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THE LIABILITY OF THE BUILDER AND VENDOR OF HOUSES

*PROTECTION OFFERED BY THE
LAW OF TORT AND CONTRACT,
IN CANADA*

Sharon A. Williams*

I. INTRODUCTION

Scope of the Problem

It is strikingly apparent that we live in a consumer conscious society. No longer can it be said that the consumer is "regarded as an unorganized victim of the mass-manufacturer, a person whose few existing legal rights were taken from him at every turn by exclusion clauses galore."¹ However, this awareness as well as consumer protection itself, have been related mainly to movable goods purchased by the general public. As Dworkin so aptly states:

*Paradoxically, the most important purchase undertaken by the average consumer in his lifetime, a house, has remained in many ways virtually unaffected by this increased social responsibility.*²

The importance of this statement is that the social significance of a house purchase to the average person is much greater than the purchase of other domestic items such as cookers, freezers or even cars. The purchase of a house involves a large sum of money and most often a mortgage which will last for twenty years or so.

As Martini points out:

*This is important when one considers that in 1973 there were 268,000 housing units started in Ontario and that there have been over a million houses constructed in Canada since 1970. In 1973 as well, over 2,280 Canadians complained to the Consumer Affairs Department about housing defects and this ranks third on the complaints list behind food and motor vehicles. Thus, it comes as no surprise that there has been a growing public concern that there is little purchaser protection for the Canadian home buyer.*³

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¹ G. DWORKIN, *Consumer Protection and the Problems of Substandard New Houses*, (1964) 23 *Conv. and Prop. Law. (N.S.)* 276.

² *Ibid.*

³ S.P. MARTINI, "Defective Construction of New Homes", (1974) 22 *Chitty's L.J.* 269.

This paper is devoted to a brief discussion of the problems affecting a purchaser of real property who finds it necessary to make repairs to his property, or who is physically injured by some of its defects.

It is necessary to define the relevant perimeters. Although both "old" and "new" houses are to be considered, most problems arise in connection with new houses.

In order to explain the position of the purchaser of a home, one must look at the protection afforded to him by legal and extra-legal means.

This study will consider the liability of the builder-vendor in tort and in contract. It will not deal with the protection given to the purchaser by the HUDAC program, as this topic is considered in detail by another participant in this conference.

This paper will attempt to outline the law as it exists in Ontario. By comparing it with that of the other jurisdictions analyzed at this conference, there may appear ways of surmounting the difficulties to be encountered by purchasers.

2. The Common Law Protection Afforded to a Purchaser

a) Liability in Tort

Contractual rights may be inadequate both from a practical and legal point of view. Furthermore, since any rights which do exist are solely of benefit to the parties to the contract, it is important to determine what remedies a person may have for damage suffered as a result of a defective building when he is not a party to the contract of sale. It is generally agreed that the law in this area does not impose adequate responsibilities on developers.

(i) Vendors

At the outset, it must be realized that the position of a vendor of an old house is a protected one. By parting with the title and possession of the property his control over it ceases and he is generally released from liability for personal injuries caused by defects in the property. The maxim *caveat emptor* applies. The risk of quality lies upon the purchaser.

This principle was first applied to leases and is stated by Erle C.J. in *Robbins v. Jones* as follows:

*A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumbledown house: and the tenant's remedy is upon his contract, if any.*⁴

No doubt the practice of having a survey or inspection was the justification for this rule. Later on this principle was extended to sales of realty.⁵

Contract and fraud apart, the vendor is not under a duty to protect the buyer from any defects of the premises even if they existed at the time of the sale. There is no

⁴ (1863) 15 C.B. (N.S.) 221, 143 E.R. 768, at p. 776 (C.P.). This dictum was accepted by the House of Lords in *Cavalier v. Pope*, [1906] A.C. 428.

⁵ *Bottomley v. Bannister*, [1932] 1 R.B. 458 (C.A.).

implied warranty of fitness for human habitation in an old house or even in a new house which has been purchased after the construction has ended.

