CONCEALMENT AND NON-DISCLOSURE OF QUALITY-RELATED DEFECTS IN CONTRACTS

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INTRODUCTION

The purpose of this paper is two-fold. The first is to examine the ancient but relatively unexplored common law rules of concealment of quality-related defects. These rules apply equally to everyday consumer contracts for the purchase and sale of goods, as they do to contracts for a business opportunity or for the sale of real estate. This paper is concerned with the concealment or non-disclosure of material facts and defects in goods and property which do not become a part of the implied or express terms of the final contract. A study of the common law reveals, perhaps surprisingly, that many of the tactics employed by businessmen and even private sellers to induce a customer to buy before forming an independent opinion as to the quality or value of the goods or property, may constitute fraudulent concealment, entitling the buyer to an action in deceit for damages and rescission. However, in their attempt to introduce a degree of conscionability into the bargaining process, the courts have not forgotten the maxim *caveat emptor*. Therefore, the common law has reached a point in its development where a rather arbitrary distinction is drawn between the mere failure to disclose defects which the buyer obviously does not know exist and active steps taken to prevent discovery of those defects. Only the latter course of conduct is actionable.

The secondary purpose of this paper is to examine the artificiality of the distinction between non-disclosure and active concealment and to look at recent statutory reforms in the area of disclosure. It is submitted that a duty to disclose known existing material defects would promote the interests of establishing conscionability in contracting while still maintaining the desired aims of certainty and finality. This has already been achieved to a considerable extent in the common law of most of the United States.

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While it is beyond the scope of this paper to examine the area of statutory reform it should be noted that the need for stronger disclosure requirements has been felt by many legislators in the United States and Canada, and elsewhere, where higher standards of conduct have been imposed and new kinds of relief established by legislation which is aimed at either the regulation of specific trades or at the sale of goods generally.[1]

PART ONE
CONCEALMENT AND DISCLOSURE OF QUALITY-RELATED DEFECTS: THE COMMON LAW

I. THE RIGHT TO REMAIN SILENT

The common law maxim caveat emptor is still very much a part of the law of contracts. Its vitality is especially great with respect to private sales and sales of specific goods where the buyer has been afforded an opportunity to inspect the goods and is therefore deemed to have taken them subject to any apparent, or patent, defect.[2] The purpose of this paper is to examine this maxim as it relates firstly to the duty to disclose, and secondly the duty not to conceal, defects going to the quality of the subject matter in contracts for the sale of goods. Essentially, the risk of all defects in goods falls upon the buyer[3] unless (a) the seller has expressly assumed the risk by a term of the contract or a representation; or (b) if there is an implied condition or warranty under the New Brunswick *Sale of Goods Act*.[4] The *Sale of Goods Act* has severe limitations upon its scope because most of the implied terms relating to quality are restricted to sales made in the ordinary course of business and further because of the uncertainty associated with such phrases as "fitness for purpose" and "merchantability".[5]

The rules related to risk may seem to produce harsh results upon a buyer who has been the victim of unscrupulous trade prac-

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1 See, for example, *MOTOR VEHICLE INFORMATION AND COST SAVINGS ACT* 15 U.S.C.A. 1988, 1989; *UNIFORM CONSUMER SALES PRACTICES ACT* (U.L.A.); *TRADE PRACTICES ACT*, S.B.C. 1974, c.96; Bill 55, 4th Sess., 29th Legis., Ontario 23 Eliz. II, 1974; Bill 21, 4th Sess., 17th Legis., Alberta 24 Eliz. II, 1975.

2 Ontario Law Reform Commission, *REPORT ON CONSUMER WARRANTIES AND GUARANTEES IN THE SALE OF GOODS* (Ontario, Department of Justice, 1972) p. 32.

3 See: P.S. Atiyah and F.A.R. Bennion, "Mistake in the Construction of Contracts;, (1961), 24 Mod. L.Rev. 421 at 433.

4 R.S.N.B. 1973, c. S-1 ss. 13-16.

5 Ontario Law Reform Commission, Supra n.1 at pp. 36-41.

tices. All too often a vendor, fully aware of the defects in his goods offered for sale, and cognizant of the buyer's ignorance of those defects, may by his silence unload those goods onto the unsuspecting purchaser. Generally, the buyer in such circumstances will be left without a remedy because the law imposes no obligation on the seller to disclose defects. Mere silence is not a misrepresentation however deceptive it may be in fact. The mere offer to sell defective goods with the knowledge that they are defective is not fraud.[6] There are a few major exceptions to this general right to remain silent. Briefly, the exceptions are as follows:

(a) A duty to disclose arises with respect to facts coming to the seller's notice before the conclusion of the contract if they falsify an express representation made previously.[7]

(b) A duty to disclose all material facts arises when the seller makes an express representation which is incomplete and thus amounts to a half-truth.[8]

(c) If it can be shown that it is a custom of the trade to disclose defects, then it is a misrepresentation to fail to disclose the defect.[9]

(d) In contracts *uberrimae fides*, or where some fiduciary duty exists between the contracting parties, disclosure is a prerequisite.[10]

(e) If the decision of the English Court of Appeal in *Karsales (Harrow) Ltd. v. Wallis*[11] is carried to its natural conclusion, then a seller may be liable for failing to disclose a defect arising between the time of examination of the goods by the buyer and the time the risk passes to the buyer.

(f) Finally, recent developments in tort law and products liability, particularly the judgment of the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Iron Works*[12] impose an obligation on manufacturers and retailers to warn of defects in goods which pose a potential danger to the physical safety of those using the product. Ritchie J. said that ". . . knowledge of the danger involved in the continued use . . . for the purpose for which they [pintle-type cranes] were designed carried with it a duty to *warn* those to whom

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6 *Ward v. Hobbs* (1877), 3 Q.B.D. 158, affirmed (1878), 4 A.C. 13 (H.L.).

7 *With v. O'Flanagan* [1936] Ch. 575; *Briess v. Woolley*, [1954] A.C. 333.

8 *Dimmock v. Hallett* (1866), 2 Ch. App. 21; *Peek v. Gurney* (1873) L.R. 6 H.L. 377, 392; *Arkwright v. Newbold* (1881), 17 Ch. D. 301, 318.

9 *Jones v. Bowden* (1813), 4 Taunt. 847; 128 E.R. 565.

10 *Carter v. Boehm* (1766), 3 Burr. 1905.

11 [1956] 2 All E.R. 866; [1956] 1 W.L.R. 936. See: Atiyah and Bennion, "Mistake in the Construction of Contracts" (1961), 24 Mod. L. Rev. 421 at 430.

12 [1974] S.C.R. 1189 (S.C.C.).

cranes had been supplied".[13] It should be noted that this duty applies even after the delivery of the goods to the purchaser but appears restricted to defects liable to result in personal injury.

