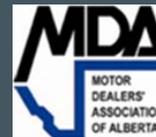


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In this Issue...

Not As Seen On Television	1
This Issue's Tip	3
About this Newsletter	4
About the Author	4

Not As Seen On Television

As any sports fan knows, the game looks really easy on TV. Whether it's Phil Mickelson hitting a wedge, Pedro Martinez pitching or LeBron James doing whatever he seemingly wants, the pros make it seem effortless. As every golfer knows, the game is actually really hard and there is a reason we have our day jobs. While I don't have firsthand experience, I'm confident that working at a hospital isn't as steamy as it seems on television, either. Since we all learn from television, this edition of our newsletter highlights some common television-based misconceptions about how lawsuits actually unfold.

In real life, lawsuits are not as exciting, and are rarely as fulfilling, as they appear on television. While being in the courtroom is fun for lawyers, cases are *very* rarely won or lost because of a

brilliant idea or gotcha moment that a lawyer delivers in the courtroom. Just like a football team practices and schemes all week for Sunday afternoon, in trial the real work and the great ideas come before the walk into the courtroom. If you're in a dispute and your lawyer tells you there is a problem in your case, don't—don't—hope for the kind of outcome you see on television. Bad cases don't get better once you enter a courtroom.

This is true even if you didn't do anything wrong. One of our common refrains is that our legal system is not designed to deal with what happened; our legal system is designed to deal with what someone *can prove* happened. You may have done everything properly, but if you cannot prove that you did, a court may not be able to rule in your favour. Whatever key facts underpin your

case, you have to be able to prove them on a balance of probabilities. Oratory doesn't overcome a solid expert report, pictures of a problem, or documents that show escalating employee discipline.

Plus, there are some key differences in how lawsuits unfold in the United States and how they do in Canada. Here is something that is a jurisdictional difference, not a case of television exaggerating reality for entertainment value: in the United States a party in a lawsuit can question (depose) any witness under oath. In Alberta, only a party to the action—which for companies, includes employees or contractors—can be questioned under oath. This can be very important in situations where a bystander is a key witness. One of the benefits to questioning a party under oath is that we get to see that witness's evidence in a transcript and before trial. That gives a party the certainty about what the evidence will be, or the ability to impugn a witness if (s)he changes stories. But, if a key witness isn't a party to the lawsuit, the lack of a transcript increases the risk at trial.

Another important difference—in real life judges actually care about the rules of evidence and procedural requirements. Judges have senses of humour, but they are not controlled by them during

business hours. You might be charming and a popular wedding MC amongst your friends. Charisma is great in Hollywood, but it will not overcome provable facts or legal principles in a courtroom. Going to trial is not show business.

Our last point is critical for you to keep in mind. Just as we often see "minor" gunshot wounds on television, few want to watch the less pleasant parts of an enterprise. Whether it's the cost of living in Manhattan in *Friends* or the ironic secret that no-one ever got drunk on *Cheers*, most shows gloss over the less pleasant aspects of life. Television doesn't tend to focus on what it costs to litigate a civil dispute, but — trust us — it's an expensive process. As we've noted in previous newsletters, very few lawsuits make it all the way to trial, and the cost of getting there is a primary reason for settlement. Some legal issues make an economic assessment difficult —custody of children and the potential loss of one's liberty are two of them. But in commercial litigation, money is usually at issue, and it's important to understand what it costs. We always want clients to make informed decisions, and barring intangible issues, it does not make economic sense—or common sense—to spend \$100 trying to recover \$50.

This Issue's Tip

Hopefully this edition hasn't been too much of a killjoy, but if the scenarios we've outlined do not sound like much fun, that's the point. You never know in advance when a lawsuit will come. Do your best to be organized, follow your policies and be realistic when disputes arise. If everything were as easy as it looks on TV, I'd be playing in the U.S. Open, not watching it.

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!

Andrew Stead

About the Author



Andrew Stead 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.