

2010

No. 325016

**SUPREME COURT OF NOVA SCOTIA**

**Between:**

CHARLES VIGNEAU,

**Plaintiff,**

**and**

TOYOTA CANADA INC., TOYOTA MOTOR CORPORATION, and  
TOYOTA MOTOR NORTH AMERICA INC.,

**Defendants.**

*Brought under the Class Proceedings Act.*



**Notice of Action**

**To:**

**TOYOTA CANADA INC.**  
One Toyota Place  
Scarborough, Ontario  
M1H 1H9

**TOYOTA MOTOR CORPORATION**  
One Toyota-Cho  
Toyota City, Aichi Prefecture  
471-8571, Japan

**TOYOTA MOTOR NORTH AMERICA INC.**  
9 W. 57<sup>th</sup> St.,  
Ste. 4900  
New York, NY  
10019

Court Administration  
MAR 02 2010  
Halifax, N.S.

RECEIVED BY COURT ADMINISTRATION

**Action has been started against you**

The plaintiff takes action against you.

The plaintiff started the action by filing this notice with the court on the date certified by the prothonotary.

The plaintiff claims the relief described in the attached statement of claim. The claim is based on the grounds stated in the statement of claim.

**Deadline for defending the action**

To defend the action, you or your counsel must file a notice of defence with the court no more than following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

**Judgment against you if you do not defend**

The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

**You may demand notice of steps in the action**

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

**Rule 57 - Action for Damages Under \$100,000**

Civil Procedure Rule 57 limits pretrial and trial procedures in a defended action so it will be more economical. The Rule applies if the plaintiff states the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the plaintiff.

This action is not within Rule 57.

**Filing and delivering documents**

Any documents you file with the court must be filed at the office of the prothonotary The Law Courts Building, 1815 Upper Water St. Street, Halifax, Nova Scotia (telephone 902-424-4900).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

**Contact information**

The plaintiff designates the following address:

**MERCHANT LAW GROUP LLP**

Barristers and Solicitors  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8,

**Phone:** (306) 359-7777

**Fax:** (306) 522-3299,

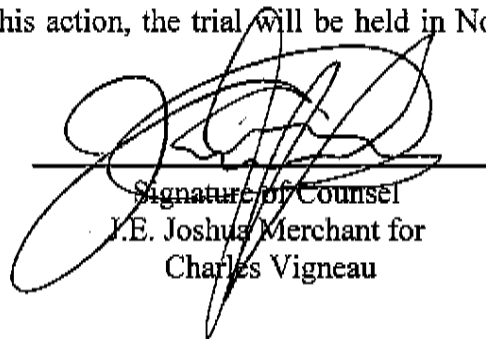
J.E. Joshua Merchant

Documents delivered to this address are considered received by the plaintiff on delivery. Further contact information is available from the prothonotary.

**Proposed place of trial**

The plaintiff proposes that, if you defend this action, the trial will be held in Nova Scotia.

Signed: February 11<sup>th</sup>, 2010



Signature of Counsel  
J.E. Joshua Merchant for  
Charles Vigneau

**MERCHANT LAW GROUP LLP**

Barristers and Solicitors  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8,

Phone: (306) 359-7777

Fax: (306) 522-3299,

**Prothonotary's certificate**

I certify that this notice of action, including the attached statement of claim, was filed with the court on ~~February \_\_\_\_\_, 2010.~~

*March 2, 2010*

*Annette M. Boucher*

**Prothonotary**

C:\Documents and Settings\peterson\Local Settings\Temporary Internet Files\Content.Outlook\LYZYLHVW\NS Notice.wpd