The right to remain silent does not give rise to the right to conceal the existence of some defect or some other material fact. The common law distinguishes between the vendor's passive acquiescence in the self-deception of the buyer and the active concealment of defects in the goods being offered for sale. The latter amounts to a fraudulent misrepresentation, whereby the purchaser is entitled to sue for damages or to rescind the contract. Active concealment was recognized as a fraudulent misrepresentation as early as 1862 in *Horsfall and Another v. Thomas*[14] and still forms a part of our common law.[15] This duty was expressed in *Kerr on Fraud and Mistake*[16] in the following manner:

> "A Vendor may not...use any art or practise any artifice to conceal defects, or make any representation for the purpose of throwing the buyer off his guard, or use any device to induce the buyer to omit inquiry or examination into the defects of the thing sold. If he says or does anything whatever with an intention to divert the eye or obscure the observation of the buyer even in relation to open defects, or to prevent his use of any present means of observation, there is misrepresentation".

The seller impliedly represents that the article is in fact what ex facie it purports to be; that is to say, the article has been given the appearance of possessing better quality or condition than it actually possesses.[17] This appearance amounts to a misrepresentation.

II. ACTIVE CONCEALMENT: TYPES

A. INTRODUCTION

Practical difficulties arise, however, in attempting to distinguish between concealment and mere silence. The distinction is crucial to the success of any action brought by the purchaser. The term "concealment" creates notions of some positive act and not merely a state of mind. On the other hand, non-disclosure or silence is an omission, rather than a positive act. It is consistent only with complete passiveness on the vendor's part vis-à-vis the defect or fact, although, there may be a "guilty" state of mind. Only by an examination of the cases is it possible to arrive at some satisfactory

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13 *Id.*, at p. 1200

14 (1862), 1 H. & C. 90, 158 E.R. 813.

15 See, for example: *Ames v. Investo Plan Ltd.* et al (1973), 35 D.L.R. (3d) 613 (B.C.C.A.).

16 Denis Lane McDonnell and John George Monroe, (London: Sweet and Maxwell, 1952) p. 49.

17 Spencer Bower and Sir Alexander Kingcome Turner, *THE LAW OF ACTIONABLE MISREPRESENTATION* (London: Butterworths, 1974), p. 72.

conclusion as to the nature of this all important distinction between concealment and non-disclosure.

Essentially the types of concealment which amount to a fraudulent misrepresentation, entitling the purchaser to an action in deceit seem to fall generally into one or more of the following categories:

(1) steps taken to prevent examination;

(2) camouflaging the defect;

(3) diversion of the buyer's attention;

(4) avoidance of the buyer's suspicion; or

(5) creation of a false market.

There is however, nothing sacred about the preceding classifications and it is quite possible that other methods of concealment could be construed as fraudulent misrepresentations.

B. THE TYPES

(i) *Steps Taken to Prevent Examination.*

The philosophy behind the maxim *caveat emptor* is that the purchaser is free to inspect the goods or property offered for sale. He should therefore be responsible for his failure to discover patent defects. Consequently, any attempt by the vendor to prevent the purchaser's examination of the goods or property and to thereby avoid his discovery of the defects, amounts to actionable concealment.

Schneider v. Heath[18] provides the best illustration of concealment by means of avoiding inspection. In that case, the defendant had taken his ship, the Juno, from the water to dry dock for minor repairs when he discovered that the ship's keel was in an advanced state of deterioration. The Defendant promptly "took her from the ways on which she lay, and where the state of her bottom and her keel might easily have been discovered, and kept her constantly afloat, so that these defects were completely concealed by the water.[19]" The ship was advertised for sale "with all defects" and sold to the Plaintiff. Lord Mansfield, C.J. held that such conduct constituted "positive fraud", entitling the plaintiff to a return of his deposit. Intention to defraud the Plaintiff was implied from the Defendant's conduct.

Schneider v. Heath should be contrasted with *Baglehole v. Walters*[20], where Lord Ellenborough affirmed the sale of a ship "with all defects" on the ground that no active step had been taken to con-

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18 (1813), 3 Camp. 506, 170 E.R. 1462.

19 *Id.*, 170 E.R. 1462 at 1463.

20 (1811), 3 Camp. 154, 170 E.R. 1338.

ceal the defect. Since the all-important requirement for some positive act, such as returning the ship to the water to prevent examination, was lacking, the defendant was guilty of no fraud. Lord Ellenborough said: "In a contract such as this I think there is no fraud, unless the seller, *by positive means*, renders it impossible for the purchaser to detect latent faults."[21]

Another common method of preventing the purchaser from conducting an examination of the goods being offered for sale is by means of a falsehood to the effect that the goods for some reason cannot be inspected. This tactic is frequently employed in the sale of real property. For example, in *Leeson v. Darlow*[22] the defendant would not allow the Plaintiff's representative to see any part of the tenement house except the basement by suggesting:

> ". . . it would be unwise to make any attempt to see through the building, that the tenants objected to being shown through, prospective purchasers and such like and that it would be better not to go through".[23]

There followed a positive assurance that the premises were in excellent repair; nonetheless, the attempt to prevent the purchaser from discovering the dilapidated condition of the house constituted a fraudulent concealment. Masten J.A. of the Ontario Court of Appeal said:

> Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any *act* done with intent to prevent a fact from being discovered...[24]

A similar finding was made in *Abel v. MacDonald*[25] when the plaintiff purchased premises in such a state of repair that they immediately collapsed. The Defendant had prevented the plaintiff from discovering the state of disrepair by refusing to allow the plaintiff to examine certain rooms of the house on the excuse that her child was ill and also by drawing the blinds to those rooms to frustrate any attempt made by the plaintiff to inspect from the outside.

(ii) *Camouflaging The Defect*

Another positive act amounting to fraudulent concealment is the camouflaging of defects. As stated in *Kerr on Fraud And Mistake*, "...a vendor may not...use any art or practise any artifice to conceal defects...for the purpose of throwing the buyer off his guard, or use any device to induce the buyer to omit inquiry or examination

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21 *Id.*, 170 E.R. 1338 at 1339.

22 (1926), 59 O.L.R. 421; [1926] 4 D.L.R. 415 (Ont. C.A.)

23 59 O.L.R. 421 at 439-440.

24 59 O.L.R. 421 at 440.

