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Dream house nightmare

Imagine living in a house, which shifts slightly under a heavy snow load or in a high wind, because of an unstable centre-bearing wall. Whenever it rains, water enters the building through a breach in the building envelope. The flooding in the basement creates a proliferation of toxic mould.

Sharon Ann Mariani got more than she bargained for when she moved into her 3,459-square-foot house in the Township of Puslinch, south of Guelph, in 1991.

The house had been built as a dream home by John and Anne Lemstra back in 1987. Although not professional builders, they did much of the work themselves, and enlisted the help of a contractor and some sub-trades. They had a building permit, but moved in without a final inspection or an occupancy permit.

Last week, the Supreme Court of Canada wrote the final chapter in a case which began back in 1993 when Mariani sued the Lemstras and the township for damages. After a nine-day trial in 2001, Justice Thomas Dunn ruled that the house was a write-off and had to be demolished. He awarded Mariani \$300,000, plus interest and costs. The Township was responsible for 25 per cent, but had already settled with Mariani for \$150,000.

Justice Dunn based his ruling on fraudulent representation and negligent misstatement. The listing agreement for the house described it as well-built, but the agreement of purchase and sale contained no warranties.

Last year, the case got to the [Ontario Court of Appeal](#). Justice Robert Sharpe found that there were no grounds for finding that the Lemstras were responsible for fraudulent or negligent misstatement.

The three-judge panel held the Lemstras liable for negligent construction. Their 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, not just the first buyers, with respect to dangerous defects.

The Court of Appeal decided that Mariani was only entitled to "to the reasonable cost of putting the building into a non-dangerous state" and not any resulting damages such as repairing Building Code defects.

It reduced Mariani's damages from the cost of demolishing and replacing the house to the cost of repairing the defects slightly more than \$75,000, less \$30,000 in costs awarded to the Lemstras because they were successful in having the damages reduced. The Lemstras, however, had to pay court costs of the original trial.

After the Ontario Court of Appeal decision, both parties were unhappy and applied for permission to appeal to the Supreme Court of Canada.

Earlier this month, the Supreme Court dismissed both applications for leave to appeal without giving any reasons. This effectively means that the Court of Appeal judgment is final, and the Supreme Court in Ottawa will not interfere with it.

In the aftermath of *Mariani v. Lemstra*, anyone building a home, whether a professional or amateur builder, can be held responsible not only to the first purchasers, but to an endless chain of subsequent owners, if the house contains hidden dangers or unsafe conditions.

The case emphasizes once more the importance of buyers of new homes checking out the reputation and track record of their builders. Using a professional home inspector when buying a new or resale home is money well spent.

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