Litigation Involving
Faulty Workmanship Issues

Helpful Guide to the Law Regarding Faulty Mechanical Repairs or Renovation Project Defects

Constructors, mechanics, technicians, and others who are paid to build, assemble, install, fix, or repair things are human and will, from time-to-time, make mistakes that are quite costly to correct, if correctable at all, resulting in litigation for recovery of the resulting losses.

Legally, 'defective workmanship' cases are usually framed in contract law as well as tort law. The contract law issues allege 'breach of contract' for the breach of an expressed term or an implied term within the workmanship agreement and regardless of whether such agreement was verbal or in writing. Generally, a contract will explicitly state that work shall be performed to usual and proper standards or, if the contract is silent on the standards, the law deems that proper standards were presumed. Similarly, in tort law, allegations are made as 'negligence' for the failure to perform workmanship to usual and proper standards.

Legal professionals tend to frame defective workmanship lawsuits as both a breach of contract claim and negligence claim as there may be slight, but important, differences in the manner in which courts assess and award the damages owed for the faulty work depending under which basis for claim is ultimately determined as the valid basis in a given situation. Legal professionals when setting out claims as either breach of contract or negligence will do so with each as an alternative to one another; what is known as 'pleading in the alternative'. The idea of 'pleading in the alternative' is to open up either the 'breach of contract' strategy and/or the 'negligence' strategy as possibilities for winning if the case ultimately goes to trial (as happens unless settled beforehand).

Defects Defined

What constitutes a defect is often highly subjective. Excessively proud property owners may be more discriminating upon the quality of workmanship than the contractor who believes that the quality of workmanship, while imperfect, meets or exceeds the specifications stated as contractual obligations or the common law standard expected in negligence law known as 'a good and workmanlike manner'. The contractor may also perceive, sometimes wrongfully, that simply satisfying the standards of workmanship prescribed by statutes such as the ***Building Code Act, 1992***, S.O. 1992, Chapter 23 is satisfactory. Of course, a defect is a defect only when a judge says so.

In ***Scott v. Sarsfield Foods Ltd.***, 2000 CanLII 3533, a defect was accepted by Justice Stewart as:

> [37] Principles relied upon by both parties are summarized, to a large degree, in I. Goldsmith and T.G. Heintzman, Goldsmith on Canadian Building Contracts, fourth edition (Toronto; Carswell, 1988 at pp. 5-11 to 5-14 under a Breach Contract; 2. By Contractor(b) Defective Work which reads in part as follows:
>
> > Work which does not meet the requirements of the specifications contained in the contract, or which, in the absence of such specifications, is not a reasonable workmanlike quality, is not proper compliance with the contract and constitutes a breach. Furthermore, compliance by the contractor with the specifications will not be sufficient performance if the specifications were prepared by him and are deficient, even if they were approved by the owner. Whether work, or material supplied, is defective or not is, in each case, a question of fact, depending on the construction of the particular specifications where there are any, and on expert evidence as to what is reasonable where there are none.
>
> > Where a contract, either expressly or by implication, contains a particular standard for the work to be done, an owner is not entitled to insist on work of a higher quality.

> On the other hand, compliance by the contractor with a statutory or regulatory standard of conduct may not be sufficient, if it is not the standard called for by the contract, or reasonable in the circumstances.

> An owner who has accepted the work does not thereby necessarily lose his right to claim damages for defective work, unless the defects have been expressly approved, or unless approval of them can be otherwise inferred from the owner's conduct. Sometimes a contract contains a provision guaranteeing certain parts of the work for a particular period, and any defects occurring during such period of guaranteed maintenance must be remedied by the contractor.

> Generally speaking, a contractor is liable only for defects resulting from his own work or from work or materials of his suppliers and subcontractors. ...

> Apart from being contractually liable to the owner, a contractor who has been guilty of negligent constrction in a dangerous or unsafe structure may be liable in tort to the owner and to third parties. ... The standard of care for which the contractor is responsible may be determined by his contractrs with the owner or subcontractor or, in the absence of specific provisions applying to the circumstances, by expert evidence about the standard of conduct in his industry.

