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# Court will decide about 'latent defects'

Does a seller have an obligation to disclose to a purchaser with young children the fact that a person convicted of child pornography lives across the street? That was the issue in a court case which came before Justice Alexandra Hoy in March of this year.

The plaintiffs were Jason Dennis and Rebecca Bound, a husband and wife who are the parents of two young children. After they purchased a house in Bracebridge from William and Helen Gray, they discovered that a person convicted under the child pornography provisions of the Criminal Code lived across the street and that this was common knowledge in the neighbourhood.

The Grays were aware of this, knew the buyers had young children, and did not disclose it to them. The buyers have not lived in the property and do not intend to.

Last year, Dennis and Bound sued the Grays and the real estate agents involved in the transaction. They based their claim on the failure to disclose what in law is known as a hidden or latent defect in the home, namely the fact that a neighbour with a particular criminal record lived on the street, and represented a potential danger to the children of the purchasers.

In March of this year, before the case was scheduled for trial, the Grays asked a judge to strike out the claim against them because it disclosed no reasonable cause of action. Their position was that even if the facts were proved, there was no legal basis for a court to award damages to the plaintiffs.

The test on the motion to dismiss this case before trial was whether it is "plain and obvious" that the seller of a house does not have to disclose to a purchaser with young children the fact that a person convicted of child pornography lives across the street — a situation which was common knowledge in the neighbourhood.

In other words, Hoy succinctly stated the issue by asking whether it is "plain and obvious" that such a fact does not in law amount to the kind of latent defect which must be disclosed to a purchaser.

If it was "plain and obvious" to the court that the plaintiff's action was doomed, the judge would have to dismiss the case.

In general, the doctrine of caveat emptor, or buyer beware, applies to the sale of land. The Supreme Court of Canada has ruled that a buyer who does not protect himself by contract or by inspection will, in the absence of fraud, have no case against the sellers.

The only exception to this rule is that a seller may be liable to the purchasers of a resale home if he knows of a hidden defect which renders the property dangerous or unfit for habitation and fails to disclose it. This exception was the basis of the plaintiffs' case.

In her decision on the Grays' motion to dismiss the case, Hoy reviewed a number of Canadian court cases decided between 1979 and 2006 to determine how the courts have treated hidden defects. These cases deal with defects such as landslides, radioactive soil, landfills on or near the property, leaky basements and hidden structural, electric and plumbing defects.

Hoy noted that the buyers' claim was novel and raised policy issues, including the protection of children and whether, if successful, the case would have the effect of making the reintegration into society of persons convicted of certain crimes more difficult.

Hoy concluded that it was not "plain and obvious" that the plaintiffs' action would fail. She dismissed the sellers' application to strike out the buyers' claim, effectively ruling that the case should go to trial and that there was a chance that the buyers could succeed — even though it might be a challenge for the court to stretch the definition of latent defect to include the ex-convict across the road.

The real estate community will be watching the outcome of this case with considerable interest.

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See Bob Aaron on CHCH TV news interview on this subject

http://www.chch.com/index.php/home/item/3406-how-much-can-you-know-about-your-neighbours?

# Dennis v. Gray, 2011 ONSC 1567 (CanLII)

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| Noteup: | Search for decisions citing this decision |

Reflex Record (related decisions, legislation cited and decisions cited)

### Legislation cited (available on CanLII)

- Criminal Code, R.S.C., 1985, c. C-46

### Decisions cited

- Fraser-Reid v. Droumtsekas, 1979 CanLII 55 (SCC) — [1980] 1 SCR 720 • 103 DLR (3d) 385
- Sevidal v. Chopra, reflex — 64 OR (2d) 169

**CITATION:** Dennis v. Gray, 2011 ONSC 1567

**COURT FILE NO.:** CV-10-00409237-0000

**DATE:** 20110311

**ONTARIO**

# SUPERIOR COURT OF JUSTICE

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| **B E T W E E N:** | ) | |
| | ) | |
| **JASON DENNIS and REBECCA BOUND**<br>Plaintiffs/Responding Parties<br>- and -<br>**WILLIAM GRAY, HELEN GRAY, RE/MAX LAKE COUNTRY REALTY INC., RAY JARVIS, PAUL KANE and LEA KANE**<br>Defendants/Moving Parties | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Arnie Herschorn**, for the Plaintiffs /<br>Responding Parties<br><br><br><br><br><br>**J. Anthony Caldwell**, for the Defendants /<br>Moving Parties |
| | ) | |
| | ) | **HEARD:** March 2, 2011 |

**Hoy J.**

**REASONS FOR DECISION**

[1] The defendants, William and Helen Gray, bring this motion under Rule 21.01(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for an order dismissing this action against them by the plaintiffs, Jason Dennis and Rebecca Bound, on the basis it discloses no reasonable cause of action.