25 (1964), 45 D.L.R. (2d) 198 (Ont. C.A.).

into the defects of the thing sold".[26]

In *Horsfall and Another v. Thomas*[27] the defendant ordered a cannon from the plaintiff, giving two bills of exchange in payment therefor. The defendant defaulted on the second bill when a defect in the cannon caused it to explode. The defendant claimed that the plaintiff had inserted a metal plug in the cannon to conceal the defect from any person inspecting the gun. Bramwell B. said that the defendant would have been justified in rescinding the contract if there was evidence of active concealment which did in fact conceal the defect. However, since the court found that the defendant had not examined the cannon, it was impossible for the attempted concealment to have had any operation on the defendant's mind or conduct. On this ground, judgment was entered for the plaintiff vendor. That part of Bramwell B.'s judgment has since been questioned. The facts presented in the case could equally support the conclusion that the defendant did indeed examine the cannon. Cockburn L.J. in *Smith v. Hughes*[28] would likely have allowed the defendant to repudiate the contract on grounds of active concealment tantamount to fraud. Certainly the plaintiff's attempt in the *Horsfall* case met the test of active concealment put forth by Masten J.A. of the Ontario Court of Appeal in *Leeson v. Darlow*: "...to cover over the defects of an article sold with intent that they shall not be discovered by the buyer has the same effect in law as a statement in words that those defects do not exist".[29]

Defects may also be camouflaged by the method of packing. It is not uncommon, for example, to purchase a bushel of what appears to be fresh, ripe apples, only to discover upon removing the top layer that the bulk is neither ripe nor fresh. While this may at times fall under the sale by sample rules of the New Brunswick *Sale of Goods Act*[30], such practices would also seem to constitute active concealment. In *Udell v. Atherton*[31], Martin B. suggested that it was fraudulent to conceal a hole in a log of mahogany being offered for sale by turning the log over. In *Jones v. Bowden*[32] it was held that a misrepresentation had been made in the sale of sea-damaged pimento, when the samples from the bulk showed no such defect in the pimento.

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26 Supra., n. 16 at p. 49.

27 (1862), 1 H. & C. 90, 158 E.R. 813.

28 (1871), L.R. 6 Q.B. 597, See: J.P. Benjamin, *BENJAMIN ON SALES* (New York: Hurd and Houghton, 1877) p. 441-442.

29 *Supra.*, n. 22 at 59 O.L.R. 440.

30 R.S.N.B. 1973, c. S-1, ss. 14, 16.

31 (1861), 7 H. & N. 172; 158 E.R. 437.

32 (1813), 4 Taunt. 847; 128 E.R. 565. See: Bower and Turner, *THE LAW OF ACTIONABLE MISREPRESENTATION*, supra. n. 17, p. 72.

Hill v. Gray[33] is a curious case. In that case, the defendant purchased a picture under the mistaken belief that it belonged to Sir Felix Agar. The plaintiff's agent knew that the defendant laboured under this delusion, but said nothing. This would seem to be the classic case where mere silence or reticence on the part of the vendor would not afford the defendant purchaser an opportunity to rescind the contract or to seek damages. Yet Lord Ellenborough said:

> "Although it was the finest picture that Claude [the actual artist] ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in the suspicion on the part of the purchaser which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it...This case has arrived at its termination, since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment."[34]

This case is not easily reconciled with both earlier and later authorities. It is difficult to find any positive act of concealment from the facts as stated in the case. Yet in *Keates v. Earl Cadogan*, this was described as a case of positive "aggressive deceit".[35] *Hill v. Gray* has not, however, developed as a landmark case in the law of concealment. Later authorities would still seem to require some more positive act on the part of the seller before holding him liable for fraudulent misrepresentation. Indeed, in *Keates v. Cadogan* itself, Jervis C.J. did not find any active concealment by the Vendor in failing to disclose to the vendee the ruinous and unsafe condition of the house being sold, even though the vendee was clearly labouring under a deceptive belief as to the condition of the property. *Benjamin On Sales* suggests that it was the act of the agent in putting the picture among those belonging to Sir Felix Agar which constituted the concealment.[36] Such an explanation is consistent with the view that camouflaging a fact, or defect, amounts to active concealment; however, if such be the case, it is only the very slightest of *acts* upon which the Court will seize in order to find active concealment as opposed to mere silence.

Other frequent attempts at camouflaging defects, or facts, may be found in the "antiquing furniture" cases in which the furniture made to appear antique becomes "a silent asserter".[37] In such cases,

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33 (1816), 1 Stark. 434; 171 E.R. 521.

34 *Id.*, 171 E.R. 521.

35 (1851), 10 C.B. 591; 138 E.R. 234 at 238 (per Jervis C.J.)

36 Supra., n. 28, pp. 442-443.

37 *Patterson v. Landsberg and Son* (1905), 7 F. (Ct. of Sess.) 675 at 681; *Edgar v. Hector*, [1912] S.C. 348; See: Bower and Turner, *THE LAW OF ACTIONABLE MISREPRESENTATION* supra, n. 17, p. 78.

the person deceived has the normal remedies available for actionable concealment.

(iii) *Diverting The Buyer's Attention*

Any attempt by the vendor to conceal the discovery of defects, or other material facts by diverting his attention away from the defect constitutes an active concealment or misrepresentation.[38] A modern application of this practice might be the use of subdued lighting or of large mirrors designed to obscure vision or inhibit close inspection of the goods being offered for sale. This would seem to meet the requirements laid down in *Horsfall v. Thomas* and other authorities that there be (1) deliberate acts (2) intended to prevent the buyer's discovery of certain facts or defects (3) affecting the value or quality of the goods being sold and (4) which do in fact conceal those defects from the buyer, thereby inducing him to enter into a contract.

(iv) *Avoiding The Buyer's Suspicion*

Often the seller will want to avoid raising the potential purchaser's suspicions by concealing his own identity as the vendor. In *Leeson v. Darlow*[39] the defendant Nealy who was the sole beneficial owner of the property offered for sale put title to the property in the name of the defendant Darlow in order to better enable sale of the property. This was a fraudulent concealment of a material fact designed to induce the purchaser to enter into a transaction which he would have otherwise avoided or which would have at least affected the price. It gives rise to an action for deceit.

In *Hepting v. Schaaf*[40] the Supreme Court of Canada affirmed the unreported judgment of the trial judge who awarded damages to the plaintiff for the defendant's fraudulent misrepresentation implied, inter alia, from the concealment of the fact no building permit to build a suite on the premises had been issued, thereby reducing the value of the property. The report does not disclose what active steps, if any, were taken to conceal that there was no building permit. It is, however, another example of how active concealment may be used to avoid raising the vendee's suspicions and further that such a concealment is a fraudulent misrepresentation.

(v) *False Market*

Another method of concealment which constitutes a fraudulent misrepresentation is the device known as "rigging the market" or alternatively, "making a market".[41] It is used primarily to misrepre-

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38 See: *KERR ON FRAUDS* supra., n. 16, p. 49.

39 Supra., n. 22.

40 (1964), 43 D.L.R. (2d) 168 (S.C.C.).

41 See: Bower and Turner, supra, n. 17, pp. 220-222.

sent by implication the value of the property offered for sale by making the demand for it appear much greater than it is in fact. It can, however, be used to conceal facts other than the fair market value or demand. This method of concealment has probably had its greatest use in share transactions. In *Scott v. Brown, Doering, McNab and Co.*[42] it was held that an agreement between two or more persons to purchase shares in a company to induce others to believe that there was a far greater value to the shares than actually existed was a fraud on the persons so deceived.

