

IT'S THE LAW

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THE CUSTOMER IS ALWAYS RIGHT?

not always...

As if powersports dealers don't have enough to worry about in their businesses these days, now a new worry has come along. You, as a dealer, have recently sold a snowmobile, motorcycle or an ATV to a customer whom, unfortunately, was seriously injured or killed while driving their recent purchase. As it happens, there seems to be a growing number of powersports dealers that have been joined into legal claims made by injured customers (or their heirs) who invariably go home and injure themselves and others and believe someone, anyone else but themselves, is responsible. Regrettably, these actions in personal injury lawsuits against dealerships are becoming the rule rather than the exception.

Civil litigation lawyers often apply a strategy of inclusion. They attempt to spread the net of liability as widely as possible in the hope that someone will be caught. This shot gun approach to liability looks to many potential wallets to possibly raid. Why? With the inclusion of what we call joint and several liability engaging a dealer and his insurer could help compensate the injured customer completely even though the dealer may be held responsible for only 10% of the liability that is attached to the accident.

Even when dealers are vindicated, there is always an immense amount of lost time and personal effort that could be better invested in the running of their business rather than in a legal matter and also the possibility of subsequent insurance increases driven by these lawsuits which hurt everyone in the industry. I have been openly reviewing some of the laws in the United States that have recently been enacted that bar individuals from suing people when their own stupidity or negligence is in question. Hopefully, this will take root in Canada at some point in the near future.

The question remains: Is the customer always right? I counsel my powersports clients to realize that every customer that comes through the door could be a potential liability when it comes to their negligent actions. The following is an abbreviated checklist of certain things that should be addressed within your business practices for not only for used but also new products that you currently market.

Always require a standard Waiver and Pre-delivery Inspection form for the purchaser to sign upon taking possession of the product. In the unfortunate event that there is an accident, this waiver becomes a first line of legal defence. The waiver supports the legal argument that a customer accepts the vehicle and that the dealership is not responsible for any misuse, horseplay or any other activities once that vehicle leaves the dealership which, reasonably, it should not be.

Within the context of the waiver it is also important to include safety standards, rules of use, and appropriate operation of the vehicle. This will act to further support the reasonable argument that the dealer is not at fault and that the customer acknowledged his or her actions fall back to them, the

injured party. I insist to my dealership clients that a waiver be signed for customers who test drive vehicles as well as for employees of the dealership. Any employee form should be appended to their employment agreement. Furthermore, it is also important to have a guardian of any individuals under the age of 18 sign these waiver forms where appropriate.

Another important consideration in regard for your protection as a dealership from these lawsuits, surprisingly perhaps, is estate planning. Reputable dealers have been dragged into these expensive lawsuits where the claimed damages substantially exceed their insurance coverage. If your home is attached to the dealership, and you find yourself in this situation, unfortunately your home could be in jeopardy. Efficient and industry specific estate planning can provide another layer of protection from lawsuits and can make your dealership more profitable, while protecting your nest egg for the future.

These simple, inexpensive changes can mean a significant savings in time and legal fees if you should find yourself involved in such a lawsuit. Having preventative measures in place not only for your customers, but also for your potential customers and employees, is an important aspect of protecting your investment. I know its just more thing to worry about-but well worth a little time and effort.

Mark McMackin is a commercial lawyer with Ricketts Harris LLP. Mark is an avid powersports enthusiast and collector of antique snowmobiles. Mark also sits as counsel and director to the Canadian Powersports Dealers Association. Should you have any questions in relation to the foregoing information, please do not hesitate to contact me via my website at <www.powersportslaw.com>