

Improperly Failing to Provide Latent Defect Disclosure of Dangerous Conditions and Improperly Concealing Patent Defect Discovery



An unfortunate and all too common type of legal case involves the allegation of failing to disclose details of an existing latent defect, or the intentional concealment of a patent defect, during inspections or negotiations, or otherwise prior to the closing of a sales transaction. This concern occurs especially so in realty transaction matters and can give rise to damages for the cost of restorations, repairs, temporary accommodations, and general damages for distress and upset.

A latent defect is a defect that is unavailable for inspection, being visibly unobservable or otherwise unnoticeable and therefore a buyer would be, generally, unable to discover a latent defect. Contrarily, a patent defect is a defect that is 'front-and-centre' within sight for discovery by a reasonable observer. The difference between a latent defect and a patent defect was well defined within the case of *Krawchuk v. Scherbak*, [2009 CanLII 40556](#) where it was said:

[34] Defects in property may be either “patent” or “latent”. A defect which is readily apparent to someone exercising reasonable care in their inspection of a property is said to be patent. A defect which is not readily apparent on such an inspection is said to be latent. Patent defects need never be disclosed to purchasers because they are there for the purchasers to see for themselves. Latent defects, however, are treated somewhat differently. Latent defects cannot be concealed by the Vendors so as to prevent their discovery by purchasers. In addition, even if not concealed by the vendor, if a latent defect is known to the vendor and is such that it makes the property uninhabitable, dangerous, or potentially dangerous, it must be disclosed to purchasers (See *McGrath v MacLean* (1979) [1979 CanLII 1691](#) (ON CA), 22 O.R. (2d) 784).

Sellers of homes often come under attack from the buyer following a sale where the buyer alleges that the seller failed to advise of a defect (eg. leaky basement with mold, asbestos, etc.). Unfortunately, in these cases as in most legal matters, the burden of proof upon the Plaintiff (the suing buyer) is difficult to overcome especially the burden to prove that the seller had knowledge of the defect. The requirement to prove that the seller was fully aware of the defect was well stated in the case of *Crone v. Kilmer*, [2013 CanLII 55833](#) where it was said that more than speculation or simply a "gut feeling" that the seller was aware of a defect is needed for the Plaintiff to successfully prove a case:

[12] Kilmer may or may not have known that there was a problem with the furnace. Unfortunately, the trial process does not allow me to go back in time and read her mind. Rather, it requires me to make a finding of fact based upon credible evidence given at trial and the onus is on Crone and Cichewicz to persuade me that it is more likely than not that Kilmer knew of the problem. In this case, while I fully understand why they are convinced that she knew, there was insufficient evidence to allow me to conclude that it is more likely than not that she did. In particular, there was no direct evidence challenging Kilmer's credibility and no facts proven that would be inconsistent with a lack of knowledge. The reasons given by Crone for their "feeling" that she knew unfortunately (for them) amount to little more than speculation.

Generally, the doctrine of *caveat emptor* (buyer beware) applies to the sale of various objects, including realty such as homes, and it is necessary for the buyer to inspect for defects (usually via a qualified home inspector). However, where a home contains a defect that is dangerous or otherwise makes the home uninhabitable, and this defect is known to the seller; *McGrath v. MacLean*, [1979 CanLII 1691](#):

Legal Duty Upon Seller to Refrain From Concealing a Patent Defect

Additionally, the doctrine of *caveat emptor* fails to apply in situations where the seller has actively taken steps to conceal a defect from discovery by buyer prior to, and at the time of, sale. The *caveat emptor* doctrine also fails to apply where a material misrepresentation was made by the seller where 'but for' the misrepresentation the buyer would have avoided dealings with the seller and

avoided the transaction completely. This rule applies even in the circumstances where an object was sold on an As Is basis as was decided in *Mautner v. Metcalf*, [2008 CanLII 3969](#) where it was stated that:

[6] In summary, these are the extracted principles I intend to apply:

(a) the vendor is not bound to call attention to patent defects; the rule is 'caveat emptor';

(b) where there is active concealment of an otherwise patent defect, the general rule of 'caveat emptor will not apply';

(c) if a vendor actively conceals a latent defect, the rule of caveat emptor no longer applies and the purchaser is entitled, at their option, to ask for a rescission of the contract or compensation for damages;

(d) a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But, as is pointed out in the lecture above referred to, in such a case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representations made by him; and

(e) where there are no "clues" and no reasonable means of testing for defects that liability for actively concealing defects, whether patent or latent, actively not disclosing latent defects, or fraudulently misrepresenting facts relating to latent defects, remains with the seller, subject to the requirement with respect to active concealment or active non-disclosure that the same constitute a fraud on the purchaser the same as a fraudulent misrepresentation would.



In addition to the cost of correcting the defect, or diminution of value if the defect unremediable or unreasonably remediable, courts now recognize that where inconvenience and annoyances as well as other distress occurs, an award of general damages may be available, even without medical evidence. As stated by Justice Harper in *Kelly, et al v. Pires, et al*, [2015 ONSC 2871](#):

[60] The plaintiffs claim general damages in the amount of \$200,000. In his submissions, Mr Ion suggested the more appropriate range for general damages would be between \$30,000 and \$50,000.

[61] They did not call any medical evidence to support their claim that they suffered from the stressful situation in which they lived. They called no supporting evidence to their claim that the living circumstances caused a strain on their marriage.

[62] I have no doubt that the plaintiffs' living circumstances created substantial stress and anxiety in their lives. Their living conditions were unsafe for their children. The children had to stay at their grandparent's home for a period of time. The family had to live in very small quarters upstairs while the remediation was taking place. Ms. Kelly was reasonably in constant fear that her children might open the door and be subjected to a serious fall as the deck had to be removed in order to put a proper drainage system in. the parties lost the use and enjoyment of their⁴ property for an extended period. However, without any substantiating evidence or professional opinion, quantifying the extent of their stress and anxiety for the purpose of determining appropriate damages is difficult.

[63] Given my finding on liability and my findings related to the inconvenience, and stressful living situation, I set the general damages at \$30,000.

Summary Comment

A seller of realty must disclose to a buyer the details of known latent defects that are dangerous and may make the premises unoccupiable or unfit for use. A seller of realty must also refrain from knowingly concealing patent defects in such a way

as to impair discovery by a diligent buyer. If otherwise, a seller may be liable for actual damages suffered by a buyer for the cost of correcting the defects as well as general damages for inconvenience, distress, among other sufferings.