III. THE POSITIVE ACT PREREQUISITE

Whether the concealment is brought about by (i) preventing an examination by the purchaser, (ii) camouflaging the defect or material fact, (iii) diverting the buyer's attention, (iv) avoiding his suspicions or (v) creating a false market, the common thread running throughout the cases on actionable concealment is the requirement for some positive, aggressive act of concealment on the part of the vendor. The only real chink in the armour was *Hill v. Gray*, although that too is reconcilable.[43] The important and decisive element is that of the positive act because the other required elements of fraudulent intent, deception and materiality may all be implied by virtue of the act. To say, as did Jervis C.J. in *Keates v. Cadogan*[44] that the act must be "aggressive" is misleading. Anything that goes beyond mere silence or mere omission will suffice to constitute an "active" concealment.

Alternatively, the disappointed buyer might argue that the mistake or deception was such that there was no *consensus ad idem* as to the identity of the subject matter or other material term. Proof of the vendor's active concealment is not essential to such an argument[45]. If there is no consensus ad idem, there is no contract. Lord Atkin however, said that a mistake as to quality will not affect assent unless (1) it is the mistake of *both* parties and (2) "is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be."[46]

The fine line between active concealment and mere non-disclosure is best exemplified in *Schneider v. Heath*, the facts of

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42 [1892] 2 Q.B. 724 (C.A.). See also: *NATIONAL EXCHANGE CO. OF Glasgow v. Drew* (1855), 2 Macq. H.L. 103 and *R. v. Deberenger* (1814), 3 M. & S. 67; 105 E.R. 536.

43 See supra. at pp. 12, 13.

44 Supra., n. 35 at 138 E.R. 238.

45 *Cundy v. Lindsay* 3 A.C. 459; *Smith v. Hughes* (1871) L.R. 6 Q.B. 605; *London Holeproof Hosiery Co. Ltd. v. Padmore* (1928), 44 T.L.R. 499 (Eng. C.A.); *Scriven Bros. & Co. v. Hindley & Co.* [1913] 3 K.B. 564.

46 *Bell v. Lever Brothers, Ltd.*, [1932] A.C. 161, 218 (H.L.).

which were discussed supra, and *Ward v. Hobbs*[47]. In *Ward v. Hobbs* the defendant sold pigs "with all faults" in a market knowing that they were infected with typhoid. The Plaintiff purchased the pigs and, upon discovering the typhoid, sued the plaintiff claiming compensation. The House of Lords said there was no duty on the defendant to disclose the existence of the typhoid even though the health inspector at the market had declared the pigs to be sound. By putting the pigs up for sale at the market, knowing all the while of the contagious disease and of the health inspector's error, the defendant had still committed no positive act of deceit. Consequently the plaintiff was without remedy. However, in the analagous *Schneider* case there was an additional factor: the defendant *took* the boat from the dry dock after realizing the condition of its hull and put it in the water to avoid inspection by prospective purchasers. It was on this fact that the case hinged. If the boat had been in the water all along and if the vendor had some other means whereby he knew of the condition of the boat's bottom, the purchaser would have been left without a remedy.

It is interesting to note that in light of *Rivtow Marine*,[48] both *Ward v. Hobbs* and *Schneider v. Heath* might be decided in favour of the purchaser today on the ground that the concealed defects threatened the physical safety of the purchasers. The Plaintiff would, however, be restricted to damages attributable to breach of the duty to warn which may, in an appropriate case, include economic loss. Of course this argument is of no avail where the goods sold present no threat of physical harm and the defect or fact concealed affects only the value or quality of those goods. Therefore *Rivtow Marine* would not be arguable in *Ames v. Investo-Plan et al*[49] where, in selling treasury shares in the Performance Plus Fund Ltd., it was not disclosed that the prospectus of the company had never been approved by the Securities Commission of British Columbia. Since there was neither statutory relief available to the plaintiff nor any active concealment by the defendant, the British Columbia Court of Appeal affirmed the validity of the transaction.

One interesting departure from the normal positive act requirement is in the area of fraudulent concealment of a cause of action. In *Applegate v. Moss*[50] and *King v. Victor Parsons & Co.*[51] the English Court of Appeal has espoused a doctrine of "equitable fraud". If the defendant is aware that the plaintiff has a cause of action against him

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47 (1878), 4 A.C. 13 (H.L.).

48 [1974] S.C.R. 1189 (S.C.C.).

49 (1973) 35 D.L.R. (3d) 613 (B.C.C.A.).

50 [1971] 1 Q.B. 406 (Eng. C.A.)

51 [1973] 1 W.L.R. 28 (Eng. C.A.).

for breach of contract and he does not disclose that fact to the plaintiff, the defendant is guilty of a fraudulent concealment whereby the English *Limitations Act* stipulates that the six year limitation period will not begin to run against the plaintiff until he discovers the breach of contract. While these cases form an interesting contrast to the common law concealment rules, their application is limited to disclosure of breaches of terms of existing contracts. The non-disclosure does not give rise to any rights and liabilities; rather it extends already existing rights and liabilities. They have no part in the negotiation of contracts.

IV. REMEDIES

A. DAMAGES

Damages are available to the victim of a seller's fraudulent concealment. Damages are recoverable for:

(i) pecuniary loss;

(ii) personal injury;

(iii) property damage or loss.

A claim for damages for active concealment is founded in the tort of deceit. Damages for pecuniary loss therefore do not reward the expectation interest. The philosophy behind damage awards in tort claim is to put the plaintiff in the position he would be in had the fraudulent misrepresentation by means of concealment not been made.[52] The measure of damages is the difference between the purchase price actually paid by the Plaintiff and the value of the property at the *time* of the sale.

The failure to compensate the purchaser's expectation interest can be of considerable significance. *Parna et al v. G.& S.Properties Ltd. et al*[53] is an example of such an instance. In the *Parna* case, the plaintiffs paid $251,000 for property, the net annual income on which the defendant vendor fraudulently represented to be $24,193, or an annual yield of 9.6% on the actual purchase price. In fact, the net annual income of the property was only $21,807. The trial judge, in assessing the damages, determined the amount of capital which at 9.6% would yield a net annual income of $21,807. He found it to be $226,210. He then gave the plaintiffs judgment for the difference between $251,000 (the amount paid) and $226,210; in other words, $24,790. On appeal, the judgment was varied and the plaintiff awarded only the reduced sum of $4,000. Evans J.A. said that the

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52 John G. Fleming, *THE LAW OF TORTS* (Australia: The Law Book Co., 1971) pp. 560-561. See also: *Parna et al. v. G. & S. Properties Ltd. et al* (1969), 5 D.L.R. (3d) 315, at 317 (Ont. C.A.; *Hepting et al v. Schaaf*, [1964] S.C.R. 100 (S.C.C.).