In *Bottomley v. Bannister*,⁶ a house on a building estate was sold. The purchaser and his wife took possession before completion and were found dead a month later, having been gassed by a defective gas boiler. The English Court of Appeal held that even if the defect were due to the negligence of the builder-vendor, and this was not clearly established, there was no liability. Lord Justice Scrutton stated that:

*It is at present well established law that in the absence of express contract, a landlord of an unfurnished house is not liable to his tenant or a vendor . . . to his purchaser for defects in the house or land rendering it dangerous or unfit for occupation even if he constructed the defects himself or is aware of their existence.*⁷

The distinguishing factor that there was a landlord-tenant relationship was considered immaterial by the court, and the immunity from liability was held to cover builders selling property. This decision has been criticized on the ground that Lord Justice Scrutton's views were *obiter* as the plaintiff had failed to establish negligence,⁸ and also because the court's decision was rendered before the House of Lords decided *Donoghue v. Stevenson*⁹ where a general duty of care in negligence was established. Lord Atkin stated in *Donoghue v. Stevenson*:

*. . . a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care . . .*¹⁰

His Lordship referred¹¹ to *Bottomley v. Bannister*¹² and merely said that the case was decided on the grounds that the boiler was part of the realty and that the vendor¹³ did not know of the dangerous situation.

This would appear to place a limitation on Scrutton L.J.'s earlier statement,¹⁴ but only as regards knowledge on the part of the vendor. He did not suggest that his "good neighbour" principle be extended to real property. Lord Atkin's principle has been applied to "virtually every type of product under the sun",¹⁵ but in Canada until *Lock v. Stibor*¹⁶ was decided in 1962, it was confined to chattels and did not extend to realty.¹⁷ It was an anomalous situation that even "certain chattels, when incorporated

⁶ *Ibid.*

⁷ *Id.*, at p. 468.

⁸ This viewpoint is, however, rather a pedantic one. It could be argued to the contrary that *Donoghue v. Stevenson* is a case which is concerned solely with its own factual situation and that Lord Atkin's views as to a general test of foreseeability are not applicable to other fact patterns.

⁹ [1932] A.C. 562.

¹⁰ *Id.*, at p. 569.

¹¹ *Id.*, at p. 570.

¹² *Supra*, note 5.

¹³ Lord Atkin used the term "landlord."

¹⁴ *Supra*, note 5, at p. 468.

¹⁵ A.M. LINDEN, ed., "Products Liability in Canada", in *Studies in Canadian Tort Law*, Butterworth, Toronto, 1968, 612 p., p. 220.

¹⁶ (1962) 34 D.L.R. (2d) 704 (Ont. H.C.). See discussion *infra*, pp. 8-9.

¹⁷ *Malone v. Laskey*, [1907] 2 K.B. 141 (C.A.); *Bottomley v. Bannister*, *supra*, note 5; *Otte v. Bolton and Norris*, [1936] 2 K.B. 46. (C.A.).

into real property, might be treated as such for some legal purposes".¹⁸ Thus, a vendor would still be exempted from liability "if a product went into the house as a chattel but then was affixed to the realty. As such the vendor was not liable even if the fixtures were defective and sold unattached from the realty".¹⁹

In *Otto v. Bolton and Norris*,²⁰ the English Court of Appeal had to decide whether *Bottomley v. Bannister*²¹ and other old cases had been over-ruled by *Donoghue v. Stevenson*.²² The court held that they had not. The defendants, who had sold a partially constructed house to the plaintiff Miss Otto, were held not to be liable for injury caused to her mother when the ceiling collapsed.²³ The court reaffirmed the theory of *caveat emptor* in all its glory!