[2] The question on this motion is whether it is "plain and obvious" that the seller of a house does not have to disclose to a purchaser with young children the fact I which was common knowledge in the neighbourhood I that a person convicted under the child pornography provisions of the *Criminal Code*, R.S., 1985, c. C-46 lives across the street. Alternatively stated, is it "plain and obvious" that such a fact does not, in law, amount to a "latent defect" of such a nature that it must be disclosed to a purchaser?

[3] The plaintiffs' claim is novel. And it raises policy issues, including the protection of children and whether, if successful, the claim will have the effect of making the re-integration of persons convicted of certain crimes into society more difficult. For the reasons that follow, I have concluded that it is not "plain and obvious" that the plaintiffs' action is certain to fail, and in the result the defendants' motion is dismissed.

The test

[4] The well-established test for striking out a statement of claim as disclosing no reasonable cause of action is that the court must find it "plain and obvious" that the statement of claim discloses no reasonable cause of action:

...if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with her is her cause. Only if the action is certain to fail because it contains a radical defect....should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

*Hunt v. Carey* Canada *Inc.*, [1990] 2 S.C.J. 959 (S.C.C.), para. 21

[5] On a motion under Rule 21.01(b) the court must accept the facts alleged in the statement of claim as proved.

The facts alleged.

[6] The plaintiffs are husband and wife and are the parents of two young children.

[7] Mr. and Mrs. Gray were the previous owners of a residential property in Bracebridge.

[8] The plaintiffs purchased the property from the Grays. They discovered that a person convicted under the child pornography provisions of the *Criminal Code* lived across the street and that this was common knowledge in the neighbourhood.

[9] The Grays were aware of this, knew the plaintiffs had young children, and did not disclose it to the plaintiffs.

[10] Because a convicted sex offender lives across the street, the plaintiffs have not lived in the property and do not intend to.

Review of the law cited relating latent defects in property

[11] The doctrine of "*caveat emptor*" or "let the buyer beware" generally applies to the sale of land. There is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The notion is that a buyer who does not protect himself by contract, or by inspection, will, absent fraud, be without remedy. *Fraser-Reid v. Droumtsekas*, 1979 CanLII 55 (S.C.C.), [1980] 1 S.C.R. 720 at p. 720 (S.C.C.)

[12] That doctrine is, however, subject to the concept of "latent defects".

[13] In *McGrath v. MacLean et al.*, [1979] 22 O.R. (2d) 784 (C.A.), Dubin J.A. wrote in *obiter* that a vendor may be liable to the purchaser of premises which are not new if he knows of a latent defect which renders the premises unfit for habitation or dangerous in themselves and does not disclose it to the purchaser.

[14] In that case, the purchasers alleged that the seller did not disclose that there had been several landslides of earth, stone and debris from adjoining properties unto the seller's property. The purchasers' claim failed because they did not establish that a slide of the magnitude at issue had occurred before, and there was some indication that the slide was due to the tortious conduct of others. The Court did not therefore engage in an application of the principles enunciated by Dubin J.A. regarding latent defects to the facts.

[15] In *Sevidal v. Chopra* reflex, (1987), 64 O.R. (2d) 169 (H.C.J.), the sellers of a house knew, at the time the agreement of purchase and sale was entered into, of the existence of radioactive material in the area and did not disclose it to the purchasers. They subsequently became aware, prior to closing, that their own property was also contaminated and did not tell the purchasers. While referring to *McGrath v. Maclean*, Oyen J. framed his analysis in deceit, an established exception to *caveat emptor*. He found that the amount of material was sufficient that it was a potential risk and hazard and although not an immediate risk or danger, amounted to a potential danger. In all of the circumstances, the sellers had a duty to disclose to the purchasers and their concealment of facts so detrimental to them amounted to fraudulent misrepresentation. Oyen J. wrote that the fact that the latent defect was only known to be on property in the immediate area and not on the property itself provided no excuse for non-disclosure.

[16] In *Godin v. Jenovac*, [1993] O.J. No. 2548 (Gen. Div.), the sellers failed to disclose the existence of a nearby landfill site which had been used as a garbage dump. McCombs J. found that the plaintiff knew that the site at issue had been used as a landfill. He also found that there was no evidence that the landfill site posed a health hazard, or other danger. Citing *McGrath v. Maclean*, he commented that had the landfill site posed a health hazard, the sellers would have had a duty to disclose that fact.