**ANNETTE M. BOUCHER, Q.C.**  
Prothonotary

## STATEMENT OF CLAIM

### I. PARTIES

#### *(1) plaintiff*

1. The Plaintiff Charles Vigneau resides in Sydney, Nova Scotia.

#### *(2) defendants*

2. Toyota Canada Inc. was incorporated pursuant to the laws of Canada. Its headquarters are in Scarborough, Ontario. It carries on business in Nova Scotia.
3. Toyota Motor Corporation was incorporated pursuant to the laws of Japan.
4. Toyota Motor North America Inc. was incorporated pursuant to the laws of California. It carries on business in Nova Scotia.
5. Hereinafter all Defendants are referred to collectively as "Toyota".
6. Each Defendant is vicariously liable for the acts and omissions of the others:
  - (a) Each was affiliated with the other.
  - (b) Toyota's business was inextricably interwoven.
  - (c) Toyota intended that its business be operated as a global enterprise.
  - (d) Each created and executed a common business plan to manufacture and sell

Toyota vehicles in Nova Scotia and throughout the world.

(e) For the purposes of designing, developing, manufacturing, distributing, marketing, and selling Toyota vehicles in Nova Scotia, and Canada, each was the agent of the other and each acted in concert.

## II. CLASS

7. The Plaintiff brings this claim on behalf of all persons who purchased or leased a Toyota or Lexus vehicle equipped with the electronic throttle control system known as the ETCS-Intelligent System, or a faulty accelerator pedal.

## III. PARTICULARS

8. Runaway acceleration occurs when the throttle opens contrary to the driver's intentions. The automobile continues out of control despite desperate braking efforts by the driver and, unless the driver manages to disengage the engine quickly, the likelihood of a catastrophic outcome is great. Consequently, many manufacturers provide an electronic or mechanical fail-safe to allow the driver to return the vehicle safely under control when faced with such an emergency. Toyota has failed to provide such fail-safe on any of its vehicle lines equipped with the electronic throttle control system known as the ETCS-Intelligent System ("ETCS-i").

9. Reports of unintended accelerations of Toyota vehicles began to increase significantly in 2002, when Toyota began installing the ETCS-i in a broad range of its vehicle lines. Vehicles equipped with the ETCS-i have a dangerous propensity to suddenly accelerate without driver input and against the intentions of the driver. This increased propensity for runaway acceleration stems in part from the ETCS-i's vulnerability to electronic "confusion" in its sensors and electronic processors.

10. ETCS-i-equipped vehicles are sometimes referred to as "throttle-by-wire" or "drive-by-wire" because the ETCS-i has no mechanical linkage between the accelerator pedal and the throttle plate in the engine.

11. Vehicles equipped with the ETCS-i, include but are not limited to the following:

- (a) Lexus models from 1998 through 2010;
- (b) Toyota FJ Cruisers from 2007 through 2010;
- (c) Toyota Tacoma pickup trucks from 2003 through 2010;
- (d) Toyota Camrys from 2002 through 2010;
- (e) Toyota Tundra pickup trucks from 2000 through 2010;
- (f) Toyota 4Runner SUVs from 2001 through 2010;
- (g) Toyota Avalons from MY 2005 through 2010;

- (h) Toyota Land Cruisers from 2001 through 2010;
- (i) Toyota RAV-4s from 2005 through 2010;
- (j) Toyota Sequoias from 2001 through 2010;
- (k) Toyota Siennas from 2004 through 2010;
- (l) Toyota Corollas from 2005 through 2010;
- (m) Toyota Highlanders from 2004 through 2010; and
- (n) Toyota Matrixes from 2003 through 2010.

12. It soon became apparent that models with the ETCS-i were experiencing a failure rate significantly greater than other models. As the number of reports involving Toyota models with “throttle-by-wire” electronics grew, the claimed injury and death toll also increased alarmingly. However, Toyota and its dealers continue to market ETCS-i-equipped vehicles without an appropriate fail-safe despite knowledge that they are unreasonably dangerous by virtue of their design.

13. By marketing vehicles equipped with ETCS-i such as the Toyota Corolla, without incorporating an electronic or mechanical fail-safe similar to those provided by Toyota’s competitors, Toyota has misled and harmed the Plaintiff and thousands of unsuspecting consumers throughout Canada.