*Bottomley v. Bannister*²⁴ had survived *Donoghue*²⁵ and was still good law. The court stated that "[i]t is settled law that a vendor of a house, even if also the builder of it, gives no implied warranty as to its safety".²⁶ *Donoghue v. Stevenson*²⁷ was held to have no application to the case. Atkinson J., stated:

*That was a case dealing with chattels, and there is not a word in the case from beginning to end which indicates that the law relating to the building and sale of houses is the same as that relating to the manufacture and sale of chattels.*²⁸

Similar decisions were also reached in *Travers v. Gloucester Corporation*²⁹ and *Davis v. Foots*.³⁰

It must be noted, however, that in all three cases the defect was patent and the purchasers or tenants had a reasonable opportunity to examine the property. A distinction between latent and patent defects may well be the answer to the problems created by the case law.³¹

In *Johnson v. Summers*,³² three years after *Otto v. Bolton and Norris*³³ had been decided, the Manitoba Court of Appeal held that it was not bound by that decision. Adamson J.A. refused to grant recovery to a housemaid who had been injured when a hot water radiator weighing approximately four hundred pounds fell from the wall and struck her because she could not show that the defendants method of installation was the cause of the injury. However, he felt that *Donoghue v. Stevenson* was a case whose principles were of general application and went on to state a prophetic *obiter dictum*:

¹⁸ S.M. WADDAMS, *Products Liability*, Toronto, Carswell, 1974, 250 p., p. 25.

¹⁹ R.E. CARR, "Latent Defects in New Houses: Who Pays?", (1971) 29 U. of T.L. Fac. Rev. 84, at p. 93.

²⁰ *Supra*, note 1.

²¹ *Supra*, note 5.

²² *Supra*, note 9.

²³ The purchaser, Miss Otto, had a remedy in contract for the repair of the ceiling, based on the warranty of fitness.

²⁴ *Supra*, note 5.

²⁵ *Supra*, note 9.

²⁶ *Supra*, note 17, at p. 52.

²⁷ *Supra*, note 9.

²⁸ *Supra*, note 17, at pp. 54-55.

²⁹ [1947] K.B. 71.

³⁰ [1940] 1 K.B. 116.

³¹ DWORKIN, *op. cit.*, note 1, at p. 292.

³² [1939] 2 D.L.R. 665 (Man. C.A.).

³³ *Supra*, note 17.

*I can see no reason why the legal liability for negligently erecting a heavy fixture in a cottage should be different from negligently erecting a similar fixture in a railway coach or in a large motor bus. There is no principle upon which such a distinction can be made.*³⁴

*Lock v. Stibor*³⁵ is generally considered as having eliminated the distinction between chattels and realty. The plaintiffs were paying a social call to the house which the purchaser had bought from the builder-vendor. The female plaintiff was injured when a kitchen cabinet fell from the wall, striking and injuring her. The Ontario High Court held that the manner in which the cabinet was installed created a foreseeable risk that it would fall, and that the danger was latent. Richardson J. was of the opinion that Mr. Justice Atkinson in *Otto v. Bolton and Norris*³⁶ had not said that *Donoghue v. Stevenson*³⁷ does not apply to realty as well as to chattels.³⁸ He felt that the cabinet was a hidden danger and distinguished *Otto v. Bolton and Norris*,³⁹ because the defects were plainly to be seen in *Otto*, whereas in the case he was considering, the defect was latent and therefor the ordinary principles of negligence applied. He stated:

It is said that the alleged grounds for the distinction between realty and chattel seems to be the suggestion that there is always opportunity for inspection and possibility of discovery of a defect in realty whereas that is not always so with a chattel. This, in my opinion, is not the case because if that is the ground for the distinction, how could a layman be expected to inspect the brakes of his automobile after they had been repaired by a garageman?

*In the case at bar no inspection after the cabinet was erected could have disclosed to anybody the defective workmanship. This work was negligently done by the workmen of the corporate defendants who knew or should have known that visitors would come upon the premises and into the kitchen and I think they owed a duty to them not to expose such people to this danger.*⁴⁰

Thus, the builder-vendor was held to be liable.

This case demonstrates that even if the rule of *caveat emptor* is so firmly entrenched into our legal system that it cannot be eradicated, it should only apply to patent defects. When a defect is latent, a duty of care should be placed on the vendor to disclose or remedy the defect.

