2003

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Caveat Emptor: The Position at Common Law

John D. McCamus*

I. INTRODUCTION

A factory site is sold to a developer. The soil is contaminated with a hazardous substance. The vendor gave no warranty with respect to the quality of the land. The vendor may or may not have known of the purchaser’s intended use of the property — a high rise condominium development. The developer buys a second property on which is located a large transmission tower. The tower appears unrelated to the vendor’s business. The vendor neglects to tell the purchaser that there exists a lease and easement relating to the use of the tower by a third party. Although it is widely rumoured that the doctrine of caveat emptor is moribund, or worse, the developer’s lawyer is going to discover that, in the absence of contractual terms on point, resolving these disputes will

* Professor of Law, Osgoode Hall Law School, York University. I am very grateful to my research assistant, Jacklin Tabar, a member of the 2002 LL.B. class for her excellent work, and to Paul Perell of Weir Foulds LLP and Jeffrey Lem, my colleague at Davies, Ward, Phillips & Vineberg LLP, for helpful conversations on particular points.

1 Let the buyer beware. Or, more completely, “Caveat emptor, qui ignorare non debuit quod jus alienum emit.” Let the purchaser, who ought not to be ignorant of the amount and nature of the interest, exercise proper caution.
require an examination of the current state of this doctrine and that it
will play a role in determining their outcome.³

This paper attempts, in relatively brief compass,⁴ to provide an
account of the current doctrine of caveat emptor at common law. The lat-
ter qualification reflects the fact that two other papers in this lecture
series will deal with the related topics of the Ontario legislation impos-
ing warranty liability on sellers of new homes,⁵ and the conveyancing
practices and techniques that may have an impact on the operation of
the caveat emptor doctrine.⁶

Assessing the current status of the doctrine, one must treat sepa-
rately the different legal regimes relating to defects of quality as
opposed to defects in title. The mysteries of the latter topic, in particu-
lar, arise from the differences between Canadian and English con-
veyancing practice. In his 1960 Special Lecture on this topic,⁷ Professor
Bora Laskin, as he then was, much illuminated this dark corner of real
estate law. One particular source of difficulty was the migration into
Canadian law of the English distinction between patent and latent
defects of title, coupled with the imposition of a duty on the vendor to
disclose latent defects of title. It was Professor Laskin's thesis, presum-
ably a controversial one, that no such duty is imposed on vendors under
the law of Ontario and accordingly, that the distinction between latent
and patent defects has "no concern with matters of title."⁸ Forty years

2 As of 1979 at least, Dickson J. maintained that the doctrine had lost little of its
"pristine force" in the context of sale of land. See Fraser-Reid v. Draountsekas

3 The scenarios set out in this paragraph are drawn loosely from Tony's
Broadloom & Floor Covering Ltd. v. N.M.C. Canada Inc. (1997), 141 D.L.R. (4th)
394 (Ont. C.A.); and 11 Sumcount Holdings Ltd. v. Chassis Service & Hydraulics

4 For a detailed and very helpful treatment, see P. Ferell, "Caveat Emptor and
Latent and Patent Defects" (1999), 24 R.P.R. 34. See also, D. Manderscheid,
"Caveat Emptor and the Sale of Land: The Erosion of a Doctrine" (2001), 39
Alta. L. Rev. 441.

5 See H. Herskovitz & R. Wong, "The Death of Caveat Emptor: Mandatory
Warranties and Disclosure in New Home Transactions", elsewhere in this
volume.

6 See E.N. McLellan, "Drafting Purchase Agreements to Qualify or Extend
Caveat Emptor", elsewhere in this volume.

7 B. Laskin, "Defects of Title and Quality: Caveat Emptor and the Vendor's duty
of Disclosure" in LSUC Special Lectures 1960: Contracts for the Sale of Land
(Toronto: De Boo, 1960) at 389.

8 Ibid. at 391.
on, we should attempt to determine if his thesis has proven true. With respect to defects of quality, the reasoning of Ontario courts has been increasingly, in Laskin’s phrase, “expounded in the meter of latent and patent defects.” Following in Professor Laskin’s footsteps, we may ask whether the distinction between latent and patent defects offers greater illumination in the context of defects in quality than, in his view, it does in the context of defects in title.