Furthermore, it is important to note that while violations of the ***Building Code Act*** will constitute a defect, the reverse is untrue; whereas, compliance with the ***Building Code Act*** may still be a violation of the express terms, or implied terms, of the contractual requirements; ***Enfield Hardware Ltd. v. DeGier***, 2002 NSSC 164 at 9. Essentially, compliance with the ***Building Code Act*** is the statutory minimum requirement; however, a higher level of performance may be required. As stated in ***Enfield***, the usual standards of a trade may be higher than the minimum requirements of the applicable 'code'. If the contract calls for standards higher than the applicable 'code', or a contract is silent on specific standards and therefore the

usual standards apply, compliance with the mere minimums may be deemed a defect.

Common Concerns, breach of contract by defect

It is quite common for homeowners to over-react by prematurely alleging breach of contract by defect. A homeowner tends to perceive the homeowner's house as the homeowner's castle and often expects perfection. A construction contract is without obligations upon the contractor to perform perfectly. A contractor is required to perform reasonably and the homeowner is required to reasonably give some slack and allow the contractor a few defects, subject to the willingness of the contractor to make corrections, prior to the homeowner treating the contract as breached and terminating the contract. This point was well articulated in ***C.S. Bachly Builders Ltd. v. Lajlo***, 2008 CanLII 57444 where it was said:

> [84] "Mere bad or defective work will not, in general, entitle an owner to terminate a contract": I. Goldsmith, Canadian Building Contracts (4th ed.), p. 6-4 (passage approved in *Argiris (c.o.b. Atlas Painting) v. Calexico Holdings Inc.*, [1998] O.J. No. 6291 (Gen. Div.) at para. 12; *568694 Ont. Ltd. v. Davis*, [1994] O.J. No. 1030 (Gen. Div.) at para. 5).

> [85] For the defendant, the roof repair deficiencies became a convenient coincidence with her plan to pursue a cash settlement through the vehicle of NFA permitting, in her view, her act of taking the work out of the hands of the contractor.

> [86] While the state of the roof repairs by Bachly amounted to a breach of contract on its part, "breach of contract is a long way from repudiation of contract": *Argiris*, at para. 10. The condition of the roof work in this case was not so bad or defective as to deny the defendant the substance of the benefits of the contract and did not amount in substance to a failure or refusal to carry out the contract work and thus amount to repudiation. It is the defendant who failed to fulfil her contractual obligations and thus repudiated the contract. Without justifiable cause, Ms. Lajlo denied the defendant access to the work site and the opportunity for Bachly's performance to the completion of the contract.

> [87] Although the defendant may be entitled to a set-off for that roof work which was defective, in the absence of a fundamental breach by Bachly, she was obliged in mitigation of her damages to provide the plaintiff a reasonable opportunity to correct its own work. An expert's report would have been unnecessary. I am satisfied, on the evidence I accept, that Mr. Whittick offered to rectify the deficiencies but that the defendant and her agent, Hanson of NFA, denied that opportunity. In these circumstances, the defendant is not entitled to damages based on her own costs of correction: see *Obad (c.o.b. Rockwood Drywall) v. OntarioHousing Corp.*, [1981] O.J. No. 282 (H.C.J.) at para. 48 per Blair J. (as he then was); *568694 Ont. Ltd.*, at para. 31; Argiris, at para. 22.

Furthermore, where the homeowner prematurely terminates the contractual agreement, the contractor may seek damages for the breach or a quantum meruit for the value of work done as per ***Pierre Paroyan v. Chee***, 1995 CarswellOnt 2952:

> [24] I believe the law relating to a building contract situation such as that in the present case is set out in *Comorowski v. Vanweil* 12 O.R. (3rd) p. 444 where it is stated in the headnote as follows:
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> > When a contract is repudiated, the innocent party may elect to treat the contract as terminated and be discharged from his or her own preformance obligations. The innocent party may than elect to cover either damages for breach of contract or on a quantum meruit for the value of work performed before repudiation. On a quantum meruit claim by an innocent contractor, deficiencies in the work are counted for as reductions in the value of the work done, but no account is taken of the owner's cost to complete.

