

**In the Small Claims Court of Nova Scotia**  
Cite as: MacGillvary v. Aviva Canada Inc, 2008 NSSM 45

**BETWEEN:**

Name: Jerome MacGillivray

**CLAIMANT**

- and -

Name: Aviva Canada Inc.

**DEFENDANT NO. 1**

Name: Karen MacLean

**DEFENDANT NO. 2**

Name: A A Munro Insurance

**DEFENDANT NO. 3**

**Revised Decision:** The text of the original decision has been revised to remove addresses of the parties on August 8, 2008.

Appearances: Jerome MacGillvary, for the claimant  
Denise Mack, for the defendants

**Decision**

1. This matter came before me on December 6. Ms. Denise Mack represented the interests of the Defendants Aviva Canada Inc., Karen MacLean and A A Munro Insurance. Mr. Jerome MacGillivray represented himself.

2. This claim arises out of a motor vehicle accident. The parties confirmed with me that there are no issues as it relates to liability . They are concerned only with the assessment as it relates to the damages arising out of this motor vehicle accident. There is an admission by Karen MacLean, the Defendant driver in this instance that she was 100% liable for this loss.

3. The original claim form sought the amount of \$4,999.99.

4. I understand from Mr. MacGillivray's preliminary motion, that he wished to amend this

claim to a total of \$6,055.77. Although the Defendant did not have a significant period of time in which to consider this additional claim, I decided that we would proceed and should Ms. Mack be concerned that she wasn't able to respond to the additional claim, she could either call rebuttal evidence or seek an adjournment to bring further evidence forth on another day. At the end of the presentation of the evidence I believe it was quite clear that the Defendants were not prejudiced by this amendment and I therefore allowed it.

5. The vehicle involved in the accident was a 1997 Chrysler Intrepid STD. Mr. MacGillivray gave evidence that he had purchased the vehicle on a second hand basis and that it was in very good condition at the time of the accident. In addition, there was an admission that there was a small amount of damage on the front corner of that vehicle. The vehicle was in Mr. MacGillivray's name, however, it was his son that was driving at the time of the accident.

6. Mr. MacGillivray provided a number of different tables and graphs, one of which was the summary of the claim amount, which is as follows:

Car Repair	\$2,916.52
Loss of Use of car for first two days	\$ 85.72
Cost of rental car from the time Aviva Canada Inc. terminated with malice the first rental car for our loss	\$ 461.47
Loss of insurance premiums on our Damaged 1997 Intrepid	\$ 125.84
Loss of the car registration for the 1997 Intrepid	\$ 14.82
Mileage and travel costs searching for replacement car	\$ 356.50
Mileage and travel costs to serve AA Munro Insurance and Karen MacLean	\$ 89.52
Cost of the Registered Mail	\$ 34.07
Loss of time off work	\$1,971.31
Total	\$6055.77

7. In addition to this, Mr. MacGillivray is looking for interests plus costs.

8. This claim started out innocently enough with Mr. MacGillivray connecting with the Defendant's insurer, Aviva Canada. I believe the first contact was Mr. MacGillivray calling Jaclyn Strum an adjuster for the Defendant on September 20, in and around 2:30 in the afternoon.

9. The gist of the disagreement on this matter, oddly enough, does not arise out of the original estimate for the repair of the damages, but arises out of the value of the vehicle at the time, which then determined whether that vehicle would be written off, consequently providing the Claimant with the value of that vehicle or alternatively that the vehicle would be fixed.

10. Mr. MacGillivray, on cross-examination, made several references to the response time by the adjuster to him throughout the course of this settlement process. There were references both as it relates to not returning calls within a reasonable period of time, not responding to requests for a rental within a reasonable period of time and other issues that I shall point out that were in the nature of service complaints made by Mr. MacGillivray.