14. Toyota engaged in unfair and deceptive marketing of its ETCS-i-equipped vehicles both in direct communications to its consumers and in misinformation supplied by Toyota to Transport Canada, and to American National Highway Transportation Safety Administration (“NHTSA”) investigators. Specifically, Toyota Motor North America was the Toyota entity charged with communicating with the NHTSA and is liable for its misconduct in causing or contributing to unfair deceptive acts and practices in so doing.

15. When the NHTSA opened an investigation<sup>1</sup> of 2002 and 2003 model year Camrys, all equipped with the ETCS-i, the safety agency described the defect alleged by Toyota owners: “Allegations of (A) an engine speed increase without the driver pressing on the accelerator pedal or, (B) the engine speed failing to decrease when the accelerator pedal was no longer being depressed – both circumstances requiring greater than expected brake pedal application force to control or stop the vehicle and where the brake system functioned normally.”

16. At the outset of its investigation, NHTSA asked Toyota to:

[S]tate the number of each of the following, received by Toyota, or of which Toyota is otherwise aware, which relate to, or may relate to, the

---

<sup>1</sup> Defect Petition DPO4-003; Investigation PE04-021.

alleged defect in the subject vehicles:

- (a) Consumer complaints, including those from fleet operators;
- (b) Field reports, including dealer field reports;
- (c) Reports involving a crash, injury, or fatality, based on claims against the manufacturer involving a death or injury; notices received by the manufacturer alleging or proving that a death or injury was caused by a possible defect in a subject vehicle; property damage claims; consumer complaints; and/or field reports;
- (d) Property damage claims;
- (e) Third-party arbitration proceedings where Toyota is or was a party to the arbitration; and
- (f) Lawsuits, both pending and closed, in which Toyota is or was a defendant or co-defendant.

For subparts 'a' through 'd,' show each category (e.g., consumer complaints, field reports, etc.) separately. Multiple incidents involving the same vehicle are to be counted/shown separately. Multiple reports of the same incident are also to be counted/shown separately (i.e., a consumer complaint and a field report involving the same incident in which a crash occurred are to be shown as a crash report, a field report and a consumer complaint).

17. The scope of the information request became the subject of discussions and negotiations between Toyota and representatives of the NHTSA's Office of Defects Investigation, with the result that certain relevant categories of incidents were

|

inexplicably excluded.

18. Toyota reported 123 complaints that it said “may relate to the alleged defect”, however, Toyota *intentionally excluded* from its response the following categories of complaints, among others:

- (1) an incident alleging uncontrollable acceleration that occurred for a long duration;<sup>2</sup>
- (2) an incident in which the customer alleged that they could not control a vehicle by applying the brake; and
- (3) an incident alleging unintended acceleration occurred when moving the shift lever to the reverse or the drive position.

19. Toyota thus deceptively concealed from Transport Canada, and the NHTSA, as well as from the news media and consumer safety groups that monitor Transport Canada and NHTSA safety defect investigations, potentially relevant customer complaints. For example, the report from a driver who had experienced a sudden acceleration which lasted for a considerable time would not be seen by the NHTSA because Toyota did not include it in its response, since it occurred for a “long duration”. Similarly, a driver who reported that he was standing on the brake and could not overcome the open throttle would have had his report excluded from the

---

<sup>2</sup> “long duration” is defined as lasting longer than one (1) second.

investigation.

20. The NHTSA's investigation of the alleged defect in 2002 and 2003 Toyota Camrys was based largely on information supplied by Toyota, including a cleverly-limited group of customer complaints and assertions by the company that its dealers and manufacturer representatives had "failed to identify a fault within the vehicle." As a result of Toyota's deceit, Transport Canada and the NHTSA conducted no testing of the integrity of the ETCS-i in terms of its vulnerability to transient electronic interference; nor did Transport Canada or the NHTSA conduct any tests as to the efficacy of the braking system in an open-throttle condition. NHTSA closed its investigation, stating that "[a] defect trend has not been identified at this time and further use of agency resources does not appear to be warranted."<sup>3</sup>

21. Complaints and incident reports from Toyota customers who had experienced sudden, unintended accelerations continued to come in to Transport Canada, the NHTSA, and Toyota, in substantial numbers after the NHTSA investigation was closed. Both the agency and the manufacturer issued statements blaming the driver-side floor mat, despite evidence that floor mats were almost never the cause.