53 (1969), 5 D.L.R. (3d) 315 (Ont. C.A.) (per Evans J.A.).

trial judge had erred by measuring damages as the difference between the price actually paid and what would have been the value if the representations had been true. In an action for deceit, the plaintiffs are not entitled to the loss of their bargain, *unless they can establish a breach of warranty.*

The following hypothetical provides another illustration of the refusal of the Courts to compensate the purchaser's expectation interest in deceit actions arising out of an active concealment: Suppose A buys from B a valuable china vase, paying $1,000 therefor. However, the vase has a serious crack which B conceals by the use of glue. Because of the crack, the actual value of the vase is only $700. When he bought the vase, A had a prospective purchaser, C, who was willing to pay $1400 for it. C, however, discovers the crack and will not take the vase. A sues B in deceit for actively concealing the defect:

If Expectation Interest Compensated:		If Restitution Interest Compensated:	
Value of Vase without Crack	($1400)	Purchase Price	($1000)
Less:Actual value of Vase with crack	($ 700)	Less: value of vase	($ 700)
Equal: A's damages	($ 700)	Equals: A's damages	($ 300)

In an action for deceit, A will recover only $300. To be entitled to $700, A will have to establish a breach of warranty or condition. Therefore when acting on behalf of a purchaser, a solicitor should always be conscious of the difference between the value of the expectation and restitution interests, and, where significant, attempt to establish an implied term under the *Sale of Goods Act*, or an express condition or warranty related to the quality of the goods.

Besides damages for pecuniary loss, relief may be granted for any personal injury suffered as a result of the defect fraudulently concealed by the Vendor. The Ontario Court of Appeal in *Graham v. Saville*[54] concurred in Lord Wensleydale's opinion expressed in *Smith v. Kay*[55] that the "only damages of which the law takes cognizance [...in a deceit action...] is actual and temporal damage-that is, some loss either of money or money's worth, or some physical injury, capable of being pecuniarily compensated...". Damages are therefore recoverable for physical injury, including pain and suffering.

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54 [1945] 2 D.L.R. 489 (Ont. C.A.) per Roach J.A., See also: Harry Street, *The Law of Torts* (London: Butterworths, 1972), 5th ed., p. 375.

55 (1858), 7 H.L.C. 750 at 775, 11 E.R. 309.

Resultant property damage is also recoverable in an action for deceit. In *Mullett v. Mason*[56] the defendant seller fraudulently misrepresented that a cow was free from disease. The disease spread from the infected cow, killing five other cows. The Plaintiff sued successfully for the loss of the five other infected cows.

Exemplary damages are not normally allowed in a deceit action.[57]

B. RESCISSION

It is a maxim that fraud vitiates everything. Accordingly, the defrauded purchaser is generally entitled not only to his damages, but also to rescind a contract induced by fraud. The contract remains valid until rescinded, unless the mistake was so fundamental that there was no consensus ad idem. In the latter, and exceedingly rare, instance the contract is void.[58] Normally, therefore, the purchaser must elect to affirm or avoid the contract. An election is irrevocable. Furthermore, affirmation may be inferred by conduct upon discovery of the fraud.[59] Such was the result in *Leeson v. Darlow*[60] where the plaintiff by her dealings with the property after learning of the defendant's fraudulent concealment, and by her delay, was held to have affirmed the contract. She was therefore restricted to a claim for damages. Once the contract is affirmed, the right to avoid it is extinguished.

The right to rescind is also dependent upon the possibility of *restitutio in integrum*. At common law, there could be no rescission unless there could be complete restoration in specie of the *status quo ante*. No allowance would be made for such exigencies as depreciation. The courts of equity relaxed these stringent common law rules. As a result, depreciation and other exigencies are the subject of consequential orders and, in the interest of justice, *restitutio in integrum* is required only so far as it is practically possible.[61] If the Plaintiff cannot return the property to the defendant in the same state, the defendant will at least receive money value as compensation. Equitable relief is of course discretionary.

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56 (1866), L.R. 1 C.P. 559.

57 John G. Fleming, *The Law of Torts* (Australia: The Law Book Company, 1971) pp. 560-561.

58 *Cundy v. Lindsay* (1878), 3 A.C. 459.

59 *United Shoe Co. v. Brunet* [1909] A.C. 330.

60 (1926), 59 O.L.R. 421; [1926] 4 D.L.R. 415 (Ont. C.A.).

61 *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 A.C. 1218 (H.L.); See generally, Cheshire and Fifoot, *The Law of Contract* (London: Butterworths, 1969), 7th ed., pp. 249-252.

PART TWO:
REFORM OF THE COMMON LAW OF CONCEALMENT: A DUTY OF DISCLOSURE

V. DISCLOSURE OF KNOWN MATERIAL DEFECTS

The curious and rather arbitrary distinction between mere silence and active concealment begs the simple question: "Why?". The vendor scarcely seems less morally blameworthy because he acquiesces in the buyer's mistaken belief. In either instance, he is taking an unfair advantage of an unsuspecting buyer. One may also question why the courts have moved only so far as to impose a duty to disclose those defects which endanger the user's safety. Should this trend not be extended to include all defects, even those affecting quality. Finally, it remains to be considered why quality-related defects are not at least tantamount to a breach of such of the implied conditions as fitness for purpose.[62]

The maxim *caveat emptor* developed because of the acknowledged need for certainty to govern the day to day affairs and dealings of businessmen. It is essential to both parties in the bargaining process that identifiable rights and duties be created. Any other system would be intolerable and unmanageable. The courts are reluctant therefore to interfere in either the bargaining process or the final contract. Parties should be free to contract their own terms. Atkin L.J. expressed this sentiment in *Bell v. Lever Brothers Limited*:[63]

> ...Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just...

and later:

> ...Nevertheless it is of greater importance that well established principles of contract should be maintained than that a particular hardship should be redressed...

Bramwell B. said it would be "mischievous" if the seller were:

> ...bound to point out everything which might by any possibility be considered a defect; and the consequence would be that if the manufacturer, for prudence sake, pointed out some flaw which made no difference whatever in the value of the article, the purchaser would immediately say, 'There is a defect, I must have an abatement of the price'....[64]

Such opinions are not without considerable merit. It would be inconceivable that a seller should be obliged to point out every single defect or flaw. Such a standard would be thoroughly subjective and

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62 *SALE OF GOODS ACT* R.S.N.B. 1973, c. S-1, S. 15(a).

63 [1932] A.C. 161 at 226 and 229 (H.L.).

64 *Horsfall et al v. Thomas* (1862), 1 H. & C. 90, 158 E.R. 813 at 817.

grossly unfair. No vendor should be left so unprotected that he is not able to oblige a purchaser to accept responsibility for faults which to a reasonable man with average intelligence would have been readily apparent upon inspection, so long as nothing was done to hinder that inspection of the property. It is submitted, however, that where there are (1) major defects affecting quality; (2) of which the vendor is aware (3) at the time the contract is made, other principles ought to be considered. In all the cases where active concealment was held to be fraudulent, these three factors were present. In all instances the defects were such that, had the purchaser been aware of the existing defects, he would not have entered into the contract or alternatively, would have done so at a greatly reduced price. If any of these three requisites (materiality, knowledge, and pre-existence) were lacking, the purchaser would not have successfully proven concealment.

