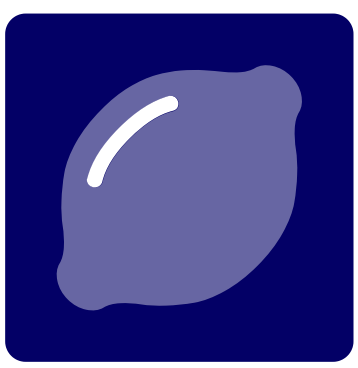
Avoiding Lemon Vehicles

Protection in Rights of Consumers

Helpful Guide to Understanding the Statutory Warranty Within Consumer Protection Laws



An unfortunately all too common consumer protection issues case, usually proceeding in the Small Claims Court, involves the purchase of a used vehicle from a dealer, rather than private sale, where the vehicle is subsequently discovered as having significant mechanical defects that render the vehicle unfit for the intended purpose - the intended purpose being as a personal use automobile.

In this situation, unless the 'As Is' box upon, and within, the standard Bill of Sale document from the Used Car Dealers Association (UCDA) is checked and initialled by the buyer, the seller may be liable for the losses of the buyer. These losses can include repair costs, towing costs, rental vehicle costs, and even awards for disappointment whereas the purchase of a vehicle is reasonably expected to include emotional benefits such as the pleasure and freedom to travel, among other things.

It is noteworthy that proving that the dealer knew of the defect at the time of sale is unnecessary; however, providing that the vehicle was defective at the time of sale is required. Proof that the vehicle was defective before the sale or after the sale is insufficient – it must be proven that the vehicle was defective at the exact moment of sale. Of course, it is sometimes obvious that by proving the vehicle was defect before the sale and after the sale inherently proves that the vehicle was defective at the time of sale. The legal test requires demonstrating that at the moment of sale, being delivery of the vehicle; ***Elbassiouni v. World Fine Cars Limited***, 2016 CanLII 75052:

> *... from the moment the ... vehicle was sold by the Defendant to the Plaintiff it was not operating properly and was not of merchantable quality and not reasonably fit for purpose that it was sold for: that purpose being as a roadworthy vehicle to be used as a means of transportation. It had all the defects the Plaintiff testified about and since it was not sold "as is", the Defendant breached its contract with the Plaintiff and is liable for all the reasonably foreseeable damages arising from the breach of contract.*

Statutory authorities relied upon in ***Elbassiouni*** included section 9(2) of the ***Consumer Protection Act, 2002***, S.O. 2002, Chapter 30, Schedule A and section 15 of the ***Sales of Goods Act***, R.S.O. c. S.1.

Claiming General Damages

Although undealt with in ***Elbassiouni***, it would seem that in similar cases, general damages may also be available in accordance to the principles outlined in ***Fidler v. Sun Life Assurance Company of Canada***, [2006] 2 S.C.R. 3 whereas it could, and perhaps should, be argued that a breach of contract involving the failure to properly deliver a vehicle of "*merchantable quality*" also involves the failure to deliver the incidental emotional benefits of freedom to travel and pleasure, among other things, and such is therefore a failure to deliver all that was bargained for within the sale. This requires a genuine argument that the parties to the contract reasonably contemplated such emotional benefits were bargained for, explicitly or impliedly, at the time of the sale. Specifically, in ***Fidler***, the Supreme Court said:

> 48 While the mental distress as a consequence of breach must reasonably be contemplated by the parties to attract damages, we see no basis for requiring it to be the dominant aspect or the "very essence" of the bargain. As the House of Lords noted in *Farley*, the law of contract protects all significant parts of the bargain, not merely those that are "dominant" or "essential". Lord Steyn rejected this kind of distinction as "a matter of form and not substance" (para. 24). Lord Hutton added:

> I can see no reason in principle why, if a plaintiff who has suffered no financial loss can recover damages in some cases if there has been a breach of the principal obligation of the contract, he should be denied damages for breach of an obligation which, whilst not the principal obligation of the contract, is nevertheless one which he has made clear to the other party is of importance to him. [para. 51]

> Principle suggests that as long as the promise in relation to state of mind is a part of the bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable. This is to state neither more nor less than the rule in *Hadley v. Baxendale*.

> 49 We conclude that the “peace of mind” class of cases should not be viewed as an exception to the general rule of the non-availability of damages for mental distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.

Summary Comment

The doctrine above shows that consumers are well protected by the statutes and common law in that an implied warranty of "merchantable quality" exists for goods, such as used vehicles, and that dealers who fail to deliver such, knowingly or otherwise, will likely be found liable for pecuniary and non-pecuniary losses incurred by the consumer.