

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA  
Cite as: Fuller v. Arctic Cat Sales Inc., 2016 NSSM 67

**Claim:** SCY No.454844  
**Registry:** Yarmouth

**Between:**

ROBBIE D. FULLER

CLAIMANT

– and –

ARCTIC CAT SALES INC.

DEFENDANT

Adjudicator: Andrew S. Nickerson, QC

**Heard:** October 20, 2016

**Decision:** October 31, 2016

**Appearances:** the Claimant, self-represented  
The Defendant, represented by its agent Roger Mailhot

**DECISION**

FACTS

the claimant called Robert Crowell to testify. Mr. Crowell is involved in sales for Yarmouth Forklift, an Arctic Cat dealer, and also does some service. He appeared by subpoena. He testified that he met the claimant in connection with the purchase of an Arctic Cat all-terrain vehicle (ATV). He said that he vaguely recalled discussing reliability and that there was a two-year warranty on the vehicle. He said he did not recall the claimant attending at his place of business with respect to a battery problem. He did not recall the claimant attending his place of business with respect to a belt casing filling with water. He did however recall the claimant attending with concerns with respect to play in the steering.

He attempted to put through a warranty claim for a steering problem. He acknowledged that there was some play in the power steering and that that was more than normal wear and tear. He put in a warranty claim with the insurer who covered warranty claims after a six months manufacturer's warranty. That insurance company wanted to know the manufacturer's tolerances and sent an independent appraiser. He testified that there were no specified manufacturer's tolerances for the steering but that there could be some kind of a safety issue with too much play in the steering. The insurer then wanted the part broken down or taken apart to see what the problem was. He testified that the part involved cannot be broken down and is an unrepairable item. He recalled that the claimant returned a second time and as a matter of customer satisfaction he arranged for parts to be removed from a demonstration unit and placed on the claimant's vehicle.

He said that the claimant returned on a subsequent occasion concerned about a head gasket leak. He said that neither he nor his staff could find a leak after cleaning and inspection. He also testified that he observed that the throttle was sticking. He said that his staff cleaned and lubricated the cable and it then seemed to work fine.

In cross-examination he confirmed that the two-year warranty was a promotion and that the normal warranty is six months.

Mark Wallace has been a mechanic since 1991 and certified to work on motorcycles in recent years. He owns his own service shop and did an inspection of the claimant's ATV in May 2016 shortly before the claimant disposed of the vehicle. He did not start or drive the vehicle but examined it visually. He did observe that the throttle was sticking. He stated that there was play in the steering but acknowledged that he did not know what the allowable tolerances were. He was not sure if it was unsafe but felt that it should be looked at. He said that he did see some wetness around the head gasket. He was challenged in cross-examination that this could be "sweating". He stated that he had not heard that terminology but that in his experience when you see wetness there usually is a problem. He also acknowledged that he had not worked on Arctic Cat machines.

The claimant testified that he had been an ATV owner for over 15 years and previously owned machines but made by other manufacturers. He testified that he met with Mr. Crowell and he bought the vehicle and stressed that reliability was an important issue to him. He said that the two-year warranty was a major selling factor for him. He testified that he was not told that it was

six months on a manufacturer's warranty and then 18 months covered by an insurance policy. He thought it was entirely a manufacturer's warranty and bought on that basis.

He testified that he had a battery failure on two occasions which resulted in him being stranded in the wilderness. On one occasion he had to walk 5 km to get help. He also complained that on several occasions the crank case filled with water which made the ATV fail. Fortunately he was riding with friends who assisted him. He stated that the power steering seemed to work fine when he first got the vehicle but shortly thereafter there was a considerable amount of play. He recalls taking it to the dealership on more than one occasion. Ultimately he says he simply was told "it is fixed" and was not initially aware that a part from the demonstration unit had been substituted on his vehicle.

After 18 months of ownership and multiple problems he was frustrated that the reliability was not as he believed had been represented. He felt that trading the vehicle at that point was the best way to mitigate his losses.

He went to the dealer of another brand of ATV to acquire a new vehicle. That dealer was not prepared to take his ATV on trade but did arrange for a wholesaler to purchase his vehicle. He said that upon examination by the dealer of the other brand and the wholesaler, the wholesaler told him that he would offer \$700 less than the "blue book" value. The reason for this was that they told him that there appeared to be a leak in head gasket and they were concerned that this was a common problem with this particular ATV. He was offered \$7000 in trade.