II. THE CLASSICAL DOCTRINE:
DEFECTS OF QUALITY

The classical application of the caveat emptor doctrine is in the context of defects relating to the quality or fitness of the property being sold as opposed to defects pertaining to matters of title. Professor Laskin provided the following pithy summary of the application of the doctrine in this context:

Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expected amenities, unless he protects himself by contract terms.\(^9\)

As we shall see, the bleak prospect offered to the purchaser by this statement of the doctrine has been ameliorated both by statute and at common law by subsequent developments. Nonetheless, the general principle of caveat emptor persists as the governing principle, against which such developments are to be measured.

The persisting influence of the caveat emptor doctrine in this context rests, to some extent, on general principles of the law of contract. Thus, as a more general matter, the common law refrains from imposing an obligation on negotiating parties to disclose material facts, one to another.\(^11\) Further, though courts have occasionally flirted with the notion that negotiating parties might be subject to a duty to bargain in good faith,\(^12\) the weight of authority is against this proposition\(^13\) and the recent decision of

\(^9\) Ibid. at 392.
\(^10\) Supra note 7 at 403.
\(^11\) The leading case remains Smith v. Hughes (1871), 1 L.R. 6 Q.B. 597.
the Supreme Court of Canada in *Martel Building Ltd. v. Canada*\(^{14}\) appears inhospitable to a development of this kind. In the real estate context, the doctrine of *caveat emptor* draws strength from the common law’s traditional unwillingness to imply conditions and warranties relating to quality and fitness into contracts for the purchase and sale of land. In this respect, of course, the law of real estate transactions stands in marked contrast to the law for the purchase and sale of goods. In the latter context, implied conditions of merchantability and fitness for a purpose communicated to the seller were first recognized at common law and then enshrined, as default rules, in sale of goods legislation.\(^{15}\) Although, as we shall see, the common law recognized implied obligations relating to the fitness of sales in houses to be constructed or in the course of construction, it has been unwilling to extend warranty protection of this kind beyond this narrowly defined context. In the context of the sale of unimproved land, completed new homes and used housing, then, *caveat emptor* is unimpeded by any doctrine of implied warranty. The rationale for the imposition of *caveat emptor* is particularly evident in the case of used housing. As an American judge observed: “Problems of varying degrees are to be found in most dwellings and buildings. . . Without the doctrine [of *caveat emptor*] nearly every sale would invite litigation.”\(^{16}\) Moreover, in the typical sale of used housing, both buyer and seller are amateurs. In the sale of new housing, however, the typical case couples a professional seller with an amateur buyer. A stronger case for implied warranty can obviously be made in this context, though, as indicated above, this approach has not been completely embraced by Canadian common law.

As Professor Laskin intimated, the well-advised purchaser will seek protection through contractual terms. In their absence, as he further noted, the purchaser may seek protection through application of the doctrines of fraud, mistake, or misrepresentation. In the years following his lecture, however, Canadian courts have developed further protections, of rather uncertain ambit, which have the effect of imposing duties of disclosure upon vendors. Each of these protective devices will be briefly considered below. After considering these matters, we shall

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\(^{14}\) (2000), 193 D.L.R. 1 (S.C.C.), where a tort claim for economic loss resulting from allegedly negligent bargaining was dismissed for reasons likely to undermine the arguments for recognition of a duty to bargain in good faith.  
attempt to determine whether there exists a particular vulnerability of purchasers with respect to patent defects of quality and a resulting burden of inspection imposed on purchasers at common law.

1) Application of the Doctrine

As the illustrations selected by Professor Laskin indicate, the doctrine often applies so as to impose on the purchaser the risk of unpleasant surprises concerning the quality of the land conveyed or the buildings located thereon. Thus, in Scott-Polson v. Hope,\textsuperscript{17} the purchaser had no remedy with respect to the fact that the insulation in the house he purchased was infested with moths. This was a latent defect of quality for which no relief was available. In Heighington v. Ontario,\textsuperscript{18} the purchaser of land contaminated by nuclear waste was without a remedy. The same result obtained in Boulderwood Development Co. v. Edwards,\textsuperscript{19} in which the soil conditions of a vacant lot were such that they would not support the construction of a house. In the foregoing cases, the vendor was unaware of the defects in question. This fact is, however, irrelevant. Caveat emptor applies whether or not the vendor, being aware of the problem, could have disclosed the difficulty. Thus, in McCallum v. Dean,\textsuperscript{20} the purchaser had no remedy when he learned that the home he purchased was not connected to the city sewer system, as he had assumed, but was serviced by a septic system.

