



**Right:** A seller has an obligation to inform a buyer if the horse is unsuitable for the buyer's stated purposes. If the horse is being purchased for a beginner rider, and the seller knows the horse is unsafe, the seller is obligated to inform the buyer that the horse is unsuitable for the intended use.

# Horse Trading

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## An Update on Sellers' Obligations

**I**n the September/October 2005 issue of *Canadian Horse Journal*, I provided an overview of the law with respect to the buying and selling of horses. Since that article was published, the British Columbia Provincial Court has issued a decision which clarifies the legal obligations of sellers. This decision is a strong warning to sellers that they have an obligation to disclose information about the horse they are selling.

### Case Study: Sutton v. Burch and Knies

In *Sutton v. Burch and Knies*, 2011 BCPC 0408, the claimant bought a horse named Fao from the defendants. The claimant alleged that, at the time of the sale, both defendants were aware that Fao had suffered a significant and potentially chronic injury. This injury had been diagnosed previously as a hind high suspensory injury, and rendered Fao unsuitable for the claimant's

intended use of para-dressage training and competition. The claimant said that she expressly asked one of the defendants, prior to any agreement to purchase the horse, whether he had suffered any injury. That defendant told her several times that the horse had not.

The claimant argued that the defendants' failure to disclose the existence of the previous high hind suspensory injury constituted fraudulent or negligent misrepresentation. The claimant asked the court to set aside the contract of purchase and sale and give her an award of damages for the misrepresentation, or for breach of contract. These damages would include return of the purchase price and all costs associated with the purchase of the horse.

The defendants in the case were Fao's owner and the owner's agent in the sale. Both defendants are professional horsewomen. At trial, both denied



**Right:** "Soundness" is a relative concept. A horse may be sound for trail riding but unsound for the rigours of show jumping. A buyer is entitled to know the horse's complete medical history in order to make their own assessment on this issue.

any knowledge of the injury to Fao or the veterinary diagnosis. The defendant agent said that she was never asked by the claimant about injury to Fao, but only whether he was sound. The defendants denied that Fao's condition was misrepresented to the claimant. Both defendants took the position that Fao was accurately represented to be sound. They argued that any subsequent lameness was not shown to be caused by the high suspensory injury.

The defendants also relied on the terms set out in the bill of sale for the proposition that Fao was sold "without warranty of any kind" and that the rule of *caveat emptor*, or "let the buyer beware," puts the risk of injury or unsoundness onto the purchaser. The judge rejected all of the defendants' arguments. At trial, he did not accept their evidence or that of witnesses called on their behalf, preferring to believe the evidence of the claimant and her witnesses. The judge found that both defendants had knowledge of Fao's previous hind high suspensory injury. As such, they were liable to the claimant for fraudulent misrepresentation. The claimant was entitled to the refund of the purchase price, as well as all associated costs.

## The Sellers' Obligation to Disclose Information

The court's decision in *Sutton v. Burch and Knies* makes it very clear that where a seller intentionally makes a false statement or deliberately fails to disclose information which the seller possesses, and which is relevant to the purchaser's decision to buy the horse, that failure will constitute a fraudulent misrepresentation. Judge Harrison stated in his decision:

*"The claimant has amply made out the claim of fraudulent misrepresentation. Ms. Burch repeatedly represented to Ms. Sutton that the horse had no previous injury. That representation was false as the horse had been significantly injured. This was confirmed in the Pullman [Washington State University Veterinary Teaching Hospital in Pullman, WA] report and the common significance of the injury to a dressage horse was set out in the report of Dr. Hawkins. Ms. Burch knew of the injury and the report but denied the existence of any previous injury. This was a deliberate misrepresentation on a matter of fundamental importance to Ms. Sutton's decision to purchase and which caused Ms. Sutton to enter into the contract, as it was no doubt intended to do."*



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The courts have described a fraudulent misrepresentation as "a representation of fact made without any belief in its truth, with intent that the person to whom it is made shall act upon it and actually causing that person to act upon it."

It is important to note that Fao's soundness at any particular time was not in issue, but rather, the failure of the defendants to disclose his previous injury to the claimant. This is an important distinction as many sellers may think that a horse's medical history is irrelevant, provided the horse is currently sound. However, "soundness" is a relative concept. A horse may be sound for one purpose, but unsound for another. A buyer is entitled to know the complete medical history of the horse in order to make their own assessment on this issue. As stated by Judge Harrison:

*"... This horse was sold to a questioning buyer expressly as an animal with no history of injury. It was said to be suitable for the demands of para-dressage training and competition, when the vendor well knew the horse had*

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**Above:** Silence can have the same result as making an intentionally untrue statement. If the seller realizes that the buyer incorrectly believes something to be true, by remaining silent, the seller is taken to have confirmed the truth of the inaccurate information.

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*suffered a significant injury and was at serious risk to become chronic."*

A seller has an obligation to disclose information about their horse in the following circumstances:

- If the buyer asks a question about the horse's history, the seller has an obligation to answer truthfully. For example, if the buyer asks whether the horse has had any lameness problems or injury, the seller must disclose all lameness problems and injury of which the seller is aware, even if they occurred before the seller owned the horse. This is very similar to the circumstances in the *Sutton v. Burch and Knies* case;
- If the buyer tells the seller what they intend to use the horse for, and the seller knows that the horse cannot or should not be used for that purpose. For example, the buyer mentions that she's buying the horse for a beginner rider and the seller knows that the horse has a habit of rearing. In these circumstances the seller is obliged to inform the buyer that the horse is unsuitable for the buyer's purposes; and
- If the seller realizes that the buyer incorrectly believes something to be true about the horse. For example,

the buyer mentions that after showing the horse for a year, they plan to breed her, but the seller knows that the mare cannot successfully carry a foal. The seller cannot stand by silently because, by remaining silent, the seller is taken to have confirmed the truth of the inaccurate information (i.e. that the mare can carry a foal).