---

<sup>3</sup> ODI Resume, PE04-021, Date Closed 07/22/2004.

22. In 2007, the NHTSA's Office of Defects Investigation opened an engineering analysis of 2007 Lexus ES-350 vehicles which was prompted by the failure rate of Toyota vehicles equipped with the ETCS-i. According to the report, the purposes of the engineering analysis were to:

- (a) Determine whether reported incidents of unintended acceleration were caused by a vehicle system malfunction or mechanical interference;
- (b) Understand and document the effects of unintended acceleration as they impact controllability of the vehicle; and
- (c) Document potential difficulties experienced by the operator while attempting to regain control of the vehicle.

23. The NHTSA report entitled, "Analysis of the Effects of Unintended Acceleration on Vehicle Control," states in part:

The safety consequences of an unsecured rubber floor mat trapping the accelerator pedal with the vehicle in gear can be severe. With the engine throttle plate open, the vacuum power assist of the braking system cannot be replenished and the effectiveness of the brakes is reduced significantly. During trapped throttle acceleration testing, several methods to defeat acceleration proved effective but not necessarily intuitive.

24. The engineering analysis described the first redundancy as follows:

"Application of the brake -- Significant brake pedal force in excess of 150 pounds was required to stop the vehicle, compared to 30 pounds required when the vehicle is

operating normally. Stopping distances increased from less than 200 feet to more than 1,000 feet. This required brake pedal force is beyond the physical capabilities of most drivers.” This indicates a pressing need for an electronic or mechanical fail-safe.

25. On September 29, 2009, following the widespread publicity surrounding the apparent sudden acceleration of a 2009 Lexus ES350 that resulted in a four-fatality crash near San Diego, California, Toyota issued a “Safety Advisory,” saying that the company had “taken a closer look” at the potential for the accelerator to get “stuck in the full open position” due to interfering floor mats. The advisory stated that the company would soon be recalling certain 2007 – 2010 Toyota and Lexus vehicles, 3.8 million in all, to address the issue – the largest automobile recall in Toyota’s history and the sixth largest in United States history.

26. Toyota’s advisory is misleading, for the following reasons, among others:
- (a) By suggesting that only a trapped floor mat can cause a loss of throttle and braking control, it lures owners of models with no driver-side floor mat into believing there is no possibility of a potentially catastrophic loss of throttle and braking control.

- (b) The advisory also misleads owners with a driver's-side floor mat into believing that, in the event of a sustained near-wide-open throttle malfunction, the first response should be to visually determine if the floor mat is interfering with the accelerator pedal. This will, in many cases, exacerbate the driver's loss of control as the driver will lose valuable time in shifting to neutral or turning off the ignition.

27. Toyota vehicles containing the ETCS-i system have been purchased throughout Canada, and are in wide use on Canadian roads.

28. A recall and advisory are ineffective because the design flaws are inherent to the Toyota Corolla, and all the vehicles equipped with the ETCS-i. Toyota has no solution to these problems of their creation.

29. On February 1<sup>st</sup>, 2010, Toyota announced that it would install "a steel reinforcement bar" into the pedal assembly, this diminishes the value of Toyota and Lexus vehicles even more and does not correct the design flaw anymore than the floor mat recall described below.

30. The Plaintiff Charles Vigneau purchased a 2009 Toyota Corolla in the spring of 2009. He paid in excess of \$28,000 for the new vehicle from a dealer in Sydney, Nova Scotia.

31. Consumers purchasing a Toyota vehicle containing the ETCS-i are not informed of the heightened propensity for runaway acceleration in ETCS-i equipped vehicles, and are not informed that Toyota does not incorporate an adequate electronic or mechanical fail-safe into its design.

32. Toyota had actual knowledge that ETCS-i-equipped vehicles, as currently designed and manufactured, are unreasonably dangerous for the purposes that consumers expected to use them.