There is certainly logic in this view. If the court in *Lock*⁴¹ had not come to this conclusion, distinguished *Otto v. Bolton and Norris*,⁴² and *Bottomley v. Bannister*⁴³ and applied *Donoghue v. Stevenson*,⁴⁴ the plaintiffs would have been unable to recover.⁴⁵

³⁴ *Supra*, note 32, at p. 667.

³⁵ *Supra*, note 16.

³⁶ *Supra*, note 17.

³⁷ *Supra*, note 9.

³⁸ *Supra*, note 16, at p. 708.

³⁹ *Supra*, note 17.

⁴⁰ *Supra*, note 16, pp. 709-710.

⁴¹ *Supra*, note 16.

⁴² *Supra*, note 17.

⁴³ *Ibid.*

⁴⁴ *Supra*, note 9.

⁴⁵ Even if the implied warranty "scheme" had been used as the house was uncompleted at the time of the transaction, only the purchaser would have had the benefit of it. It would have remained, however, for the plaintiffs to have sought compensation for their injuries from the Stibors under occupiers liability, the Locks, being able to seek an indemnity from the vendor under the warranty. See discussion on implied warranty, *infra*, pp. 19 *et seq.*, and DWORKIN, *op. cit.*, note 1, at p. 296.

The vendor's immunity is incompatible with the principles enunciated in *Donoghue v. Stevenson*⁴⁶ and its survival can be attributed to deference to an entrenched anomaly.

It has been suggested that if no one had sued in tort for personal injuries arising from a defective house until after Lord Atkin's principle had been expounded in 1932, there would have been liability⁴⁷ on the basis of foreseeability, the injured purchaser or guest being a "neighbour."⁴⁸

As Salmond points out⁴⁹ the immunity of the vendor must be regarded as an exception to the general principle of *Donoghue v. Stevenson*.⁵⁰ It is "a rock which has escaped the flood tide of liability released [by that case]."⁵¹

(ii) *Builders*

It is quite clear that the builder has no immunity in tort and that the ordinary principles of negligence apply. The industry has always insured against this risk.

In *A.C. Billings and Sons v. Riden*,⁵² builders who had been employed to reconstruct the approach to a house, left it in a dangerous condition. As a result a woman who was visiting the house was injured when she tried to leave. The House of Lords held that the builders were:

*[U]nder a duty to all persons who might be expected to visit the house and that duty was the ordinary duty to take care as, in all the circumstances of the case, was reasonable to ensure that visitors were not exposed to danger by their actions.*⁵³

In *Clay v. A.J. Crump and Sons Ltd.*,⁵⁴ the building contractors, demolition contractors and the supervising architect were made liable for negligence in leaving a dangerous wall standing during work of redevelopment. On the same principle, in *Sharpe v. E.T. Sweeting and Son Ltd.*,⁵⁵ and *Gallagher v. McDowell Ltd.*,⁵⁶ builders who were not the vendors but were building under contract with the landowner, have been held liable to third persons for injuries caused by negligent work.

The courts only considered the question of liability when the builder was the contractor and not the vendor. It was assumed that *Bottomley v. Bannister*⁵⁷ was still good authority where the builder was also the vendor, and thus would be exempted from

⁴⁶ *Supra*, note 9.

⁴⁷ WINFIELD, note on *Otto v. Bolton and Norris*, (1936) 52 L.Q.R. 313.

⁴⁸ *Ibid.* Note Lord Denning's comments in *Dutton v. Bognor Regis U.D.C.*, [1972] 1 Q.B. 373 (C.A.), at pp. 392-394, and Sachs L.J.'s finding that *Bottomley v. Bannister*, *supra*, note 5, had not survived *Donoghue v. Stevenson*, *supra*, note 9.

⁴⁹ *Salmond on Torts*, (17th ed.) by R.V. HEUSTON, Sweet & Maxwell, London, 1977, 740 p., p. 293.