However, in creating the rules related to active concealment, the courts have perhaps mistakenly over-emphasized the infringement of the right to inspect. As a result, we have arrived at this arbitrary distinction between active concealment and mere non-disclosure. The elements of unconscionability, so important to the result, have been overlooked in providing reasons for that result. Recognition should be given to a concept whereby knowledge affects the passing of the risk to the buyer. If a choice has to be made between an immoral and unscrupulous vendor and a reckless, and perhaps naive, purchaser, surely the risk should fall to the individual guilty of sharp and unconscionable conduct whenever the defect is of more than minimal significance.

Of course, the more significant the defect must be before there is a duty to disclose its existence, the greater the chance that a court would be able to fit it into one of the implied terms of the *Sale of Goods Act*. However, it is undesirable that a purchaser should be obliged to prove an implied term in all such cases. If the *Sale of Goods Act* is relied upon, a vendor with a superior bargaining position who has intentionally taken advantage of the weaker party may be able to contract out of an implied term by a properly worded exclusionary clause. Furthermore, the implied terms of the *Sale of Goods Act* apply only to dealers. It does not make sense that a duty of disclosure or a doctrine of unconscionability should be limited to a vendor acting in the course of his business. It should apply equally to private sales.

This proposed duty of disclosure is not as broad as the duty to warn imposed by *Rivtow Marine*. There the duty is to warn of defects which endanger the user's personal safety. The duty continues even after risk has passed to the buyer. The reason for such a duty is the overriding public interest in its own personal security. In

the normal contract situation, there is no reason to continue the duty of disclosure once property, and therefore risk, have passed to the buyer. The *Rivtow Marine* case seeks to protect an entirely different interest. The vendor's knowledge at the time of bargaining is irrelevant in *Rivtow*. The reason for imposing a duty to disclose known material defects in everyday contracts is to introduce a degree of conscionability and fairness into the bargaining process, not to protect one's personal safety. The bargaining is over when the contract is made. Not only would a policy that required disclosure after risk had passed be unreasonably harsh, it would be impossible to administer. If the buyer wishes such protection, he should procure specific assurances from his seller.

If a duty to disclose known major defects is to be imposed, a test must then be found for measuring the significance of defects. Its standard must be objective. One possible test is whether or not the defect is such that it renders the good unfit for the purpose for which it was intended to be put. Such a test would catch the dry rot on the ship's keel in *Schneider v. Heath*, the typhoid infected pigs in *Ward v. Hobbs*, the dilapidated tenement house in *Leeson v. Darlow* and *Abel v. MacDonald*, the faulty cannon in *Horsfall v. Thomas*, the hole in the mahogany log in *Udell v. Atherton*, the sea-damaged pimento in *Jones v. Bowden*, the "antiqued" furniture in *Patterson v. Landsberg and Son*, and the phony painting in *Hill v. Gray*. An obligation to disclose such defects would impose no greater hardship on the vendor who is aware of the defect than is already imposed by the common law rule not to conceal such defects. The vendor is no less morally blameworthy by virtue of his silence.

It might be felt that a fitness for purpose test is too strict. Perhaps the court should be given flexibility to impose disclosure requirements where the fact not disclosed is major although not so significant as to affect its fitness for purpose. If such is the case, the test might be whether a reasonable purchaser, aware of the defects, would have entered into the transaction at all, or whether he would have done so only at a greatly reduced price. The drawback to such a test is its imprecision and uncertainty. How much lower would the fair value of the goods have to be before a court could say with any certainty that the buyer would have entered into the transaction only at a much lower price. A fitness for purpose test clearly affects only major defects and, if liberally construed, should catch most cases of injustice. On the other hand, the second test covers a much broader range of transactions than does fitness for purpose. For example, the fitness for purpose test does not catch the blatant abuse made of suggestive selling techniques by many fast food franchisers who know that the consumer is confused or misled as to what foods are included in each item of their menu. The consumer still gets food capable of consumption, but if he had been aware of what he would

receive, he might not have ordered as he did. This is the great advantage of the test which objectively determines whether or not the fully informed buyer would have entered into the transaction, and if so, only at a greatly reduced price.

The remedy available to the purchaser should also be considered at this juncture. If a duty to disclose is imposed and breached, what should the buyer's remedy be at common law? Clearly he should be allowed to rescind the contract, because in the vast majority of cases he would never have entered into it had he been made fully aware of the facts. As for damages, the question may fairly be asked whether the buyer should be limited to the restitution interest. Is the action not sufficiently proximate to one in contract as to entitle the aggrieved purchaser to compensation for loss of his expectation interest? It seems a bit unjust that the remedy should depend upon the manner in which the action is framed. If the purchaser could somehow establish an implied or express term that the goods are free from quality related defects, then he is entitled to sue on the contract and claim damages to his expectation interest. Furthermore, the vendor's moral turpitude should be a factor in compensating the purchaser to the full extent of his loss. The possibility of a large damage award may serve as a deterrent to unconscionable selling practices.

The right of the vendee to rescind the contract and to claim damages for the vendor's concealment or non-disclosure of known material facts might fairly be tempered by allowing the vendor the right to take back the goods, re-tendering the same or similar goods within a reasonable time. The re-tendered goods would have to be of the quality anticipated by the purchaser at the time he entered into the contract. Such a right would cause no injustice to the buyer because he would still receive what he had originally bargained for under the contract.

VI. OTHER SOLUTIONS

A. INTRODUCTION

There are other possible arguments which may be advanced on behalf of a purchaser who falls prey to the sharp tactics of a seller: (1) some scholars suggest that courts resolve analogous problems by what is known as the contruction approach. (2) Of course, the implied terms of the *Sale of Goods Act* are always a possible solution. (3) The American courts have adopted a third approach, known as the doctrine of fraud.

B. THE CONSTRUCTION APPROACH

Many injustices in contracts are avoided by treating the problems as one of offer and acceptance. P.S. Atiyah is an advocate

of the construction approach[65]. If a mistake is so fundamental, a warranty will be implied. A vendor who accepts a purchaser's offer, knowing of the latter's mistaken belief, may be bound to treat the offer as though the goods were of the condition or quality believed by the purchaser.

