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Even amateur builders can be liable

Ontario's highest court has ruled that anyone who builds a home that is dangerous or unsafe whether that person is a professional or amateur builder is liable to subsequent owners of the house, whether or not they had a contract with the builder.

Back in 1987, John and Anne Lemstra built their dream home with the help of a contractor and some sub-trades. Although they obtained a building permit from the Township of Puslinch, south of Guelph, they moved in without a final inspection or occupancy permit.

Four years later, the Lemstras sold their house to Sharon Ann Mariani. The listing agreement described the house as well-built, but the agreement of purchase and sale contained no warranties.

Unfortunately, the house had two serious construction defects. The centre structural wall of the house was unstable and made the building susceptible to shifting under a significant snow load or in a high wind. Whenever it rained, a breach in the building envelope allowed water penetration and basement flooding which created a proliferation of mould.

After a nine-day trial, Justice Thomas Dunn ruled that the 3,459-square-foot house was a writeoff, and required demolition. He awarded Mariani almost \$300,000 plus interest and costs 75 per cent against the Lemstras and 25 per cent against the township. Prior to trial, Mariani had settled with the Township for \$150,000. (See Title Page, July 12, 2003, at <http://www.aaron.ca>.)

Justice Dunn based his decision and damage award on fraudulent misrepresentation and negligent misstatement.

The Lemstras appealed. The case was heard by the Ontario Court of Appeal in April and its decision was released in May. Writing for a three-judge panel, Justice Robert Sharpe ruled that there were no grounds for fraudulent or negligent misrepresentation and set aside those findings of the trial judge.

The most interesting aspect of the appeal decision is that it held the Lemstras liable for negligent construction, rather than misrepresentation. Liability was based on a 1995 decision of the Supreme Court of Canada in the case of Winnipeg Condominium Corporation 36 v. Bird Construction. That case ruled that a builder owes a duty of care to subsequent purchasers.

The Supreme Court said, "It is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent (hidden) defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves."

That decision specifically applied to builders, but the Lemstras' case means the Ontario Court of Appeal has now extended its reach to anyone who builds a house, whether they are commercial builders or not. Even though the Lemstras built the house with the intention of living in it indefinitely, they and anyone who builds a home for their own use must realize that one day they may have to sell it.

To trigger liability to subsequent owners, the defects must be more than shoddy workmanship, they must be dangerous. Ontario's highest court has now made it clear that anyone who builds a house containing hidden dangers or unsafe conditions will be liable to an endless chain of subsequent owners. This liability extends to all builders, whether large commercial concerns or weekend handypersons.

Based on this liability for negligent construction, the court in Mariani v. Lemstra reduced the damages from the cost of replacing and demolishing the house to the cost of repairing the defects. Damages were chopped from about \$300,000 to slightly more than \$100,000 less \$30,000 in costs payable by the owners because the appeal was successful. Since Mariani had already recovered \$150,000 from the township, it's possible that the Lemstras got off without paying any damages.

FOLLOW UP: On July 24, I wrote about the case of Emery and Margaret Danko who had contracted with Marbrook Homes to buy a new house to be built with a cathedral ceiling. When the house was built with a flat ceiling in the family room, the Dankos cancelled the deal and successfully sued to get their \$22,200 deposit back. (See <http://www.aaron.ca>.)

After the column appeared, Margaret Danko called me to report on an aspect of her case that did not appear in the published law journals. After a 16-day trial, she told me, she is out about \$150,000 in legal costs and still did not have her deposit back at the time of our conversation. The court ordered the builder to pay a large chunk of her legal bills, but she hasn't received anything.

Something is seriously wrong with the justice system and with the protection of the Tarion Warranty Corp. when a homebuyer is subjected to this type of loss. It's a black eye for the whole home-building industry.

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