The doctrine also applies beyond the context of what might be referred to as physical defects in the property to any material information possessed by the vendor that may have an impact on the value of the land. Thus, in Marathon Realty Co. v. Ginsberg,\textsuperscript{21} failure of the vendor to disclose that he was aware that the subject matter of the sale was about to be downzoned from residential to agricultural use did not constitute a breach of any duty owed to the purchaser. Similarly, in Godin v. Jenovac,\textsuperscript{22} the vendor was under no obligation to disclose the fact that a vacant and neighbouring lot had at one time been used as a garbage dump, the court noting that there was no evidence to suggest that the property posed a threat to health or safety. In short, then, and subject to

\textsuperscript{17} (1958), 14 D.L.R. (2d) 333 (B.C.S.C.).
\textsuperscript{22} (1993), 35 R.P.R. (2d) 288 (Ont. Ct. (Gen. Div.)).
the exceptions or limitations on *caveat emptor* set out below, a vendor is under no duty to disparage its property and may remain silent with respect to defects in the quality of the property being sold, even those defects of which it is aware.

2) Limitations on the Doctrine: Real and Apparent

a) Fraud, Mistake, or Misrepresentation
Where the vendor misrepresents the quality of the property being sold, the purchaser may have the ability to claim for damages in a tort claim or seek rescission on equitable grounds. As a matter of general principle, of course, the representation must be one of fact and must constitute more than mere “sales talk” or “puffery.” This point is illustrated in *Fraser-Reid v. Droumtekas*. In this case, a builder/vendor represented to the purchaser that he built good houses and that the house for sale was a good house. This statement was characterized by the Supreme Court of Canada as “mere trade puffery.” Assuming that the vendor’s communication meets the threshold of misrepresentation, however, the remedies for misrepresentation have the potential to provide an effective counterweight to *caveat emptor*. This is so for a number of reasons. First, some courts, at least, have been inclined to a somewhat purchaser-friendly view of the elements of fraud in this context. Second, in a variety of contexts, nondisclosure of a defect has been considered to constitute a misrepresentation. Further, in the event that the representation has been considered to be fraudulent, a generous view may be taken of the time within which a rescission of the transaction may be effected.

Each of these points is illustrated in *Rowley v. Isle*, a British Columbia case involving the sale of a house infested by cockroaches. A previous purchaser, having discovered the filthy condition of the house as a result of the infestation, insisted on a return of the purchase price and cancellation of the transaction. The vendor capitulated to this demand and instructed his agent to disclose the problem to prospective purchasers. The agent’s failure to disclose the condition of the premises to the plaintiff purchaser was held by the trial judge to constitute fraud. Accordingly, the purchaser was allowed to set aside the transaction even though it had closed and the purchaser had taken possession of the property.

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The ability to grant the remedy of rescission in a more muscular fashion in the context of fraud is well established as a matter of general principle. Thus, in Spence v. Crawford,26 Lord Wright said the following:

The Court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff...7

In the absence of contractual stipulations to the contrary, the right to rescind for innocent misrepresentation will expire upon closing. In such circumstances, the purchaser may attempt to invoke the doctrine of error in substantialibus. This doctrine, which appears to be a Canadian invention,28 essentially involves the application to real estate transactions of the general doctrine of contract law that a transaction entered into on the basis of a common and fundamental mistaken assumption may be set aside.29 The particular application of the doctrine to a real estate transaction is of interest because, as the Supreme Court of Canada indicated in Redican v. Nesbitt,30 it is possible to rescind the transaction on the basis of error in substantialibus after the transaction has closed. The mistaken assumption must fundamentally affect the subject matter of the sale. Thus, in Hysky v. Smith,31 the doctrine was applied where there was a gross disparity between the quantity of the land sold and the quantity of the land as the parties had innocently assumed it to be. As the vendor knew, the plaintiff purchased the property for investment purposes. The actual quantity of the land was approximately half of that assumed at the time of sale. Thus, the purchaser was allowed to rescind after closing on the basis of "a common fundamental mistake as to the very quality of the subject-matter which can be equated to an error in substantialibus."32 Although it is entirely conceivable that the parties could be led into a

26 [1939] 3 All E.R. 271.
27 Ibid. at 288. And see Kupchak v. Dayson Holdings Ltd. (1965), 53 D.L.R. (2d) 482 (B.C.C.A.).
32 Ibid. at 391. See also Di Cenzo Construction Co. Ltd. v. Glassco (1979), 90 D.L.R. (3d) 127 at 142-43 (Ont. C.A.).
mistaken assumption by a third party, it is very likely in the vendor/purchaser context that the purchaser’s error will result from something said by the vendor. This was the case in *Hyrsky v. Smith.* Thus, the doctrine of rescission for error *in substantialibus* may provide an escape route for a purchaser who is the victim of an innocent misrepresentation.