11. I'll begin with the pleadings set out by Mr. MacGillivray. He has noted three Defendants, Aviva Canada, Karen MacLean and AA Munro Insurance. This is first and foremost a tort claim against a third party, who further to an agreement amongst all parties was negligent in causing damage to Mr. MacGillivray's vehicle. In this instance, as pointed out prior to this, there is no need for Mr. MacGillivray to prove negligence as the parties have accepted that. This matter is simply a determination for the assessment of damages arising out of that negligence.

12. Throughout the hearing and from documentation provided by Mr. MacGillivray, I got the distinct impression that he was not happy with the response times and the nature of the responses he received from Aviva Canada Inc. in regard to their representation of Karen MacLean on this matter. I got the distinct impression that Mr. MacGillivray believed that Aviva Canada, insurer of Karen MacLean owed him the same level of responsibility as his own insurer owed him. Although without question, the parties acting as agent for the negligent party have a responsibility to the injured party, that responsibility is not the same as the one between an insured and an insurer. There seemed to be a disconnect with respect to Mr. MacGillivray's testimony with regard to his expectations. A significant amount of that testimony and documentation referenced what he believed to be poor service from Aviva Canada Inc.

13. I suppose in retrospect that part of these expectations were generated by comments made on emails. The e-mails received by the Claimant had a footer which stated " Taking care of what's important to you " I believe there is an important distinction between these two relationships.

14. There is no contractual relationship between Mr. MacGillivray, Aviva Canada or AA Munro Insurance and therefore Mr. MacGillivray has no claim against these parties. Although under the law the tortfeasor must respond with reasonableness as it relates to the compensation of the injured party, the injured party also has an obligation to mitigate its damages.

15. I heard a significant amount of evidence and received a significant amount of documentation from Mr. MacGillivray as it relates to the period between the first contact, in and around September 20, and the discontinuance of negotiation in and around October 18, 2007.

16. In reviewing all of this contact information, it became very apparent that Mr. MacGillivray was seeking responses from Aviva Canada Inc. as if they were his own insurer. Although there appears there were some brief hiccups throughout the interaction over the noted period of time, I find that Aviva Canada, for the most part, acted appropriately in regard to responding to Mr. MacGillivray's claim. An example of Mr. MacGillivray's expectation is as it relates to the expectations in regards to the rental vehicle. Mr. MacGillivray sought from Aviva Canada immediately, a rental vehicle to replace his damaged vehicle until this matter could be sorted out. Although Mr. MacGillivray felt the liability portion of this claim was

straightforward, the adjuster at Aviva Canada explained to him that she needed to get a statement from her insured before she could make a commitment with respect to the rental vehicle. Ultimately, Aviva Canada did confirm their obligation to pay for the rental and took over the contract, however, unfortunately, the two parties could not agree on the amount to be paid and Aviva withdrew their financing on the rental.

17. Ultimately, Mr. MacGillivray in his letter of October 15, 2007, sought the following compensation for the damages to his vehicle:

Damage to Vehicle	\$2,916.52
Loss of Use for 2 days after accident At rental rate	\$ 86.64
Lost time off work to pick up rental Waiting for your tow truck and getting Damage estimate	\$ 333.18
Total	\$3,336.34

18. Aviva Canada responded on the basis of the ACV of the vehicle itself. As indicated earlier, there was no argument as to the amount of damages, however, Aviva Canada, through their appraisal process, had determined that with tax the vehicle was only worth \$2,280.00 prior to the accident.

19. The issue of course was in the writing off of the 1997 Intrepid, which Mr. MacGillivray did not agree with.

20. As a result of this stalemate, approximately one month since the date of the loss, Aviva notified Mr. MacGillivray that they would be discontinuing the authorization of the rental as of the end of the day on October 18. It is my view that Aviva Canada provided a reasonable period of time with respect to the rental for this matter to have been settled. Unfortunately, and perhaps to some degree understandably, Mr. MacGillivray felt this was a heavy handed response by Aviva. Although I understand Mr. MacGillivray's concern at this stage, I believe it was unfortunately based on a misunderstanding of Aviva's obligations to him. It is clearly understandable in these circumstances that two parties might disagree with the valuation of the vehicle. What is not reasonable to believe is that Aviva, under these circumstances, would continue to pay for the rental while this disagreement continued on. This of course is the very reason why large insurers are hesitant in paying monies up front, prior to settlement, because they will only be measured by the last thing they did. Aviva Canada, in law, had no immediate obligation to pay directly for the rental in the first instance, prior to settlement. It is unfortunate that their attempts to treat a party fairly in this instance only resulted in creating greater expectations by Mr. MacGillivray. I find as it relates to the rental automobile that Aviva Canada acted appropriately and reasonably under the circumstances with respect to both the provision of that rental and discontinuance.