Duties of Owner (required to mitigate)

A common occurrence in defective workmanship cases often involves the nature of breakdown in relations between the property owner and the contractor. The manner in which the relationship breaks down can gravely affect a subsequent legal action. A property owner may wish to immediately expel a poorly performing

contractor; however, a property owner that does so may be deemed to have repudiated the contract thereby voiding certain rights in legal action. Essentially, a poorly performing contractor must be provided a reasonable opportunity to correct defective workmanship. This reasonable opportunity is in keeping with warranties within the contract (whether expressed or implied) and was well summarized by Deputy Justice Marshall in ***PSR & Construction v. Dagenais***, 2014 CanLII 29444 (ON SCSM):

> [87] The principles in such a case were canvassed by R. Smith J in *Rocksolid v. Bertolissi*, 2013 ONSC 7343 (CanLII). Rocksolid was installing masonry stonework at Bertolissi's home. Bertolissi was responsible for assuring the materials were available. He failed to do so and ultimately was found to have repudiated the contract. There had been some deficiencies in Rocksolid's work.

> [88] It was accepted in Rocksolid that at common law a builder had the right to return to a work site to repair deficiencies. R. Smith J accepted as well the following proposition [at para 80]:

> > "Although the Longwell decision is little more than a head note, it does appear to stand for the proposition that a builder who is ready and willing to complete the work required to make good the contract between it and the home owner, has the right of entry to the house to do so. In that case, it was held that a refusal to permit such entry amounted to repudiation of the contract by the homeowner."

> [89] Additional principles were gleaned from *C.S. Bachly Builders Ltd v. Donna Lajlo*, 2008 CanLII 57444 (ON SC), a decision of Hill J:

> > it was unreasonable not to permit a contractor to rectify deficiencies

> > an implied term of the contract was its completion in workmanlike manner

> short of a fundamental breach, a contractor is entitled to rectify deficiencies

> it is a matter of mitigation of damages to allow a contractor to correct its work

> any homeowner's claim cannot include work undone after a contractor justifiably left the site

It is noteworthy to point out that the contractor is entitled to a reasonable opportunity to mitigate rather than a perpetual or endless opportunity to mitigate. Of course, what is 'reasonable opportunity' will vary in each circumstance. Furthermore, and despite the abovesaid, a property owner (residential or commercial or otherwise) may terminate a renovation contract without providing a reasonable opportunity to mitigate where it is apparent that the contractor is unable to adequately perform the work; ***New Home Renovations & Construction Ltd. v. King***, 2003 NSSC 31 at paragraph 36; ***Pelliccione v. John F. Hughes Contracting and Development Company***, 2005 CanLII 34822. ***New Home*** and ***Pelliccione***, among other cases, accept the principle as articulated in Goldsmith on Canadian Building Contracts, 4ed (Toronto: Carswell, 1989), p. 6-4:

> An owner is entitled to terminate a contract if it is clear that either before the commencement of the work, or during the course of it, the contractor is not in substance able or willing to perform the work.

This is known as the 'fundamental breach' exception to requirement that a contractor be provided with a reasonable opportunity to correct defects. It is noteworthy that this exception is an abstract objective concept and determining where a 'line in sand' should be drawn becomes problematic. Expel a contractor too early and the property owner risks accusations of failure to mitigate in any subsequent legal action; but yet, provide an opportunity to correct defects and the contractor may continue to cause further defects. At some point, the property owner is with right to lose confidence in the contractor and to deem the defective workmanship as so significant as to amount to a breach of contract by the contractor; however, this 'line in sand' is indeterminable until determined by a judge

in a court of law. As expelling a contractor too early may have grave consequences in subsequent legal action, it is highly important that a property owner carefully document and gather evidence to support any decision to do so.

Mitigation - Eliminating Current Risk and Preventing Future Loss

In defective workmanship situations, the common question and legal problem often arises regarding whether or not a property owner has a right to sue for the cost of repairs or corrections to workmanship prior to the flaws in workmanship causing any actual loss or harm. This question was hotly contested for years with many legal advocates suggesting that the law should not allow property owners to sue for 'pure economic loss' (the cost of repair) before an incident or accident resulting in injuries or damage actually occurs. However, with the precedent case of ***Winnipeg Condominium Corporation #36 v. Bird Construction Co. Ltd.***, [1995] 1 S.C.R. 85, the Supreme Court of Canada decided that where there is a "real and substantial danger", liability can arise for repair of defects prior to the defect causing any actual harm. Subsequent to the ***Winnipeg*** decision, clarification to the rule that liability for the costs of repairs expended prior to any actual incident but where there is a "real and substantial danger" has occurred through many cases including the recent case of ***Vargo v. Hughes***, 2013 ABCA 96 which determined that the danger need only be "likely to occur" rather than imminent.