⁵⁰ *Supra*, note 9.

⁵¹ *Supra*, note 49.

⁵² [1958] A.C. 240 (H.L.).

⁵³ *Id.*, at p. 250.

⁵⁴ [1964] 1 Q.B. 533 (C.A.).

⁵⁵ [1963] 2 All E.R. 455 (York Assizes).

⁵⁶ [1961] N.I. 26. (C.A.N.I.).

⁵⁷ *Supra*, note 5.

liability for negligence. Lord MacDermott C.J. in *Gallagher*⁵⁸ stated that the question of immunity was a question of policy. His answer to the problem of whether the extension of the principle of *Donoghue v. Stevenson*⁵⁹ to building contractors would lead to some mischief that would justify its rejection was straightforward:

*The attitude that any enlargement of the field of tortious liability is always to be regarded as a step in the right direction is not one to be commended. Some gap between morality and law is inevitable and, if the gap is not too large, may be for the benefit of both codes. On the other hand the changes to be expected in a progressive society call, from time to time, for such adjustment in the domain of legal responsibility as will promote justice and fair dealing. Those are terms which may mean different things in different epochs, but from the point of view of what is generally regarded as just and fair today I see no reason why a responsibility similar to that of the manufacturers and repairers of chattels should not fall upon the builders of houses, or why, if it does so fall, harm to trade or commerce or some other important facet of the life of the community should be apprehended. The immunities of the landowner seem to me to strengthen rather than weaken these conclusions.*⁶⁰

Likewise Mr. Justice Nield in *Sharpe v. Sweeting*⁶¹ rejected the argument that a building contractor had immunity. He said:

*The fact that the owner is also the builder does not remove the owner's immunity, but when the builder is not the owner he enjoys no such immunity.*⁶²

It appears that the immunity of the vendor will cover his servants or agents who carry out construction — but not independent contractors.⁶³ This, leads one to conclude that immunity depends upon the contractual relationship between the vendor and the builders. Obviously, these distinctions are quite capricious!

(iii) Builder-Vendors

As already noted in *Sharpe v. Sweeting*⁶⁴ and *Gallagher v. McDowell*,⁶⁵ the view was clearly expressed that a builder who is also a vendor will not be liable. Such view is indefensible as it is unreasonable and illogical. Why should a builder-vendor escape liability when he is the vendor, whereas if he were solely the builder he would be liable? This illogical approach has not escaped Lord Denning's criticism. Thus, in *Dutton v. Bognor Regis Urban District Council*⁶⁶ the purchaser, bought a house from a person who had purchased it from the first defendant a building company. The District Council, which was the second defendant had passed the plans, even though the property was built on a rubbish tip. In 1961 the walls and ceiling cracked, the staircase slipped and the plaintiff became alarmed. She brought an action against the builders and the Council. Later on she settled her claim with the vendor-builders so that the Council became the only effective defendant.

⁵⁸ *Supra*, note 56.

⁵⁹ *Supra*, note 9.

⁶⁰ *Id.*, at p. 44.

⁶¹ *Supra*, note 55.

⁶² *Id.*, at p. 463.

⁶³ DWORKIN, *op. cit.*, note 1, at p. 295.

⁶⁴ *Supra*, note 55.

⁶⁵ *Supra*, note 56.

⁶⁶ *Supra*, note 48.

The majority of the Court of Appeal held that *Otto v. Bolton and Norris*⁶⁷ and *Bottomley v. Bannister*⁶⁸ should not be followed. Lord Denning stated that he agreed that if the builder-vendor was not liable, neither should the Council be liable. Therefore, he considered whether or not the builder-vendor was liable. He was of the opinion that although *Bottomley v. Bannister*⁶⁹ supports the positions of immunity, it can no longer be considered as good law. He felt that there was no sensible distinction to be drawn between builders who do not enjoy immunity as shown in *Gallagher*⁷⁰ and *Sweering*⁷² and a speculative builder who is fortunate enough to buy land and build houses himself for sale. Lord Denning's reasons as indicative of a future trend are important and must be quoted here:

There is no sense in maintaining this distinction. It would mean that a contractor who builds a house on another's land is liable for negligence in constructing it, but that a speculative builder, who buys land and himself builds houses on it for sale, and is just as negligent as the contractor, is not liable. That cannot be right. Each must be under the same duty of care and to the same persons. If a visitor is injured by the negligent construction, the injured person is entitled to sue the builder, alleging that he built the house negligently. The builder cannot defend himself by saying: "True I was the builder; but I am the owner as well. So I am not liable." The injured person can reply: "I do not care whether you were the owner or not, I am suing you in your capacity as builder and that is enough to make you liable."

*We had a similar problem some years ago. The liability of a contractor doing work on land was said to be different from the liability of an occupier doing the selfsame work. We held that each was liable for negligence; see *Billings (A.C.) & Sons v. Riden*, [1957] 1 Q.B. 46, and our decision was upheld by the House of Lords: [1958] A.C. 240; see also *Miller v. South of Scotland Electricity Board*, [1958] S.C. 20, 37-38.*

*I hold, therefore, that a builder is liable for negligence in constructing a house — whereby a visitor is injured — and it is no excuse for him to say that he was the owner of it. In my opinion *Bottomley v. Bannister*, [1932] 1 K.B. 458 is no longer authority. Nor is *Otto v. Bolton & Norris*, [1936] 2 K.B. 46. They are both overruled.⁷²*

Lord Denning's views⁷³ would appear to extend beyond the builder-vendor situation to that of the pure vendor. However, it has been submitted that any plaintiff who relies on *Dutton* might face grave problems, in the light of the "commonly understood doctrine of precedent in the Court of Appeal",⁷⁴ since *Bottomley v. Bannister*⁷⁵ is a decision of the Court of Appeal that was not overruled by the House of Lords in *Donoghue v. Stevenson*.⁷⁶

⁶⁷ *Supra*, note 17.

⁶⁸ *Supra*, note 5.

⁶⁹ *Ibid.*

⁷⁰ *Supra*, note 56.

⁷¹ *Supra*, note 55.

⁷² *Supra*, note 48, at pp. 393-394.

⁷³ SACHS L.J. also held *id.*, at pp. 401-402, that *Bottomley v. Bannister*, *supra*, note 5, had not survived *Donoghue v. Stevenson*, *supra*, note 9.

⁷⁴ W.Y.H. ROGERS, *Winfield on Tort* (9th ed.), Sweet & Maxwell, London, 1975, 672 p., p. 199.

⁷⁵ *Supra*, note 5.

⁷⁶ *Supra*, note 9.

Also, it must be pointed out that the builder-vendor was not a party to the case as the plaintiff settled and, thus, what was said was *obiter*. This anomalous situation has long been criticized. For instance, Fleming is of the opinion that:

*It would be indefensibly esoteric to condone a distinction which would hold a builder responsible for negligence in the execution of a construction contract, but excuse the speculative builder who has capital and foresight enough to confine himself to the sale of completed buildings. To do so would be for the law to abrogate all function in raising the standard of an industry with notoriously lax standards of efficiency and safety. Surely vendors no more than lessors (and builders), have any claim founded in history or reason to exemption from the toll which modern law exacts from all whose negligent activities expose their fellow men to unreasonable risk of physical injury.*⁷⁷

It is yet to be seen whether Lord Denning's and Lord Justice Sachs' views will be taken heed of.

The role of policy must be recognized. As Lord Denning mused: "It seems to me that it is a question of policy we, as judges, have to decide. The time has come when in cases of new import, we should decide them according to the reason of the thing."⁷⁸ It is hoped that for the sake of logic, and fairness to the purchaser, and also to his family and guests, that future courts will decide according to reason and not just base their decision on this entrenched anomaly.