To the extent that the purchaser has a claim for damages in tort for fraudulent or negligent misstatement, of course, such claims will survive closing. Thus, in *Doan v. Wilkins,* the property sold substantially encroached on city land. The vendor had, apparently artfully, disclosed a bit of information concerning the encroachments but did not disclose their full extent. The vendor’s deceitful half-truth constituted fraudulent misrepresentation and provided the basis for the purchaser’s post-closing action for damages in tort.

The general law of misrepresentation applies, to some extent, to circumstances of nondisclosure. These principles also apply to real estate transactions and, indeed, many of the leading cases have arisen in this context. Thus, as *Doan v. Wilkins* illustrates, it is well established that a little bit of information may be misleading. The undisclosed other half turns the half-truth into a misrepresentation. One of the leading English cases concerned a title defect. In *Nottingham Brick and Tile Company v. Butler,* the purchaser was a manufacturer of bricks who purchased property with a view to using it as a brickyard. The vendor himself had indicated to the purchaser that he thought there were restrictive covenants that might prevent the property’s use for that purpose. The vendor’s solicitor, when asked about this, however, indicated that he was not aware of any such covenants. This was true, as far as it went. Unfortunately, however, the solicitor did not go on to explain that he had not, in fact, made appropriate inquiries to determine whether or not this was so. This half-truth on the vendor’s behalf provided a basis for rescission.

The vendor’s silence may also amount to misrepresentation in cases of so-called “active concealment.” *Gronau v. Schlamp Investments Ltd.*

34 (1886), 16 Q.B.D. 778 (C.A.).
a well-known illustration of the doctrine. Shortly before the sale of a small apartment block, the vendor discovered a serious crack in a wall of the building. He sought advice from a structural engineer who recommended substantial and expensive repairs. Instead, the vendor covered over the crack in the wall with matching bricks. Once in possession of the building, the purchaser discovered the problem. The vendor’s act of concealment of the defect amounted to a misrepresentation and the purchaser was held entitled to rescind. The Ontario Court of Appeal held that an act of concealment may take the form of denial of access to the premises. In Abel v. McDonald, 36 the purchaser sought to visit the home to be purchased with an interior designer. The vendor denied access to the building for the apparent reason that granting access would have revealed that a collapse had occurred in a portion of the premises.

As noted above, the common law has not been willing to transport from the sale of goods into the law of real estate transactions an implied warranty that the property sold will be fit for any purpose communicated to the vendor by the purchaser. Nonetheless, there are some indications in the decided cases of a judicial willingness to deploy the doctrine of misrepresentation by silence in such fashion as to achieve a similar result. Thus, where the vendor is aware of the purchaser’s intended use of the property, courts may be more willing to find that the vendor’s failure to disclose material information concerning the fitness of the property for that purpose constitutes an actionable misrepresentation. Hartnett v. Wailea Construction Ltd., 37 for example, concerned the sale of a building lot. The vendor failed to disclose a soils report, which indicated that substantial amounts of uncompacted soil beneath the surface of the land would require unusual and expensive construction techniques. The court held that this nondisclosure amounted to misrepresentation, noting that the vendor “knew what the zoning was, he knew that the lot was to be used for the construction of a residence, and he knew that it was unsuitable for that purpose unless special foundation techniques were used or unless the subsoil was excavated and replaced.” 38 A more difficult question is whether a vendor who is aware of the purchaser’s intended use of the property is obliged to disclose the prospect of imminent changes in the permitted uses of the land that are inconsistent with the purchaser’s intended use. Relief was denied the purchaser in a case

of an anticipated change in zoning.\textsuperscript{39} Recovery was allowed, however, in circumstances where the vendor was aware of the likely designation of the property under heritage preservation legislation.\textsuperscript{40}

b) Duties of Disclosure: Dangerousness and Unfitness for Habitation

As we have seen, the doctrines relating to misrepresentation and, more particularly, those doctrines that facilitate classification of silence or nondisclosure as misrepresentation have the effect of imposing duties of disclosure on vendors in certain circumstances. In addition to these doctrines of misrepresentation by silence, straightforward duties of disclosure have been imposed by the courts in a narrow range of circumstances. More particularly, in McGrath v. MacLean,\textsuperscript{41} the Ontario Court of Appeal recognized the existence of duties of disclosure with respect to two classes of information. They were described by Dubin J.A. in the following manner:

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 . . . in such a case it is incumbent upon the purchaser to establish 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.\textsuperscript{42}

The facts of this case involved a massive landslide from neighbouring property, which allegedly rendered the property unfit for human habitation. The purchaser alleged that the vendor was aware of this potential danger and failed to disclose it. The Court of Appeal affirmed


\textsuperscript{40} Goldstein v. Davidson (1994), 39 R.P.R. (2d) 61 (Ont. Ct. (Gen. Div.)).

\textsuperscript{41} (1979), 95 D.L.R. (3d) 144 (Ont. C.A.).

\textsuperscript{42} \textit{Ibid.} at 151–52.
the holding of the trial judge that there was a complete absence of evidence upon which to make such findings. The court therefore held that the duties of disclosure, which it assumed to exist, had not been breached. Though technically *obiter dicta*, then, the duties recognized in McGrath v. MacLean do not appear to represent a substantial departure from prior law and, moreover, appear to have been accepted as authoritative by other courts.43

It is of particular interest to note that the vendors are to be subject to such duties only when either the vendor is aware of the particular defect or where the circumstances were such that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representations made by him or her. The second branch of this test may simply amount to a restatement of the law of active concealment, noted above, and tortious liability for fraudulent or negligent misstatement. Indeed, the suggestion that there must be a “reckless disregard” of the truth or falsity of any representation may place an unduly high barrier to recovery. If the vendor caused injury to the purchaser by making a merely careless statement concerning the lack of dangerousness of the property, it is not obvious why liability in tort could not follow.

c) Express or Implied Warranties
The doctrine of *caveat emptor* may be defeated, of course, by express, implied or statutory warranties that impose the risk of latent and/or patent defects on the vendor. Express and statutory warranties are the subject of other papers44 in this volume and accordingly, attention will be focused here on the implied warranties that the common law has imported into the contract for the purchase and sale of land. As indicated above, the sole warranties that the common law has implied in this context are the warranties relating to proper construction of buildings in the course of construction or to be constructed in the future.45 In such


44 See the papers by McEllan and by Herskowitz reproduced elsewhere in this volume.

agreements, it is implied that the building will be constructed in a workmanlike manner and that the home will be fit for habitation.

In his lecture, Professor Laskin expressed some optimism that this implied obligation might be extended to the sale of completed new housing, thus restricting caveat emptor in its complete rigour for the sale of second-hand or used housing.\textsuperscript{46} Noting a law review article,\textsuperscript{47} which suggested that the mass production of goods that defeated caveat emptor in the law of sales had not occurred in the context of the sale of land, Professor Laskin noted that this picture has rather changed and that “mass-produced housing is now the rule rather than the exception.”\textsuperscript{48} On this basis, he suggested, the law relating to the sale of land could be more closely aligned with the law relating to the sale of goods.

Interestingly, history records that when this matter surfaced for consideration before the Laskin Court in Fraser-Reid v. Droutmtsekas,\textsuperscript{49} the Chief Justice did not sit on the panel hearing the case. Nor, in the event, did his professorial views prevail. In this case, the purchasers had bought a newly completed house. After taking possession, the purchasers discovered that serious flooding in the basement was caused by the builder/vendor’s failure to construct proper foundation drainage. Indeed, his failure to do so constituted a breach of the applicable building by-law. In their claim for damages, the purchasers relied, \textit{inter alia}, on the implied warranties relating to proper construction and fitness for habitation, arguing that the application of these warranties should be extended to the sale of completed houses, at least in cases where the seller is also the builder of the house. Although the \textit{Ontario New Home Warranties Plan Act, 1976}\textsuperscript{50} had been enacted by the time this litigation reached the Supreme Court, the actual transaction in issue occurred in 1969 and thus preceded the enactment of the legislation by several years. Dickson J., noting that the warranty had been extended in American law thus far,\textsuperscript{51} suggested that the design of a proper warranty to deal with