A common argument of a Defendant is that a Plaintiff spent too much on repairs thereby failing to mitigate. Essentially, the Defendant states that the corrective work was done too expensively and the Plaintiff should be unable to blame the Defendant for any excessive amounts. This is a good argument, and may indeed be a worthy argument; however, often a Defendant fails to recognize that at the time the defects were corrected the Plaintiff was 'under the gun' to expedite repairs or corrections before any consequences of the defects arise. Later, when the defects are corrected and the problems are resolved, it may be discovered or recognized in hindsight that a lesser priced option was available. In this situation, the law recognizes these concerns and while the law does impose a duty to mitigate upon the Plaintiff, this duty to mitigate requires only that the Plaintiff act reasonably - the law does not require the Plaintiff to act perfectly. These requirements and expectations were well stated in ***Viper Concrete 2000 Inc. v. Agon Developments Ltd.***, 2009 ABQB 91 as:

[72] The plaintiff has a duty to mitigate its damages. *Red Deer College* at p. 330:

> ... the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff

[73] The burden of proof is on the defendant to show that the plaintiff failed to mitigate.

See: Fridman, at p. 779; Harvin D. Pitch and Ronald M. Snyder, Damages for Breach of Contract, 2nd ed., looseleaf (Toronto: Thomson Carswell, 1989) at p. 8-20.9.

[74] The question to ask is whether the actions of the plaintiff, in mitigating its damages, were reasonable. Pitch and Snyder summarized the analysis for determining whether the plaintiff properly mitigated its damages at p. 8-15 to 8-16:

> In determining whether the plaintiff's efforts at mitigation were reasonable, the court will consider the plaintiff's actions on the basis of facts which existed when the contract was breached, i.e., when the plaintiff was faced with the obligation to act immediately. In so doing, the court places its sympathy squarely with the plaintiff... The court does not impose upon the innocent plaintiff an exacting standard but instead adopts a practical perspective in line with business realities.

[75] The test is not whether a less costly course was available; rather, the test is whether the plaintiff's conduct was reasonable as described in *Nu-West Homes* at para. 58:

> In my view, one should be careful not to weigh in too fine a set of balances the conduct of the aggrieved party. The wrongdoer is entitled to expect the aggrieved party to act reasonably. He is not entitled to have him act perfectly. In my view the proper test to be applied is that set out by Lord MacMillan in *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1930] A.C. 452 at 506, where he states:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measure which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the incidence of the party whose breach of contract has the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

Privity Issues

It was also decided in ***Winnipeg***, that 'lack of privity of contract' fails to prevent a property owner from bringing legal action against those who originally performed defective workmanship. Simply stated, the common 'lack of privity' concern whereby it is usual that persons are unable to sue others for 'breach of contract' when the contract was between others was ruled moot by the determination that a tort law duty of care exists in negligence so as to impose a risk of liability upon the provider of workmanship to all those persons that may in the future become the owners of the work. Although seemingly common sense that when Contractor A builds 'something' for Customer B and then the 'something' is

later purchased by Unknown Person C, the Unknown Person C should have legal rights against Contractor A (despite any direct relations), a legal conundrum, a 'Catch 22' of sorts, existed prior to the ***Winnipeg*** decision.

Vicarious Liability (Who to Sue?)