A. Roberts & Co. v. Leicestershire County Council is an analogous case in point.[66] In that case, the plaintiff tendered for the construction of a new building to be completed in eighteen months. The Defendant accepted the plaintiff's tender, but in the formal contract changed the term to thirty months. The Plaintiff executed the contract without noticing the change. The defendant knew of the plaintiff's mistaken believe and the court allowed rectification of the formal contract to conform to the plaintiff's understanding of the original terms. Professor Atiyah quite properly cites the *Roberts* decision as lending support to his view that "...a person who accepts an offer knowing the real intentions of the offeror is bound to treat that offer as though it correctly stated the offeror's intentions, whatever the objective construction of the offer might be".[67] It of course remains to be seen if the courts will extend the *Roberts* decision into the area of quality-related defects known to the vendor.

The construction approach has the advantage of adding a degree of flexibility to the law. It would, however, be preferable if there were a consistent and logical development of the law related to concealment into the area of failure to disclose when the buyer is obviously labouring under a deceptive belief as to the goods.[68] The test of course, should be an objective one such that the buyer's mistaken belief would be shared by a reasonable man and would further be apparent to a reasonable vendor. Other shortcomings of the construction approach is its uncertainty and artificiality. The prospects of persuading the court that the quality-related defect is sufficiently fundamental or material as to constitute a term of the contract would in a majority of instances be rather slim. If the court finds that the mistake was one as to quality alone and that it was not a term of the contract, the maxim *caveat emptor* will leave the buyer without a remedy. The advisability of leaving this problem to such judicial creativity is questionable at best.

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65 P.S. Atiyah, *JUDICIAL TECHNIQUES AND THE ENGLISH LAW OF CONTRACT* (1968), 2 Ottawa L. Rev. 337, at 344-350.

66 [1961] Ch. 555.

67 Supra., n. 65 at p. 348.

68 This is the approach used by many common law American jurisdictions under the doctrine of fraud. See infra. at p. 38.

C. IMPLIED TERMS

(i) *Goods To Correspond With Description.*

Some relief for the purchaser may be found in the implied terms of the *Sale of Goods Act*,[69] especially merchantability (section 15 (b)) and fitness for purpose (section 15 (a)). Section 14, which implies a condition that the goods sold by description shall correspond with the description, is of little comfort where the defect is related only to quality. It is unlikely that the quality related defect will be so great as to affect the identity of the goods offered for sale. However, once it has been shown that the goods do not correspond with the description, the implied condition of conformity is thereby breached regardless of how insignificant the variation. The initial, and usually fatal, hurdle is to show that the article purchased is not in fact the article described.[70] The requirement that there be a sale by description is easily met despite that the buyer saw and examined the goods before making the contract if the deviation from description is not apparent.[71] Even an over-the-counter transaction has been treated as a sale by description[72]. Generally, it is true to say that the only case of a sale not being by description occurs where the buyer makes it clear that he is buying a particular thing because of its unique qualities and that no other will do.

(ii) *Merchantability.*

The consumer's greatest friend is probably found in the merchantability rule of section 15 (b). It states goods must be of merchantable quality if:

(1) they are bought by description,

(2) from a seller who deals in goods of that description.

The second requirement thereby rules out all private transactions. Various definitions have been attached to "merchantable quality". Farwell L.J. described merchantability in the following terms:

> ...if article of such a quality that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or sell again...[73]

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69 R.S.N.B. 1973 c. S-1.

70 *Arcos Ltd. v. E.A. Ronaasen and Son*, [1933] A.C. 470, [1933] All E.R. 646 (H.L.).

71 *Beale v. Taylor* [1967] 1 W.L.R. 1193.

72 *Godley v. Perry*, [1960] 1 W.L.R. 9. However, see *Godsoe v. Beatty* (1958), 19 D.L.R. (2d) 265 (N.B.C.A.) which leaves the situation in New Brunswick very unsettled; and *Peters v. Parkway Mercury Sales Limited* (1975), 10 N.B.R. (2d) 703.

73 *Bristol Tramways Co., Ltd. v. Fiat Motors Ltd.* [1910] 2 K.B. 831 at 841.

Lord Wright in *Grant v. Australian Knitting Mills*[74] said merchantability amounted to fitness for the general purpose for which the goods are used. This latter definition would exclude minor defects which do not affect the useability of the good. The House of Lords in *Henry Kendall and Sons v. William Lillico and Sons Ltd.*[75] said goods are of merchantable quality if the buyer

> ...fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms....

While it is not within the scope of this paper to embark on a detailed examination of merchantability, it is clear from the above definitions that merchantability is not a settled concept. All defects are not caught by it. It is a doctrine which relates more to useability and, consequently, many defects will not render the goods unmerchantable.[76] As in the case of *Smith v. Hughes* much will depend upon the description by which the goods were purchased.

(iii) *Fitness For Purpose*

The fitness for purpose doctrine may also be used to the advantage of a buyer who, to the seller's knowlegde, has purchased goods under some mistaken belief as to their quality or other material fact. Section 15(a) of the *Sale of Goods Act* states that where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show his reliance on the seller's skill or judgment, there is an implied condition that the goods shall be fit for such purpose. As with the merchantability rule, the vendor must be a dealer in goods of that description. Reliance is not difficult to prove because where goods are normally used for one purpose, the seller will be taken to know the purpose in the absence of a contrary indication by the buyer.[77] Furthermore, substantial, not sole, reliance is all that is required.[78] Section 15(a) does not apply where the sale was of an article purchased under its patent or other trade name.

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74 [1936] A.C. 85.

75 [1969] 2 A.C. 31 (H.L.).

76 For a further discussion on the question of merchantability, see: P.S. Atiyah, *The Sale of Goods* (Toronto: Carswell Co. Ltd., 1971) 4th ed., pp. 80-85; Ontario Law Reform Commission, *Report On Consumer Warranties and Guarantees in the Sale of Goods* (Ontario: Department of Justice, 1972), pp. 36-41; K.J. Dore, *First Report of the Consumer Protection Project* (New Brunswick, Department of Justice, 1974) pp. 69-90.

77 *Grant v. Australian Knitting Mills* [1936] A.C. 85 (per Lord Wright).

78 *Freeman et al v. Consolidated Motors Ltd.* (1968), 69 D.L.R. (2d) 581 (Man. Q.B.).

(iv) *Conclusion.*

Many instances of quality-related defects will not be sufficient to render them unfit for their particular purpose.

Merchantability is more likely to be of assistance to the buyer. Fitness for purpose does, however, provide an opportunity for a court or judge to avoid an unjust result if active concealment cannot be established, whereby the maxim cavaet emptor would otherwise be applied against the purchaser. The major problems confronting a purchaser seeking to apply the implied conditions of merchantability and fitness for purpose are:

(1) proof of sale by description;
(2) the dealer requirement;
(3) the vagueness of the applicability of the terms themselves;
(4) the uncertainty whether the defect of quality is sufficient to render the goods unfit for purposes or unmerchantable.

D. THE DOCTRINE OF FRAUD.

The positive act of concealment is a fraudulent misrepresentation that the goods are of the condition and quality that they appear ex facie to be. If an act can constitute a misrepresentation, so too should silence in appropriate situations. In other areas of tort law, an omission to act can amount to a breach of duty with resultant liability. "Misrepresentation" is an unfortunate label to apply to such conduct by the vendor. It is a misnomer and may of itself be responsible for retarding the expansion of concealment rules into the area of non-disclosure.