[17] In *688350 Ontario Ltd. v. Piron*, [1994] O.J. No. 2844 (Gen. Div.), a 26-acre property was sold to purchasers intending to build houses on the land. The seller did not disclose that there was landfill on the site. The quantity and quality of the fill was a defect for a developer of land. Epstein J. (as she then was) held that the defect was not a latent defect. She held that a latent defect is such as would not be revealed by any inquiry that a purchaser would be in a position to make before entering into the contract for purchase. She found that the plaintiff's agent for development purposes knew that there was a quantity of fill on the land and it was reasonable to expect that he would have provided the plaintiff with such information.

[18] The Court of Appeal' subsequent decision in *Tony's Broadloom & Flooring Covering Ltd. v. NCM Canada Inc.*, [1996], O.J. No. 4372 (C.A.), p. 5 stands for the proposition that the intended use of the land must be considered in determining whether the alleged defect is in fact a defect. In that case, the existence of a contaminant on land sold as industrial property was held not to constitute a defect.

[19] In *Swayze v. Robertson*, [2001] O.J. No. 968 (S.C.J.), p. 5, a flooded basement was at issue. The purchaser had arranged for a home inspection, and had specifically asked the seller if there had been any water leakage in the basement. The seller responded in the negative. LaForme J.( as he then was) found that this statement was false, and the seller knew that it was false or was at least indifferent to its truth or falsity and intended to mislead the purchaser and the statement was a material in inducing the purchaser to buy the house. At para. 27, LaForme J. described a latent defect as "some fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection". He commented that the requirement of *McGrath v. Maclean* that the premises be rendered unfit for habitation seemed to have disappeared as a principle for analysis and that "the correct approach must be to consider it in the context of whether the latent defect has caused any loss of use, occupation and enjoyment of any meaningful or material portion of the premises or residence that results in the loss of enjoyment of the premises or residence as a whole." LaForme J. accepted the evidence that the flooding was a health hazard.

[20] In *Moore v. Page*, [2002] O.J. No. 2256 (S.C.J.), p. 10, another wet basement case, the Court held that a defect is not classified as latent simply because it might not be visible, and that the purchasers are bound to make appropriate inquiries. *Swayze v. Robertson* was applied, and the seller was found liable. There was evidence, as there was in *Swayze v. Robertson*, that inquiries had been made.

[21] In *Fitzhenry v. Vaccaro*, [2009] M.J. No. 140 (Q.B.), the trial judge made an exhaustive review of the law dealing with defects discovered after the purchase of a home. She quoted Halsbury's *Laws of England*, 4th ed., vol 42 at 47, para. 51:

Patent defects of quality. Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract of purchase.

[22] She summarized the law, as follows:

125 The law seems clear that in analyzing a claim such as this, the court must first consider the question of whether the defect which the plaintiffs allege has given rise to the cause of action is a patent or latent defect. If it is a patent defect discernable upon inspection or inquiry, then the plaintiffs have no claim. However, where the defendant is shown to have taken steps to conceal a patent defect from the plaintiffs (or the signs of a defect) or has taken steps to mislead the plaintiffs from making any further inquiries whether those steps are verbal or otherwise the defendant will be liable to the plaintiff for causing the plaintiff to enter into the purchase agreement which they might not otherwise have done. If the defect would have been visible on ordinary inspection or inquiry, then the doctrine of caveat emptor applies.

126 If concealed by the defendant such that it can be said that a fraudulent misrepresentation has occurred, then caveat emptor is not available to the defendant. If fraud if to be relied upon, however, it must be specifically pleaded. Finally, it need not be shown that the vendor intended to defraud the purchaser. If the effect of the vendor's action in concealing a defect is to prevent its discovery, or to lull or mislead the purchaser into not pursuing a line of inquiry, then the requisite intent is established.

127 In order for the defendant to be held liable for a latent defect, then it must be shown that the defendant had prior knowledge of the defect and had an obligation to disclose it to the purchasers regardless of whether or not that information was sought.