21. Unfortunately, due to this action, Mr. MacGillivray responded to Aviva and told them they could pick up their rental vehicle whenever they wanted to. Implied in this response was

that he was not going to take the rental vehicle back to the rental company. And so a battle began.

22. Aviva then, on October 23 sent to Mr. MacGillivray a letter confirming the amount that they were willing to settle the claim for, and setting out an appraisal process option should he disagree.

23. Mr. MacGillivray wrote on that letter the following:

"This option suggested after Aviva Canada Inc. wilfully and with malice cancelled the rental car for our loss of use. No reply requested."

Again, the tone of these comments clearly indicate that Mr. MacGillivray believed he was being dealt with in a very heavy handed fashion.

24. It is my belief that insurers, under these circumstances, with their knowledge and expertise, have an obligation to patiently work their way through these kinds of circumstances with injured parties. I believe for the most part, Aviva did an excellent job in regard to their dealing with Mr. MacGillivray.

25. Unfortunately, there was one aspect of their interaction that seemed to me somewhat outside the bounds of what would have been appropriate under the circumstances. I specifically refer to Mr. Brown's response to Mr. MacGillivray dated October 18, 2007, where he indicated to Mr. MacGillivray that Aviva will no longer continue to respond to emails with regard to this loss. He gave him the option of either telephoning or writing via other than email. I find this extraordinary under the circumstances, and although I suspect it was driven by the numerous and continuous emails they received from Mr. MacGillivray, this does seem out of place.

26. Mr. MacGillivray ultimately did not take Aviva up on their suggestion of the appraisal process and ultimately he elected to proceed to Small Claims Court to deal with this matter.

## **Discussion**

27. In law, under these circumstances, the injured party has an obligation to mitigate their loss. Ultimately, that party should proceed to resolve their damages as quickly as possible and on the conclusion of resolving those damages, submit the cost to the tortfeasor.

28. As I have indicated before, the issue on this matter was the ACV valuation of the Intrepid at the time of the accident, and as a result of that evaluation whether it should have been fixed or written off. I find absolutely no fault on Mr. MacGillivray's part in arriving at the figure that he suggested as it relates to the value of the vehicle. It makes total sense to me that there could be a difference of opinion in regards to the appropriate amount of compensation in this instance. Valuations of second hand vehicles is not an exact science.

29. I find, on the basis of Mr. MacGillivray's allegations in regards to the value of the vehicle, that he should have immediately had the vehicle fixed and returned to the road as

quickly as possible. Although there were some hiccups in the first instance, I believe a one month period would have been appropriate to have the damages fixed and have submitted his costs for those damages. It makes absolutely no sense to do otherwise. As it turns out, as I understand the evidence, the car still sits with the damages in his driveway and he has since found a replacement vehicle.

30. I now come to the valuation of the 1997 Chrysler Intrepid at the time of the accident.

31. The Defendant, through his agent Canavan's Appraisal outsourced the valuation of the 1997 Chrysler Intrepid after their appraiser had looked at the vehicle. Insurers presently use a web based appraisal system for such evaluation called Audatext which is apparently connected to a significant number of sources such as newspapers and the like to arrive at a comparative price of a loss vehicle. The Audatext/Audasource evaluation determined that Mr. MacGillivray's vehicle, at the time of the loss, was worth approximately \$2,000.00 and with HST, they were willing to pay \$2,280.00.