Another question often arises as a result of common construction/contracting arrangements. This is the question of who should be sued and who is ultimately liable for the repair of defects or injuries to persons or losses to property when the defective workmanship involved the work of a subcontractor. In construction/contracting arrangements the property owner often hires (enters into an agreement with) a general contractor. The general contractor then hires subcontractors who may hire subcontractors (known as sub-subcontractors) who then may also further hire subcontractors and tradesmen resulting in a lack of any direct relations between the property owner and those that may produce faulty workmanship and defects. Luckily, at least for the property owner, the law works in such a way that the general contractor, being the party hired by the property owner, is ultimately responsible for the faulty workmanship and defects produced by those subcontractors and tradespeople who are brought into the project by the general contractor. The law essentially holds the general contractor accountable for the workmanship of others via a principle known as 'a non-delegable duty' whereby it is no answer to an allegation of liability for the general contractor to suggest that someone else working under the general contractor is to blame; ***Vandenbrink Farm Equipment Inc. v. Double-D Transport Inc.***, 1999 CanLII 14947 at 48 to 50. The property owner may simply sue the general contractor without the need to uncover the identity of the actual subcontractor at fault for causing the defect. Of course, for a variety of reasons, the property owner (or others for that matter) may wish to do so anyway, such as concerns for the solvency of the general contractor; however, as the general contractor is vicariously responsible for any defects caused by all others brought into the project, there is no absolute need for the property owner to sue anyone beyond the general contractor.

Additionally, even when work on a project is completely within the oversight of an incorporated general contracting business without involvement of subcontractors (or project failure is without fault of subcontractors), naming directors or officers or employees as defendants in addition to the incorporated general contracting business may be prudent and proper.

Durability and Suitability (reasonable expectation)

Often contractors are mistaken by a belief that the legal obligations under a contract are simply to do what was specified within the contract. This perception can lead to legal action for failure of durability or suitability of the work product; as essentially, when a contractor agrees to supply materials and perform work, the law imposes an implied term within the contract that the materials and work will be both reasonably durable as well as reasonably suitable for the job. These implied terms were stated within ***Dirm Inc. v. Bennington Construction Ltd.***, 2010 ONSC 3298 as follows:

> [98] I further conclude that, while not an expressed term of the contract between these parties, it was an implied term of the contract that the concrete finish would be durable. Reasonable durability of the concrete has a certain degree of obviousness and as such it is a reasonably implied term of the contract: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, [1999] 2010 ONSC 3298 (CanLII) 1 S.C.R. 619 at paras. 27-19. The delamination appeared within less than one month after the pouring of the concrete.

> [99] Further, although Dirm may have complied with the specifications provided to it, in general terms, having undertaken to produce a particular result, it will still be liable even if it followed the specifications and the required result was not obtained: *Steel Co. of Canada v. Willand Management Ltd.* [1996] S.C.R. 746; *Temar Construction Ltd. v. West Hill Redevelopment Co.*, 1986 Carswell Ont. 778.

Obligations (Design or Result)

As above per Dirm, a contractor must perform beyond just completing work in accordance to the design or specifications; the contractor must achieve the reasonably expected result. This obligation was recently articulated in ***Alliance v. Manorcore***, 2013 CanLii 60850 as follows:

> [99] The Supreme Court of Canada in *Steel Co. of Canada v. Willand Management Ltd.*, [1966] S.C.R. 746 approves the proposition in Hudson's Building and Engineering Contracts, 8th ed. 1959 which states "Sometimes again, a contractor will expressly undertake to carry out work which will perform a certain duty or function in conformity with plans and specifications, and it turns out that the work constructed in accordance with the plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty."

> [100] This case as followed in *Dirm Inc. v. Bennington Construction Ltd.*, [2010] O.J. No. 2591 at paragraphs 98 and 99. Both cases indicate that if a contract was to produce a particular result then the contractor can be liable even if it follows the specifications required.

The issue of who is responsibility for a design flaw, such as specifications or plans, where the design was prepared by unqualified layperson whom the contractor knew was relying upon the expertise of the contractor was well stated in ***Complete Access Lift & Mobility Ltd. v. Riggi, et al***, 2010 CanLII 100648 as follows:

> 120 1) Responsibility for Design - The Plaintiff's position throughout has been that it faithfully performed its obligations as agreed and set out in the final contract between the parties, as amended. That it explained the choices available to the Defendants and that the Defendants made their choices and are responsible for them. The Plaintiff also relied upon provisions in the Contract and the "three way" agreement with M-o-D which stipulate that the Defendants were responsible for permits, architectural drawings and engineering approvals. Plaintiff contends that since Defendants did not obtain any such permits, drawings or approvals they cannot hold Plaintiff responsible for defects that could have or should have been revealed by or in the process of obtaining same.