Silence by a seller can be taken as a fraudulent misrepresentation if, by staying silent, the seller intends to deceive the buyer. Silence can have the same result as making an intentionally untrue statement.

If a seller is asked a question and the seller knows the answer, it is not acceptable for the seller to say "I don't know" in an attempt to avoid a potential fraudulent or negligent misrepresentation. If the seller knows the answer to the question asked, they must provide the information. The law places this obligation upon sellers because they are the only ones with this information.

Negligent or fraudulent misrepresentation can occur verbally or in writing (i.e. in an advertisement). Sellers should take care to ensure that any ads accurately describe their horse and do not mislead buyers.

As in the *Sutton v. Burch and Knies* case, if a buyer can prove that a seller did not disclose information that the seller was legally obligated to disclose, the seller could face legal liability for fraudulent or negligent misrepresentation. If the buyer succeeds in proving those claims, the seller could be required to refund the purchase price of the horse and any additional expenses that the buyer has incurred in keeping the horse since the purchase.

### Sellers' Liability for Agents' Misrepresentations

Sellers should be aware that they will be liable for fraudulent or negligent misrepresentations made by their agents. The rule is that a principal is vicariously liable for the wrongs of an agent committed within the scope of the agent's authority, whether express, implied, or apparent. This includes fraudulent misrepresentations committed by the agent. This is what happened in the *Sutton v. Burch and Knies* case. In this case, the defendant owner did not make any statements to the claimant as to Fao's history or prior injuries. All such statements were made by her agent who was helping

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**Right:** Although a horse may be sound at the time of purchase, the seller has an obligation to inform the buyer of all previous injuries known to the seller. The rule of “let the buyer beware” does not apply when a fraudulent misrepresentation is made.



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her sell the horse. However, due to the rule of vicarious liability, the owner was equally responsible for the fraudulent misrepresentations of her agent.

### Caveat Emptor

The rule of “*caveat emptor*” or “let the buyer beware” can protect sellers in certain circumstances. This rule stands for the principle that, generally speaking, no vendor has an obligation to disclose defects in property being sold, particularly where that defect is discoverable upon reasonable inspection. This means that if a defect is readily apparent to a buyer, the seller has no obligation to disclose it to the buyer. For example, if a horse has a very visible splint, a seller may not be required to disclose that to the buyer because the splint is there for the buyer to see. However, this does not mean that in all circumstances a seller does not have to disclose the existence of prior splints. The obligation upon the seller will depend upon how readily apparent the splint is upon reasonable inspection. If dealing with less experienced buyers who may not know what a splint is, the seller may have a duty to disclose this information.

However, the rule of “let the buyer beware” does



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not apply when a fraudulent misrepresentation is made. Fraudulent misrepresentation is an exception to the general rule “let the buyer beware” and will not operate to permit a seller to escape the consequences of fraudulent statements. This is why the judge in the *Sutton v. Burch and Knies* case rejected the defendants’ attempt to rely on the rule of *caveat emptor*.

### No Warranty


In the *Sutton v. Burch and Knies* case, the defendants argued that the exclusionary term found in the bill of sale (which they drafted) that Fao was sold “without warranty of any kind” prevented reliance by the claimant on any alleged misrepresentation, particularly where the claimant brought her trainer to try out Fao and had him examined by a veterinarian.

The judge rejected the defendants’ argument because the law is clear that a party to a contract cannot rely on an exclusionary clause to avoid liability for fraud. Further, although not addressed by the judge, there was arguably no basis upon which to apply this exclusion clause retroactively against the claimant who, by the date the bill of sale was signed, had already acted upon the fraudulent misrepresentation by entering into the contract to buy Fao.

### Application of *Sutton v. Burch and Knies* in Other Provinces

The case of *Sutton v. Burch and Knies* has direct application in British Columbia only, although judges in other provinces may choose to follow the decision if applicable on the facts of the case before them. The general principles of law set out in the *Sutton* case as to what constitutes a fraudulent or negligent misrepresentation, and the types of damages awarded for such misrepresentation, are applicable throughout Canada. As such, sellers throughout Canada would be well advised to follow the level of disclosure mandated by the judge’s decision in *Sutton*.

### Conclusion

The case of *Sutton v. Burch and Knies* confirms that sellers must act honestly and disclose relevant information that they have with respect to the horse’s history. The deliberate failure to do so, with the intent to induce the buyer to purchase the horse, is a fraudulent misrepresentation. A finding by a court that you have acted fraudulently is a very serious matter as it impugns your credibility and honesty. It can have a profound effect on your professional reputation. This is something that most sellers, who trade off their “good name” in the horse industry, will (or should) strive to avoid at all costs. 

The writer was counsel for Ms. Sutton in this case. The full text of the *Sutton v. Burch and Knies* case is available on the Provincial Court of British Columbia’s website at [http://www.provincialcourt.bc.ca/judgments/PC/2011/04/P11\\_0408.htm](http://www.provincialcourt.bc.ca/judgments/PC/2011/04/P11_0408.htm).

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