32. The report considers a significant number of characteristics as it relates to the condition of the vehicle and the mileage, and the appraiser in this instance, appears to have gotten, for the most part, the condition of Mr. MacGillivray's vehicle accurate, in so far as the report goes. There was some cross-examination on an issue with respect to the consol, however I found that not to be significant. In addition, there was a minor amount of damage to the right fender which was deducted after the vehicle was valued through this automated system.

33. At the end of the report, there are a number of specific vehicles listed, eight in total, which are suggested to have been used as part of the sampling in calculating the selling price. The prices for these vehicles range anywhere between \$2,700.00 and \$800.00.

34. Mr. MacGillivray had significant concerns that if these vehicles were part of the sampling, they didn't appear to accurately reflect the condition and mileage of his vehicle. In a number of the samples shown, there was in fact no indication of kilometres.

35. On cross-examination by Mr. MacGillivray, I found the appraiser to be very straightforward in his testimony. When it came to the explanation of how these samplings were used, he could not however provide any kind of a reasonable explanation as it relates to why there were vehicles in the sample that weren't comparable.

36. Mr. MacGillivray also gave evidence that they had notified Aviva that he had invested a significant amount of money in this vehicle over the last couple years, and in court, he provided both a listing of the overall money he had spent on maintenance and the associated invoices for that maintenance. It was clear to me, given this evidence, that it had been maintained well and was in good shape. As I understand, Aviva never made themselves aware of this additional information.

37. In response to this assessment of the value of the vehicle, Mr. MacGillivray provided two sources in assessing the amount of the value of the vehicle at the time of the loss.

38. He first provided numerous advertisements from the Chronicle Herald, Auto Trader and Kijiji with respect to similar vehicles. Mr. MacGillivray's vehicle at the time of the loss had approximately 155,000 kms on it. He provided a spreadsheet with all of the particular information and then adjusted the evaluations as shown in the advertisements for the mileage and for the fender damage. The dates of these advertisements were in and around the same time of the accident, being October and September 2007. The average price, inclusive of taxes, was \$3,150.95.

39. In addition, as a result of being referred by Meloche Monnex, he used another website called Auto 123. That website provided ten or eleven vehicles with noted kilometres. He averaged the kilometres and the price and applied the same deductions for the kilometres adjustments and the damage to the front fender. The actual cash value, according to this source was \$3,467.24.

40. As a result of this evidence, I had significant concerns in regards to the Audatext Autosource valuation process. Mr. MacGillivray, as a lay person, was able to provide me more cogent evidence in regards to the valuation of this vehicle than the Autosource valuation did.

41. Admittedly, the valuation of a second hand vehicle is not an exact science. This of course becomes even more problematic where the value of the damages reached a level comparable to the out and out actual cash value of the vehicle.

42. It is my view, on the basis of the information that Mr. MacGillivray has been able to present, the cost of repair was slightly below the ACV of the vehicle at the time. Although there are some instances, where under these circumstances the practice would be to write the vehicle off, I am of the mind, given the non-monetary valuation owners have invested in their vehicles, that they should have the choice between the write off or repair when this close.

43. In this instance, I therefore award Mr. MacGillivray the cost of repairs, further to the appraisals provided of \$2,916.52.

44. In addition, I find that Mr. MacGillivray did not mitigate his loss, and as a result he cannot claim for the majority of the additional costs including loss of time off work, mileage and travel cost searching for replacement car, etc.

45. Although it was not two full days, I will award Mr. MacGillivray the two additional days on the front end of the rental, which he had to pay for himself in the order of \$85.72. The total loss, before costs is therefore \$3,002.24. In addition, I award the costs of initiating this action of \$85.00.

## **ORDER**

46. I therefore find in favor of the Claimant and order the Defendant Karen MacLean to pay the amount of \$3087.24. This matter is dismissed as against the other Defendants

DATED at Halifax on this      day of February, 2008.

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J.W. Stephen Johnston  
Small Claims Court Adjudicator

Original Court File  
cc Claimant/Defendant