

Protecting Buyers and Sellers from "leaky basements"



By Brian Madigan LL.B.

Never mind wondering who you can sue, the best time to protect yourself is before the deal is done.

Consider the following case, it's really quite common. John and Mary have a house which is a little older. They have moisture in the basement every Spring, and occasionally they have a small flood, perhaps every 5 or 6 years or so.

They want to move, so they paint the unfinished basement and place various furniture and other items up against the walls in an effort to conceal the problem.

They sell their house in the late Spring when everything is quite dry to another couple, Fred and Wilma. This couple is downsizing and they plan to use the basement as family room. All summer, a number of contractors assist Fred with the basement renovations to the tune of about \$20,000.00.

You know the rest of the story! You probably even know someone in Fred and Wilma's situation. No one ever knows John and Mary. This isn't something they'd talk about. They discover 3" of water in the family room in the basement. Apparently, there was a crack in the basement wall where the water leaked into the wall, ran down behind the drywall and uplifted the wood floor.

It will cost almost \$15,000.00 to repair the crack in the wall, eliminate the mould, and put the family room back to where it was.

The real estate principles of "latent" and "patent" defects apply and assist the Courts in determining liability. A latent defect is "some fault which one would not expect an ordinary purchaser to discover during a routine inspection" and patent defect is "something which an unsophisticated purchaser can discover on cursory inspection".

Was the crack in the basement wall a latent (hidden) defect or a patent (easily seen) defect? How easily could the leak have been discovered?

If it is determined to be a patent defect (easily seen), the rule "let the buyer beware" applies, and Fred and Wilma are out of luck. And, it doesn't really matter

whether John and Mary knew about it. There is no recourse against John and Mary.

However, if it were a latent (hidden) defect and John and Mary did not know about it, there is still no recourse. The rule “let the buyer beware” applies. But, if the John and Mary knew about such a defect and didn’t disclose it to Fred and Wilma, then, they are liable for the damages. A latent defect known to the vendor must be disclosed to a purchaser.

Summary of the Law of Disclosure

Patent defect: no liability

Latent defect Unknown: no liability

Latent defect Known: liability (if no disclosure)

Purchasers’ Protection

The purchasers could have taken some steps to protect themselves:

- 1) examine the Sellers Property Information Statement,
- 2) request that the owners complete such a document,
- 3) ensure that the transaction is conditional upon review of the document,
- 4) closely inspect the premises,
- 5) move some the furniture that might otherwise cover-up potential problems,
- 6) retain a home inspector to review the document and perform an inspection,
- 7) if the SPIS document will not be provided, ask targeted questions concerning the condition, (and record the answers),
- 8) incorporate the answers into warranties and representations.

Vendors’ Protection

Also, there were some steps that the vendors might have taken. They didn’t simply have to conceal the problem and hope that it would not rain the following Spring.

Consider the following:

- 1) advise the listing agent,
- 2) obtain an estimate for the repair,

- 3) complete a Seller property Information Statement with full disclosure,
- 4) specifically advise the purchasers to obtain their own home inspection,
- 5) if, the transaction is not conditional upon a home inspection, then make it so,
- 6) be “open” about the issue,
- 7) there is no need to drop the price or repair the damage,
- 8) some purchasers will assume the risk, so simply await the “offer”.

As long as the purchaser assumes the risk with full knowledge, then there is no liability upon the vendor.

In many cases like this, the vendor should simply avoid the SPIS document, make casual reference to the issue, and insist that a conditional period be included for the benefit of both parties. If the purchaser has the opportunity but fails to take advantage of it, then, the risk is still shifted.

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