121 The Defendants' argument on this point is based upon the concept of reasonable reliance. O'Toole presented himself to them as a knowledgeable and competent highly qualified expert. Defendants relied upon that expertise, Plaintiff knew that he was being relied on, the reliance was not unreasonable and therefor Plaintiff is liable when the contract fails to achieve its purpose.

122 The critical point in this argument is the contractor's knowledge of the purpose for which their work is obtained. Steel Co. of Canada v. Willand Management Ltd., 1966 CanLII 13 (SCC), [1966] S.C.R. 746 is an Ontario case in which the plaintiff roofing company: a) supplied and installed a roof using materials that were precisely specified by the defendant; and b) provided a written warranty of water tightness that was also precisely specified by the defendant. The roof failed during the warranty period due to the unsuitability of the material specified by the defendant. Plaintiff fixed the roof and was obliged to sue when defendant refused to pay. The Supreme Court of Canada found that the warranty was proof that the property owner had relied on the skill and expertise of the contractor, that the contractor knew of this reliance and that they should have realized that material specified by the defendant was not suited to the application.

123 Whether the contractor subjectively realizes that the material or the design or other contractually specified result is not suitable or feasible for its intended purpose appears to be irrelevant – liability arises from a duty that is imposed as a consequence of reliance.

124 As Eberhard, J. stated in the case of Comeau v. Perrault, [2002] O.J. No. 1834 (S.C.J.) , after reviewing the law as set out by the Supreme Court of Canada in Steel Co. of Canada and as followed and developed in related cases:

> [12] I conclude from these cases that a contractor's duty and corresponding liability, in the circumstance where the work contracted for is not feasible given the defective and/or aged state of the work site, may be wider than the terms of the contract. The concept of imposing a duty on the contractor appears to be impacted by the amount of reliance placed on the skills of the contractor and the existence (or non-existence) of an architect or engineer on site; the owner's knowledge of the work being performed and/or construction work in general.

> [13] The Plaintiff knew that the Defendant's purpose was to level her floors. If level foundations could not be achieved by constructing on the old foundations he had a duty to advise her and cannot now claim that the failure to achieve level was due to the method or prior defect in the site.

> 125 This is a case where the work contracted was not suited to its purpose, given the specific circumstances of its intended user and the existing configuration of its location.

> 126 Here, the Plaintiff knew that Defendant did not have any “team” of designers, architects, engineers or other professional consultants. He knew that the purpose of the project was to provide a safe, comfortable and convenient shower facility for Enzo Riggi in his own family home. He knew or should have realized that the Defendants were relying on him alone to achieve this and he should not be surprised that he is liable for the cost of repairing the design error.

Furthermore, it is the reliance upon the contractor that imposes the duty to produce work that will perform in accordance to the intended result per ***Jayde Mechanical Inc. v. Szabo***, 2017 CanLII 45933 where it was said:

Whether the contractor subjectively realizes that the contractually specified result is not suitable or feasible for its intended purpose appears to be irrelevant – liability arises from a duty that is imposed as a consequence of reliance. As Eberhard, J. stated in the case of *Comeau v. Perrault*, [2002] O.J. No. 1834 (S.C.J.), after reviewing the law as set out by the Supreme Court of Canada in Steel Co. of Canada and as followed and developed in related cases:

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The Plaintiff knew that the Defendant's purpose was to level her floors. If level foundations could not be achieved by constructing on the old foundations he had a duty to advise her and cannot now claim that the failure to achieve level was due to the method or prior defect in the site.

Duty to Warn, insufficient specifications

This duty to produce work that will serve the intended purpose contains a duty to warn the customer where a contractor knows, or ought to know, that the design or plan or project specifications are insufficient. The Supreme Court has said that contractors are under a 'duty to warn' with respect to designs or plans that are deficiencies and will detrimentally affect a construction project; ***Nowlan v. Brunswick Construction Ltd.***, [1975] 2 S.C.R. 523:

> 12 In the course of his reasons for judgment, Mr. Justice Bugold described the president of the appellant company in the following terms:

Mr. Durette was president and general manager of the construction company at the time. He had 22 to 24 years experience in the construction business. His company built an average of 100 to 200 houses a year as well as having been engaged in building schools, churches and any type of building. With his vast building experience there can be no doubt that he would be very proficient in the study and interpretation of plans and specifications. Since the design of the house was bad this fact should or ought to have been detected by him and, in that event, was he duty bound to advise the Owners that the plans prepared by the architects were not suitable for the intended permanent work.