Mr. Mailhot testified. He is employed as a technical service representative for Arctic Cat. He is engaged only in service and is not involved in sales. He indicated they had not encountered problems with the power steering on those vehicles. He had not examined the vehicle himself and was unable to comment anything about the specifics of the claimant's vehicle. He confirmed that the steering part is not a serviceable part and cannot be taken apart. He introduced the "blue book" with respect to both retail and wholesale values of the particular model in question.

Both parties agreed that Mr. Fuller's vehicle was clean and well maintained and in good condition. The "blue book" value for this is \$7400 and the retail value according to the same document is \$12,999.

## SUBMISSIONS

Mr. Fuller argues that he paid \$15,466.29 for the vehicle (this is not in dispute). He says that after 18 months a reasonable depreciation would be 30% reducing the value at the time he sold the vehicle to \$10,826.40. He says that due to the defects and the need to resell earlier than he wished the difference between this figure and the \$7000 he received (or \$3,826.40) should be allowed to him as his loss.

Mr. Mailhot argues that Mr. Fuller got a very fair price for his vehicle upon trade in, and that \$7000 properly and fully compensated him for the value of his vehicle. He did not address specifically the problems Mr. Fuller encountered in detail but suggest that whatever they were it made no difference to the value Mr. Fuller received.

## ANALYSIS

I have evidence before me that there were indeed problems with this particular ATV. I found Mr. Fuller to be a reliable and truthful witness at least from his perspective. I had no sense that he was attempting to mislead the court.

The defendant offered no specific evidence to establish that the complaints and problems Mr. Fuller described were inaccurate.

In all circumstances the court does not have perfect knowledge and must come to a conclusion based on an analysis of the evidence before it. The burden of proof lies on the claimant to establish his claim on the balance of probabilities. What this means is that the claimant must satisfy the court that it is more likely than not that what he states is true.

I am satisfied using the balance of probabilities test that indeed Mr. Fuller had a number of problems with this vehicle which have not been satisfactorily explained to the court. I am also satisfied that it was represented to him that he would have full two years of warranty. I also find as a fact that he was not advised that the insurance company was involved and he honestly believed that it would have been a manufacturer's warranty.

I am satisfied that Mr. Fuller did not get the level of reliability and/or the rectification of problems pursuant to warranty which he contracted for. The measure of damages where there is a breach of contract is what the courts refer to as "compensatory". What this means is the goal of damages is to compensate the injured party for their loss but no more. The principle is that the

court will award that which is necessary to place the wronged party in the position that they would have been had the wrong not occurred. This is never an easy task as very often it is hard to translate such a loss into money.

I am not satisfied that I can simply accept Mr. Fuller's analysis that a 30% depreciation should be applied. I have no evidence as to why that percentage is appropriate in the circumstances. Mr. Fuller argues that it is a reasonable percentage but the court must have something more concrete to base a finding on.

I have concluded that I must use the "blue book" in some manner. What concerns me is whether I should use the wholesale or retail value. I have searched for jurisprudence to guide me in this regard. I have found very few cases where this problem has been addressed and in fact only one which addresses it directly. In **Garnham v. Garnham 2011 MBQB 318**, the Manitoba Court of Queen's Bench reasoned as follows:

6 Also at issue in this case is the fair market value at separation of an all terrain vehicle manufactured by Polaris. In this instance, the value being advanced by the husband was \$2,800.00 and the petitioner's \$4,000.00. In support of her position, the petitioner filed an excerpt from a commercial publishing service tabulating the retail sales figures for that year and model of recreational machine. The average retail figure for a similar machine in average condition was listed as \$3,250.00. Also under Tab #8 of the Book of Agreed Documents another similar service showed a figure of \$2,550.00 for this machine but at the wholesale price level. The obvious quandary for this court is whether the retail or wholesale value should be entered in this accounting. In the opinion of this court, if the machine in question was disposed of on the date of separation, its full retail value could not be achieved. Also, the court is of the opinion that a shrewd owner would only perhaps be able to get more than wholesale value. As a result, I am of the opinion that a figure for the fair market value of this machine should be entered in this accounting at an average of these figures or \$2,800.00.

Although not a Nova Scotia Court, the Court of Queen's Bench is equivalent in level to the Supreme Court of Nova Scotia and therefore its judgment has considerable persuasive value. I am persuaded that this is a fair and reasonable approach to the resolution of this problem and I will adopt this approach for the purposes of this decision.

In the matter before me the average of the wholesale and retail value is \$10,199.50. The difference between that and \$7000 is \$3,199.50.

Having achieved a substantial measure of success I will allow the claimant the filing fee of \$99.70 and the cost of service in accordance with the documentation submitted of \$104.10.

Dated at Yarmouth, Nova Scotia, this 31st day of October, 2016.

Andrew S. Nickerson Q.C., Adjudicator