[23] In *Fitzhenry v. Vaccaro,* the purchasers bought a house without a building inspection and made no inquiries about basement seepage. They were aware that older homes in Winnipeg were subject to water seepage. When the purchasers removed panelling in the basement, they found evidence of significant prior water damage, including deterioration to the foundation and interior retaining walls. Thereafter, the basement flooded every spring and after heavy rains. The water was sometimes 10" deep. The defendant had bought the house only 6 months prior for the purpose of renovating it and selling it for a fast profit. The basement was in a finished state when he bought it. He appeared not to have been in the house over a spring. The defendant covered over some of the basement panelling, deteriorated at its base by water seepage, with new panelling. The trial judge concluded that while the defendant effectively concealed signs of water damage from the purchasers, he had no knowledge of any basement flooding, and did not hide the defective walls, which caused the seepage. She concluded that the defendant had done no more than what any reasonable person would have done in preparing a house for sale, and that the plaintiffs should have acted with more diligence and asked the defendant directly regarding water damage. The trial judge found that the principle of *caveat emptor* applied, and the purchasers had an obligation to not only to inspect, but make inquiry.

[24] In *Cotton v. Monahan*, [2010] O.J. No. 1786 (S.C.J)., the most recent case cited to me, latent structural, electric and plumbing defects were discovered . Arrell J. applied the *obiter* in *McGrath v. Maclean* and said that the plaintiff must prove that the latent defects were known to the sellers and they purposely concealed them in order to sell their house or in the alternative there was reckless disregard of the truth or falsity of any representation made by the seller regarding any defects known to them. He found that the sellers were not aware of the defects and the action was dismissed.

The parties' positions

[25] Counsel for the defendants argues that it is plain and obvious that the fact that the person who lives across the street was convicted of child pornography (1) is not a latent defect because it was common knowledge in the neighbourhood, and could have been discovered on reasonable inquiry, and (2) in any event, the plaintiffs have not pleaded that such fact creates a risk of physical harm or danger to the inhabitants.

[26] Counsel for the plaintiffs argues that it is not plain and obvious that the plaintiffs claim is certain to fail. He points to the broadening of the doctrine of latent defects, as evidenced by *Swayze v. Robertson* and the cases that have applied it and submits that the scope of the principle may well be further broadened by the court. He argues that *Swayze v. Robertson* held that a latent defect is one which is not readily apparent on a routine inspection and that the criminal record of the neighbour could not be ascertained from a routine inspection. He highlights that the intended use of the property – a home for a family which included young children – was known to the defendants and submits that the particular criminal record of the neighbour was a defect given that intended use. He further points to the fact that liability was found in *Sevidal v. Chopra*, in relation to a risk not on the property itself, and not a structural problem, that was a potential danger to the inhabitants. This he submits is analogous to the neighbour at issue on this case: he is not on the property but presents a potential danger to the children of the purchasers of the property.

Analysis

[27] The cases are not entirely consistent in approach. They do not generally first consider whether the defect at issue is patent or latent, some rely on the fraud exception and others on the latent defect principle, and some seem to apply a mix of the two to arrive at a desired result. As counsel for the plaintiffs argues, *Swayze v. Robertson* is evidence the boundaries of the latent defect principle have been stretched beyond what *McGrath v. Maclean* contemplated. It is not plain and obvious that if the danger posed by the defect is considered sufficiently grave, a duty to disclose will not be imposed on the sellers.

[28] I say this noting that *Moore v. Page* clearly states that a purchaser is bound to make inquiries, Halsbury's, quoted in *Fitzhenry v. Vaccaro*, defines a latent defect as one which cannot be determined by inquiry (presumably of anyone but the seller) and *688350 Ontario Ltd. v. Piron* applies that definition.

[29] I believe that *Swayze v. Robertson* should not be taken as authority for the proposition that a latent defect is one which is not readily apparent on a routine inspection, as opposed to one which is not apparent from an inspection, or inquiry. LaForme J.'s comment was made in the context of a case where specific inquiry had been made of the seller.

[30] I note, however, that in *Godin v. Jenovac*, the fact that the landfill site had been used as a garbage dump was presumably known in the neighbourhood, as the plaintiffs in this case plead the fact that the person living across the street had been convicted on child pornography was. McCombs J. – who cited *McGrath v. Maclean* – did not indicate that this would have resulted in the plaintiffs' case failing, simply indicating that liability would have followed if danger had been established.

[31] As to what counsel for the defendants says is the plaintiffs' failure to plead that there is a risk of physical harm or danger to the inhabitants, reading the pleadings generously, as I am required to do, the risk of harm is implicit from the other facts pleaded.

Costs

[32] The parties agreed at the hearing that the successful party would be entitled to costs in the amount of $6,000, all inclusive. The plaintiffs shall therefore be entitled to costs in such amount.

**Hoy J.**

**Released:** March 11, 2011

**CITATION:** Dennis v. Gray, 2011 ONSC 1567

**COURT FILE NO.:** CV-10-00409237-0000

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

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- and -

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**REASONS FOR DECISION**

**Hoy J.**

**Released:** March 11, 2011