**FIRST CLAIM FOR RELIEF**  
(Negligence)

33. Toyota has a duty to design, manufacture, and market vehicles that are reasonably safe for their intended uses, and to provide true and accurate information to the public to prevent undue risks arising from the foreseeable use of its products.

34. Toyota was negligent, and breached this duty owed to the Plaintiff.



35. The following acts and omissions by Toyota were negligent:
- (a) Failing properly and adequately to design Toyota vehicles equipped with the ETCS-i, and the systems, components, and parts thereof, including, but not limited to, the electronic engine control, the cruise control and other components of the engine control module, and the braking system;
  - (b) Failing properly and adequately to install a fail-safe software component or mechanical safeguard against sudden, unintended acceleration;
  - (c) Failing properly and adequately to specify components and component systems for Toyota vehicles equipped with the ETCS-i that would shield the sensors from transient signals that confuse the ETCS-i and thereby ensure that the vehicle's throttle responded to the intentions and actions of the driver;
  - (d) Failing properly and adequately to test Toyota vehicles equipped with the ETCS-i and the systems, components, and parts thereof;

- (e) Failing properly and adequately to perform or heed an adequate failure mode and effects analysis (FMEA) or fault tree analysis (FTA) of vehicles equipped with the ETCS-i and the systems, components, and parts thereof;
- (f) Failing properly and adequately to manufacture, fabricate, and assemble vehicles equipped with the ETCS-i and the systems, components, and parts thereof;
- (g) Failing properly and adequately to warn of the dangers attendant upon use of vehicles equipped with the ETCS-i, specifically including, but not limited to, the extreme risk to the driver and occupants of a loss of control of the throttle and resultant sudden, unintended acceleration of the vehicle, with the attendant risk of severe bodily injury or death.
- (h) Prior to and during the design, manufacturing, marketing, and sale of the subject vehicle and thereafter, Toyota knew, or in the exercise of reasonable care should have known, that other feasible and safer design alternatives were available to them which would have

significantly reduced the risk of sudden, unintended accelerations and the lack of efficacy of the braking system under such conditions and negligently failed to utilize such other and feasible safer designs in their design of the ETCS-i, and the braking system in vehicles equipped with the ETCS-i.

36. As a result of the foregoing, the Plaintiff and the Class have suffered damages in an amount to be proven at trial.

**SECOND CLAIM FOR RELIEF**  
(Violations of Competition Legislation)

37. At all times relevant, Toyota violated section 52 of the *Competition Act, R.S.*, 1985, c. C-34, by the use of false and misleading representations or omissions of material fact in connection with the marketing, promotion, and sale of vehicles equipped with the ETCS-i. Toyota communicated the purported benefits of vehicles equipped with the ETCS-i while failing to disclose that vehicles equipped with ETCS-i have a dangerous propensity to suddenly accelerate without driver input and against the intentions of the driver, with the intent that consumers, like the Plaintiff, would purchase a vehicle equipped with ETCS-i.

38. As a result of violating the *Competition Act*, Toyota caused the Plaintiff to purchase a Toyota Corolla.

39. As a result of the foregoing, the Plaintiff and the Class have suffered economic damages in an amount to be proven at trial.

**THIRD CLAIM FOR RELIEF**  
(Violations of Consumer Protection Legislation)

40. *The Consumer Protection Act*, S.S. 1996, c. C-30.1, as am., including s. 14 and Part III; the *Fair Trading Act*, R.S.A. 2000, c. F-2, as am. including s. 13; *The Business Practices Act*, S.M. 1990-91, c. 6; *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, as am., including s. 8; the *Trade Practices Act*, R.S.N.L. 1990, c. T-71, as am., including s. 14; and other similar legislation throughout Canada, apply to Toyota's actions and omissions, as described herein, because it extends to transactions that are intended to result, or which have resulted in the sale or lease of goods or services to consumers.

41. At all times relevant, Toyota manufactured, marketed, and distributed, Toyota vehicles equipped with the ETCS-i, in an unlawful, unfair, and deceptive manner that was likely to deceive the Plaintiff.