(b) Liability in Contract for Defects of Quality

It is an obvious conclusion that in any discussion of remedies in contract, the rights and duties of the parties will naturally depend upon the express terms of the contract.⁷⁹

The physical nature of the property may be made the subject of representations by the vendor to the purchaser. If this is so, these representations will determine the obligations under the rules of contract.⁸⁰

This idea gives vent to the theory of freedom of contract but as stated at the outset of this paper, the rule of "freedom" can be said to be not entirely free of suspicion in this area where mass-developers are dealing with individual purchasers on a "take-it or leave-it" basis.

The purchaser is certainly not on an equal footing with the developer. The trend is to have a standard form contract which provides only the warranties that the developer is prepared to give. Usually the developer will provide as little as possible.

It has been said that:

[D]ue to disparity in the bargaining power between the purchaser and the seller or simply due to the buyer's lack of sophistication, there may be nothing said as to protection against damage for any period after the transaction is closed. Even

⁷⁷ J.G. FLEMING, *The Law of Torts*, 4th ed., Law Book, Sydney, 1971, p. 418. This author in his 5th ed., 1977, states at p. 477 that vendor-builders are now liable for defects that they themselves have negligently created, as their immunity appears to have been laid to rest by *Dutton*. It is suggested that the burial is far from apparent.

⁷⁸ *Supra*, note 48, p. 397.

⁷⁹ DWORKIN, *op. cit.*, note 1, at p. 277.

⁸⁰ CARR, *op. cit.*, note 19, at p. 84.

if the buyer thinks to ask for warranties against physical defects, unless he is well-advised, he most likely will inadequately protect himself. Very few purchasers are aware of the state of the law and are knowledgeable of the fact that the law will only protect them to the extent of the conditions they have negotiated with the developer. Unless legal advice is obtained prior to the purchase the layman buyer will not think to extract adequate warranties of fitness from the builder-vendor.

*Where a buyer has asked for no guarantees and the builder has made no representations, the buyer must turn to the common law for his remedy if his house is in need of repair. Unfortunately he will find that law wholly inadequate for his purposes.*⁸¹

Is there implied warranty of fitness from the fact that the vendor is also the builder?

In answering this question it is necessary to note that Canada has followed the English authorities, which originally, as in tort law, dealt with leases. It was held that where an old house is bought or even a new house which is completed at the time of the contract, that property could be used for a number of purposes and the courts will not imply a term that the house is fit for human habitation and the materials are reasonably adequate for the purpose for which they are required. However, where the house is uncompleted at the time of the contract and the vendor-builder agrees to complete it, then a warranty is implied that it will be properly built, including the part that is already completed at the time of sale. The courts have held that such a purchaser can only wish to live in the house once it has been completed.

This was clearly stated by Swift J., although *obiter*, in *Miller v. Cannon Hill Estates Ltd.*:⁸²

*It is quite clear law that if one buys an unfurnished house, there is no implication of law and there is no implied contract that the house is necessarily fit for human habitation. That must be good sense, because a man who buys an empty house may not necessarily need it as a dwelling-house; he may be buying something which is almost in a state of ruin, knowing that he will have to restore it and pay a considerable amount of money for restoring it . . . The position is quite different when you contract with a builder or the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling.*⁸³

In *Perry v. Sharon Development Co. Ltd.*,⁸⁴ the English Court of Appeal established a rule of law based on the statements of Mr. Justice Swift in *Miller*.⁸⁵ The plaintiff had purchased an uncompleted home and when he went into occupation there were many problems. The court held that:

⁸¹ *Id.*, at pp. 84-85.

⁸² [1931] 2 K.B. 113.

⁸³ *Id.*, at pp. 120-121. The comments were, however, *obiter*, as the jury found in that case that there was an express warranty in the contract and based the liability of the defendant on it.

⁸⁴ [1937] 4 All E.R. 390 (C.A.).

⁸⁵ *Supra*, note 82.

. . . a vendor of a completed house, in respect of which there is no work going on and no work to be done, does not in the absence of some express bargain, undertake any obligation with regard to the condition of that house.

