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## DEFECTS RELATING TO REAL ESTATE:

# When is a Seller “On the Hook”?

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### Abstract

*A latent defect is a hidden or concealed defect that is not readily apparent to an ordinary purchaser during a routine inspection. A seller is not liable for damages for a latent defect of which he has knowledge unless the defect renders the premises unfit for habitation or dangerous.*

### Full Article

Guglielmi v. Russo, 2010 CarswellOnt 1172, Ont. Div. Ct. is an action that arose regarding a defective retaining wall on a residential property purchased by the appellants (the purchaser) from the respondents (the seller). The parties signed an agreement of purchase and sale with a closing date of August 27, 2004. The purchaser did not include a condition in the agreement requiring an inspection of the property. Prior to making the offer, the purchaser visited the property twice.

The property of the neighbour to the west is four to five feet below the grade of the purchaser's property. When one is on the neighbour's property, it is clear that the fence at the back of the purchaser's yard is attached to another structure being the retaining wall.

The purchaser testified that she was unaware of the retaining wall when she and her husband made the offer to purchase. The seller indicated that he did not believe there was a problem with the retaining wall since the wall had moved approximately two inches in the ten years that he owned the property.

After the agreement of purchase and sale was signed, the purchasers were contacted by the seller's neighbour regarding the condition of the retaining wall. The neighbour testified that he was concerned that it posed a safety hazard because it was leaning and he had told the seller this and tried to convince him to agree to share the cost of repairs.

The purchasers then obtained the services of an engineering company. The engineering company issued a report indicating that the complete failure of the wall was not likely to result in any significant property or personal damage.



# Defects Relating to Real Estate

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The purchaser's closed the sale but gave notice that they would seek damages for the repair of the retaining wall. The wall was repaired in June 2006 at a price of approximately \$21,500.

The main issue for the trial judge to determine was whether the retaining wall was a latent defect or a patent defect.

In the agreement of purchase and sale, the doctrine of caveat emptor applies, subject only to the equitable jurisdiction of the courts to prevent fraud, mistake and misrepresentation. In *McGrath v. MacLean (1979)*, 22 O.R. (2d) 784 (Ont. C.A.), Dubin J. A. quoted from an article by then Professor Bora Laskin on the vendor's duty of disclosure in a real estate transaction:

...a latent defect of quality going to fitness for habitation and which is either unknown to the vendor or such as not to make him chargeable with concealment or reckless disregard of its truth or falsity will not support any claim of redress by the purchaser.

Dubin J. A. went on to say:

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

Similarly, I am prepared to assume that there is a duty on the vendor to disclose a latent defect which renders the premises dangerous in themselves, or that the circumstances are such as to disclose the likelihood of such danger, e.g., the premises being sold subject to radioactivity.

It should be noted that a latent defect is one that is not readily apparent to an ordinary purchaser during a routine inspection (*Swayze v. Robertson*, [2001] O.J. No. 968 (Ont. S.C.J.) at para. 27).

The question that the trial judge should have asked is whether an ordinary purchaser doing a routine inspection prior to the purchase would have detected a defect in the retaining wall. While the purchaser's visited the property twice before making an offer, the evidence shows that the deteriorated condition of the wall was not discoverable without entering the neighbour's property and removing the steel cladding on the fence to determine what lay behind it. This suggests that the condition of the wall was a latent defect.

According to McGrath, the vendor is not responsible to the purchaser for a defect unless he conceals that defect, or he knows of a latent defect that renders the premises unfit for habitation or dangerous.

The purchaser's submit that the seller should have disclosed the condition of the wall when asked if there were any other problems. However, this does not amount to active concealment of a defect.