42. Toyota's marketing of vehicles containing ETCS-i, without incorporating adequate electronic or mechanical fail-safes, and while misrepresenting the dangers of such vehicles to the public, constitutes unlawful, unfair and deceptive business acts or practices within the meaning of the legislation set-out at paragraph 40.

43. As a result of violating *The Consumer Protection Act, supra*, Toyota caused the Plaintiff to purchase a Toyota Corolla.

44. As a result of the foregoing, the Plaintiff has suffered damages in an amount to be proven at trial.

**FOURTH CLAIM FOR RELIEF**  
(Unjust Enrichment)

45. The Plaintiff unknowingly conferred a benefit upon Toyota by paying for a vehicle which was in fact, unreasonably dangerous for use as a vehicle.

46. The circumstances, as described in this Statement of Claim are such that allowing Toyota to retain the benefits provided by the Plaintiff would be inequitable.

47. Toyota has been unjustly enriched at the expense of the Plaintiff and the Class

and, as a matter of equity, Toyota should be required to make them whole by refunding the purchase price of each vehicle equipped with the ETCS-I.

**FIFTH CLAIM FOR RELIEF**  
(Waiver of Tort)

48. The Plaintiff and the class are entitled to waive the tort and require Toyota to account for all or part of the revenue Toyota received from the sale of vehicles equipped with the ETCS-i in Canada.

49. Toyota tortiously introduced vehicles equipped with the ETCS-i into the Canadian marketplace.

50. After Toyota introduced vehicles equipped with the ETCS-i into the marketplace, Toyota marketed these vehicles as being safe and dependable, and therefore worth the purchase or lease price.

51. Toyota vehicles equipped with the ETCS-i are not safe or dependable.

52. As a result of its misleading advertising campaigns, Toyota sold hundreds of

thousands of vehicles equipped with the ETCS-i in Canada.

53. If Toyota had been honest and forthright about the risks of runaway acceleration in vehicles equipped with the ETCS-i, the Plaintiff would not have purchased a Toyota Corolla, and Toyota would not have received any or part of the revenue associated with the sale of vehicles equipped with the ETCS-i in Canada.

54. If Toyota had complied with the standard of care expected of it, vehicles equipped with the ETCS-i would have also been equipped with an adequate fail-safe such as a mechanism which would automatically reduce the engine to idle whenever the brakes are applied.

55. Toyota may not in good conscience keep the revenue it earned from selling vehicles equipped with the ETCS-i.

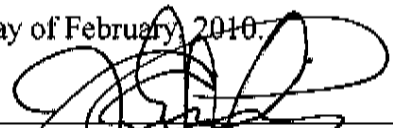
56. In all the circumstances, the integrity of vehicle sales in Canada would be undermined if Toyota did not account to the class for its revenues from vehicles equipped with the ETCS-i.

**IV. RELIEF SOUGHT**

57. The Plaintiff claims against the Defendants, jointly and severally, on behalf of himself and class members:

- (a) general and special damages;
- (b) exemplary and punitive damages;
- (c) revocation of acceptance and refund of the purchase price of each Toyota vehicle equipped with the ETCS-i, including, but not limited to sales taxes, license and registration fees, or in the alternative damages for the diminished value of each of these vehicles;
- (d) restitution and an accounting, including by way of constructive trust and aggregate monetary award;
- (e) damages for the loss of use, annoyance, and inconvenience;
- (f) pre-judgment interest; and
- (g) such further and other relief as this Honourable Court may deem just.

**DATED** at Calgary, Alberta, this 11<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
**MERCHANT LAW GROUP LLP**  
J.E. Joshua Merchant  
2401 Saskatchewan Drive  
Regina, Saskatchewan  
S4P 4H8,



Telephone: (306) 359-7777  
Fax: (306) 522-3299

C:\Documents and Settings\peterson\Local Settings\Temporary Internet Files\Content.Outlook\LYZYLVH\INS Claim.wpd