The failure to impose a duty to speak when it is reasonably apparent that the purchaser is labouring under a deceptive belief amounts to a licence to take unfair advantage of others. It is really a fraud on the buyer. "Fraud" would be a more appropriate term than "misrepresentation" and would be more conducive to expansion of its rules into the area of non-disclosure. Such has been the experience in most American jurisdictions. To extend fraudulent concealment into the area of non-disclosures would not mean that the vendor thereby loses his right to secure the best possible bargain. It would not sanction the buyer's recklessness. It means only that the seller shall be bound by the limits of reasonableness, fairness and honesty. Indeed, proof of the vendor's fraud would be more difficult given the absence of any positive act of concealment and would consequently afford some measure of protection to the vendor.

The American approach, although similar in many respects, has differed from that of Canadian and English courts in one important area; namely, the duty to disclose. The distinction between mere silence and active concealment by some trick or contrivance also ex-

ists in the common law of the United States.[79] There is no duty to speak even when it is apparent that the purchaser is mistaken so long as it is a matter on which either party may exercise his independent judgment.[80] Unlike Canada or Great Britain, however, most American courts impose an obligation of full disclosure whenever fair conduct demands it.[81] Fair conduct normally requires disclosure when the vendor possesses special knowledge which affects the value or desirability of the property or goods offered for sale and the vendee has no such knowledge and no reasonable means of acquiring such knowledge.[82] In *Jenkins v. McCormick* the following proposition is expounded:

> Where parties deal at arm's length and their relations are not confidential, silence is not fraud, especially where facts are equally within means of knowledge by both parties or particularly within knowledge of one party and of such a nature that other has no right to expect information, *but*, if fact concealed is *peculiarly within knowledge of one party* and *of such a nature that other party is justified in assuming its nonexistence*, there is a duty of disclosure, and deliberate suppression of such fact is fraud [emphasis added][83].

Although this concept applies generally to all contracts between parties dealing at arm's length, it has seen its greatest application in contracts for the sale of land. In *Williams v. Benson*[84] the Michigan Court of Appeal found the vendor of a termite infested house liable for fraudulent concealment of that fact purely by virtue of its non-disclosure:

> ...we hold that where a vendor has knowledge of the past or present existence of an instrumentality of progressive destruction or substantial impairment, *notwithstanding reason to believe that the progression has been halted*, a duty to disclose the circumstances arises... [T] he doctrines of Michigan law amalgamate to the point where a full disclosure of such basic defects as the termite infestation...sewage disposal problem...erosion...require full disclosure and *caveat emptor has no place*. Silence as to the existence or pre-existence of such known instrumentalities of progressive destruction or substantial impairment, *even absent specific inquiry*, can create liability...(emphasis added)

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79 See: 37Am. Jur. 2d 198, s 145 et seq.

80 *Stewart v. Wyoming Cattle Ranche Co.* (1888), 128 U.S. 383, 9 S. Ct. 101 (U.S. Circuit Ct., Nebraska).

81 *Cohen v. Citizens National Trust and Savings Bank* (1956) 300 p. 2d 14 (Cal. App.) per Moore J.; *Nowicki v. Padgorski* (1960), 101 N.W. 2d 371 (Mich. S.C.).

82 *Cohen v. Citizens National Trust and Savings Bank*, supra, n. 80 *Central Mutual Ins. Co. v. Schmidt* (1957), 313 p. 2d 132 (Cal. App.); *Parker v. Green* (1966), 340 S.W. 2d 435 (Mo. App.); *Wolf v. Brungardt* (1974), 524 p. 2d 726, (Kan. S.C.); *U.S. Fibres Inc. v. Proctor & Schwartz Inc.* (1973), 358 F. Supp. 467 (D.C. Mich.); *Ramel v. Chasebrook Construction Co.* (1961), 135 So. 2d 876 (Fla. App.).

83 (1959), 339 P. 2d 8 (Kan S.C.), Jackson J. see also: *Reeder v. Guaranteed Foods Inc.* (1965), 399 P. 2d 822 Kan. S.C.).

84 (1966), 141 N.W. 2d 650 at 656 (Mich. C.A.) per Fitzgerald J.

This is certainly a pragmatic expansion of the common law as it has been applied in Canadian Courts.

The American view that disclosure of material facts affecting quality or value must be disclosed by the seller if (1) the seller possesses some special knowledge and (2) the purchaser does not possess that knowledge and cannot reasonably be expected to acquire that knowledge, has some practical drawbacks. Since there is no positive act indicating a fraudulent intent, proof of fraud can be very onerous. The Court must be satisified by a "clear, convincing and satisfactory" preponderance of evidence before it will ascribe a fraudulent intention to the vendor's non-disclosure.[85] The Court may be reluctant to find that the vendor possessed special knowledge to which the purchaser has no reasonable means of access. In *Reeder v. Guaranteed Foods, Inc.*,[86] for example, the plaintiff purchased a deep freeze unit from the defendant on a food plan program whereby the plaintiff expected he would save his family a considerable food expense. However, the scheme did not prove to be the saving that he had hoped. The plaintiff claimed that the defendant was under a duty to disclose how much a purchaser could be expected to save on food bills. The Supreme Court of Kansas rejected the plaintiff's contention. Where goods are open to the inspection of the buyer, he is presumed to be as competent to judge to their value as the seller. The court felt that the plaintiff could have shopped around to compare food prices to determine how much he could save (or lose) under the scheme offered by the defendant. While this case did not deal with quality defects per se, it points out the difficulties associated with the rule of disclosure where the vendor possesses special knowledge as that rule has been expressed in the United States. What constittues an unfair bargaining advantage will fall to be determined by the peculiar facts of each case.

CONCLUSION

By misplacing its emphasis on the right to inspect goods and property rather than on a standard of conscionability in contractual bargaining, the common law has produced an illogical inconsistency: the distinction between active concealment and mere acquiescence in the buyer's mistake as to the quality of the goods or property. A more just approach would be to require a vendor to disclose all material quality-related defects known to him before risk in the goods passes to the buyer. The materiality of the defect would have to be determined objectively by asking whether a reasonable buyer, fully acquainted with the facts, would have entered into the transac-

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85 *Reeder v. Guaranteed Foods, Inc.* (1965), 399 P. 2d 822, (Kan. S.C.), Schroeder J.

86 *Ibid.*

tion or, if so, at a greatly reduced price. The best solution may lie in resort to statutory enactments defining and informing both parties of their respective rights and obligations as well as expanding the remedies offered to an aggrieved as well as expanding the remedies offered to an aggrieved purchaser. Such legislation should not be restricted to the field of consumer goods but include contracts for new business opportunities and for the purchase and sale of real estate.