13 In my opinion a contractor of this experience should have recognized the defects in the plans which were so obvious to the architect, Arnoud, subsequently employed by the respondents, and, knowing of the reliance which was being placed upon it, I think the appellant was under a duty to warn the respondents of the danger inherent in executing the architect's plans, having particular regard to the absence therein of any adequate provision for ventilation. Like Mr. Justice Bugold, I take the following excerpt from Hudson's Building and Engineering Contracts, 10th ed. at p. 291, which was adopted by this Court in *Steel Company of Canada Limited v. Willand Management Limited* 1 at pp. 753 and 754, as having direct application to this case:

So a contractor will sometimes expressly undertake to carry out work which will perform a certain duty or function, in conformity with plans and specifications, and it turns out that the works constructed in accordance with plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty.

14 In the result, I agree with Mr. Justice Bugold that the contractor was in breach of its contract and liable for the failure of the work. I would therefore dismiss this appeal with costs and affirm the judgment of the Appeal Division of the Supreme Court of New Brunswick.

General Damages, stress injury

Another point of interest involving defective workmanship involves the various heads of damages in which claims may be brought. Often when defects occur, the property owner (if a human person rather than corporate entity) endures some level of annoyance, inconvenience, distress, and upset. However, age-old principles of law from the past have held that claims for 'general damages' (pains and sufferings) are improper in breach of contract cases. Accordingly, many old school legal practitioners, and even current textbooks, suggest that only the actual losses incurred in correcting defective workmanship may be claimed. Essentially, the 'old law' states that if a contractor creates a defect that a property owner must spend $1,000 to repair, the property owner may seek only the 'actual' loss of the $1,000 from the contractor.

Today, the tide is changing. In the precedent decision of ***Fidler v. Sun Life Assurance Company of Canada***, [2006] 2 S.C.R. 3, the Supreme Court of Canada has said that when the parties to a contract had "*reasonable contemplation*" at the

time a contract was formed that the purpose of the contract included some 'peace of mind' benefits and that mental distress might occur if the contract was breached, then an award for general damages may be proper.

Since the ***Fidler*** decision (a case involving disability insurance benefits), the principle of expanding awards to include mental distress as general damages in breach of contract cases continues to evolve and, in some situations, now includes breach of contract by defective workmanship where the defects resulted in a loss of enjoyment that was "*reasonably contemplated*" when the project contract was established between the property owner and contractor; ***Van Duren v. Chandler Marine Inc.***, 2010 NSSC 139 at 106 to 111; ***Complete Access Lift & Mobility Ltd. v. Marissa Riggi and Enzo Riggi***, 2010 CanLII 100648 at 154; ***Fakih v. Palmer Homes Inc.***, 2013 CanLII 76930.

It appears commonly accepted that general damages for intangible sufferings upon breach of contract including emotional sufferings such as anxiety, distress, frustration, irritation, and the like as well as functional suffers such as loss of amenity are recoverable where an object or purpose of the contract was to obtain relief from these sufferings, or relief from the potential of these sufferings. However, it also appears that the law is evolving from infancy on the point that general damages are available where a contract purpose included an intent to obtain emotional benefits such as enjoyment, pleasure, relaxation, and even fond memories. English law, from which the Canadian legal system is derived, has evolved well in addressing these concerns (see: ***Farley v. Skinner***, [2001] UKHL 49 at 16 to 21 and ***Jarvis v. Swan Tours Limited***, [1973] 1 All ER 71). With the decision in ***Fidler***, the Supreme Court of Canada has made it clear that Canadian law should evolve equally. The result in ***Van Duren*** appears to indicate that the lower courts are getting this message.

Note: Effective June 1 2017, portions of this article appear in ***Jayde Mechanical Inc. v. Szabo***, 2017 CanLII 45933.