely to be defended by the manufacturer, even though it is common for the dealer to be included in the lawsuit. New vehicle dealers are likely to be carrying the water in a lawsuit when the allegations relate to after-market work that was done on a vehicle, repairs, service or warranty work. Essentially any step where your employees worked on a vehicle on your premises can give rise to a potential claim that you will have to defend.

One of the biggest limitations in our legal system is simple: our system is not equipped to deal with things that happened; it is only equipped to deal with things that someone *can prove* happened. Alberta judges do their best to apply the law and resolve disputes fairly. But in every instance, the presiding judge was not there when things went sideways. All that a judge can do is listen to

the parties, review the physical and documentary evidence, listen to expert opinions, weigh overall credibility and apply the law. If one party lacks the evidentiary foundation to support their arguments, that can be the difference between winning and losing.

Here is some good news: in these kinds of disputes you will be the defendant. Plaintiffs (the party that starts the lawsuit) have the onus of proving their claim. In other words, if things end in a tie the lawsuit is dismissed and you win. If neither side has any evidence the result is likely going to be in the defendant's favour. But that doesn't mean you want to bank on the plaintiff having a lack of evidence. No-one goes through the business day planning for unknown lawsuits. Still, since you don't know in advance which customer may sue you, the best practice is to take practical steps to protect your business for when these attacks come, without hampering the reason you are here in the first place: to keep an already successful business model functioning efficiently.

One of the things that hinder our judicial system is that witnesses are always asked about events that happened sometime in the past. In some cases “the past” can be measured in weeks or months, but it’s usually measured in months and years. Human memories are fragile and imperfect. There are academic journals detailing how unreliable memory is—specifically how susceptible we are to persuasion and how if a person is told something happened (s)he can subsequently honestly believe that (s)he remembers it happening. It’s a twist on the George Constanza line “Jerry, just remember. . .it’s not a lie if you believe it.” The best way to avoid these pitfalls is to rely on more than human memory.

Hopefully you have never been on the receiving end of police testimony. For most people any interaction with police is memorable—ideally it is a very rare occurrence so it sticks out in one’s mind. Police officers are trained to keep detailed notes which they refer to when giving testimony. Someone may not remember a specific, long ago incident in any detail. One may not even remember taking notes in a particular situation—after all, time passes, and whether it’s a police officer, a mechanic, or a sales representative in your parts department, everyone’s job has some amount of daily routine. By its nature, one particular moment in a regular routine is unlikely to be memorable. Someone who works on over a thousand vehicles a year probably can’t remember working on a particular pick-up 15 months ago. There is a solution and it doesn’t matter if something happened six days ago or six years ago. Someone can say I know that I went through a particular process and took notes in a specific way because that is my practice and I do it the same way every single time.

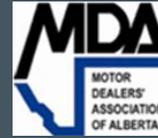
The key steps for you to preserve the evidence you will need in when defending a claim:

- create a policy and a form that your employees use when customers check-in for maintenance or repairs, or when they purchase after-market products. Make sure your forms identify the benefits and potential drawbacks of the product or service being purchased;
- train your staff! The greatest tool in the world is useless if it stays in the toolbox. Your forms are useless if your staff don’t use them every time. The best reason to have staff that consistently follow your policies is that it’s good for business. But an added benefit is that a person who can’t remember what happened on specific day can still talk about the practice that person always follows;
- keep things—especially when you learn that there might be a problem. A customer rarely runs to the courthouse after the first sign of a problem. The usual process is a back-and-forth which most of time gets the problem solved. But as part of your training, make sure your staff understand that at the first sign of a problem it’s better to document more, not less. If there is a component that isn’t working, take some pictures. If there is a part that did not work, keep it if you can.

There is a joke that lawyers can turn into the “sales reduction department”. Obviously, you are reading this because you have a successful business. We are not suggesting any kind of wholesale change to your already successful business model. The suggestions in this newsletter dovetail with good customer service that makes a business thrive. Keeping records and having uniform policies benefit just as much in peacetime as they do in wartime. But if the storm clouds come, you will be much better protected if you can prove what did happen.

# e-newsletter e-newsletter

automotive law



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## this issue's tip!:

Make sure your staff explain everything about a product or service before the customer agrees to pay for it. The sensors that detect objects behind a vehicle may not detect an overhanging obstruction. A party can't change the terms of a contract after the bargain is formed, so make sure customers are making informed decisions understanding what they are getting and what they are not getting.

### 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](mailto: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 see you at the MDA Golf Tournament!

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.

### a cautionary note:

This newsletter provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.