Indeed, the reason for that is obvious. Every contract must, of course, be construed with reference to the subject matter with which it is dealing, and, where a contract for the sale and purchase of a house is dealing with a house which is in the contemplation of both parties, and to the knowledge of both parties, supposed to be a completed house, there is no room for the implication of any term as to the doing of further work upon it. But it seems to me that, where the contract is a contract relating to a house which is still in the process of being completed . . . and particularly where the completion is not to take place until the house has arrived at the contemplated condition — namely, complete finish and readiness for occupation — there must be implied in that contract an undertaking that the house shall be in that condition.⁸⁶

Lord Justice MacKinnon did not base his reasons for the implied warranty on the purchaser's use of the premises, but rather on the difficulties of inspection as to the uncompleted portion.

Thus, if the house is incomplete or to be completed, the courts will imply a condition that the work will be done efficiently, that the proper materials will be used, and that the house will be fit for human habitation. *Caveat emptor* does not apply here.

Naturally, these implied conditions or warranties may be excluded by contract. This may be done expressly or by particular specification, which tend to eliminate their implication. For example, a builder may comply with the specifications agreed to by the purchaser which result in the house being unfit for human habitation. In such a case, the purchaser will be deprived of the benefits of the implied warranty.

The distinction to be drawn between uncompleted and completed houses is yet another area of non-occupiers liability which can be called capricious. One writer suggests that it is "magical, if not totally absurd today".⁸⁷

It does not seem equitable that the buyer of a completed house will be found not to have the benefit of implied warranties because supposedly he may not desire to live in the house and has a greater chance to inspect and discover defects, whereas the purchaser of the uncompleted house receives the implied warranties. The arbitrariness and absurdity lie in the dividing line between completed and uncompleted houses. This is the key factor since the purchaser's rights under the contract depend upon this distinction. However, the Courts have tended to look favourably on the purchaser and have found a house uncompleted on sometimes tenuous grounds. The purchaser will be allowed the benefit of an implied warranty as long as the Court can make out a case that some work, never mind how minute, remains to be done at the time of purchase. In *Croft v. Prendergast*,⁸⁸ the Court strained to find some work that remained to be done to the house. It also held that the implied warranty extended to work already done, as well as work left to be done.⁸⁹

⁸⁶ *Supra*, note 84, at pp. 392-393.

⁸⁷ MARTINI, *op. cit.*, note 3, at p. 271.

⁸⁸ [1949]2 D.L.R. 708 (Ont. C.A.).

⁸⁹ It is suggested that this destroys the reason behind allowing an implied warranty for an uncompleted house and not one for a completed house, as the basic assumption concerning the uncompleted part is impossibility to inspect. If the buyer is allowed an implied warranty also for the completed part this suggests incongruity. See LOKASH, "House Purchasers Protection — The Need for Reform", (1966) 24 *U. of T., Fac. of L.R.* 20, at p. 22.

The paradoxical situation may arise that a purchaser may benefit from an implied warranty if he buys a house, for example, three days earlier than another purchaser of a property in a similar stage, merely because something was left to be completed at that time.

In summary, when a new house is completed, the buyer is in the same position as the purchaser of an old house and *caveat emptor* applies. He must take the premises as they stand even though there may be defects present unless he has an express term in his contract. The purchaser of the uncompleted house, on the other hand, has the benefit of the implied warranty and is protected against defects. It must one again be remembered that privity of contract applies and that third parties may not recover under a warranty which is express or implied.

c) Reform

The possible solutions for beneficial reform in the area of tort and contract are obvious. In the tort field, the situation calls for an extension of liability to the vendor and vendor-builder as has been suggested in *Dutton v. Bognor Regis Urban District Council*.⁹⁰ In contract, the solution would appear to be to extend the implied warranty scheme to all new houses both completed and uncompleted as this would stop the farcical attempt to find some remaining work to be done.

⁹⁰ *Supra*, note 48.