\textsuperscript{46} Supra note 7 at 406–09.
\textsuperscript{47} Comment, “Caveat Vendor — A Trend in the Law of Real Property” (1955) 5 De Paul L. Rev. 263.
\textsuperscript{48} Supra note 7 at 409.
\textsuperscript{49} (1979), 103 D.L.R. (3d) 385 (S.C.C.).
\textsuperscript{50} R.S.O. 1990, c. O.31.
\textsuperscript{51} Dickson J. referred to E.F. Roberts, “The Case of the Unworthy Home Buyer: the Housing Merchant Did It” (1967) 52 Cornell L. Rev. 835, as offering support for the proposition that American experience suggests that the problem is better left to the legislatures. See supra note 49 at 390.
completed houses was a matter of some complexity and therefore would be better left to legislative intervention. On the particular facts of this case, however, the vendor had given an explicit undertaking that was interpreted as a warranty that the house was built in accordance with all applicable by-laws. The defendant was held to be in breach of that warranty and the purchasers succeeded on this basis in their claim for damages.

At common law, then, the implied warranties of proper construction and fitness for habitation are left with "the irrationality and odd results derived from the rigid 'complete/incomplete' distinction." As Dickson J. noted, a prospective home buyer who views a model home in a subdivision development and then purchases a home to be built on that plan will be protected by the implied warranties. The unfortunate buyer who purchases the model home will not be protected even though both homes, presumably, might suffer from the same structural defect. Similarly, the buyer of a home that is 99.9 percent complete is protected. If the buyer waited to buy a day or two while the home is completed, the protection vanishes.

Finally, we should note that representations made by a vendor during negotiation may have an after-life as warranties collateral to the contract of sale. Thus, in Yorke v. Duval, a vendor of a small apartment block orally assured the purchaser during negotiation of the sale that the basement apartment complied with municipal regulations and thus could produce rental revenue. The British Columbia Court of Appeal held that the vendor’s statement constituted a warranty collateral to the agreement of sale. The difficulty confronted by a purchaser in such circumstances, however, is the statement in Heilbut, Symons & Co. v. Buckleton that such agreements rest on establishing contractual intent concerning the warranty and, indeed, that such agreements, since their sole effect is to vary or add to the terms of the principal contract "are viewed with suspicion by the law . . . [and] must be proved strictly."

52 Supra note 49 at 390.
54 The consideration for the vendor’s warranty is traditionally considered to be the purchaser’s entry into the purchase agreement.
56 Ibid. at 47 per Lord Moulton.
d) Patent Defects of Quality

Unlike the foregoing limitations on the scope of caveat emptor, the sometimes alleged limitation for latent defects of quality known to the vendor is more apparent than real. In truth, there appears to be no such limitation. The distinction between patent and latent defects is capable of generating confusion in the present context. Thus, in decisions denying relief to the purchaser, it is occasionally stated, as if it were an important factor, that the defect in quality in question was patent. In *Alderman Holdings Inc. v. McCutcheon Business Forms Ltd.*,\(^{57}\) for example, the purchaser, after taking possession, found that the property had a defective roof. The purchaser had inspected the property at the time of sale but had not fully appreciated the nature of the problem. The seller’s argument that the defect was patent and that the seller ought to have conducted a more effective inspection enjoyed success and the purchaser’s claim for damages for failing to disclose an allegedly latent defect was dismissed. Similarly, in *Ontario Inc. v. Ward*,\(^{58}\) a purchaser’s claim for damages resulting from the need to replace damaged floor tiles was dismissed on the basis that the defect was patent. The floors crunched when they were walked on and the purchaser should, therefore, have been able to detect the problem. In *Tony’s Broadloom & Floor Covering Ltd. v. N.M.C. Canada Inc.*,\(^{59}\) the purchaser acquired industrial land in which the soil and ground water was contaminated with varsol. The purchaser had not disclosed to the vendor his intention to have the land rezoned with a view to constructing a high rise condominium building. The presence of a hazardous waste material on the property would complicate that exercise. The Ontario Court of Appeal held that on the vendor’s assumption that the land was being sold for industrial use, the contamination constituted neither a latent nor a patent defect.

The court went on to suggest, however, that even if the contamination did constitute a defect, it was nonetheless patent in nature and accordingly, at the risk of the purchaser. Decisions such as these create the misleading impression that the purchaser is at risk only with respect to patent defects and that, as a result, the purchaser is subject in some sense to a duty to engage in careful inspection. And yet, as we have seen, the purchaser is at risk with respect to both latent and patent

\(^{57}\)(1997), 15 R.P.R. (3d) 102 (Ont. Ct. (Gen. Div.)).

\(^{58}\)(1990), 9 R.P.R. (2d) 278 (Ont. Dist. Ct.).

defects. Accordingly, the references to the patent nature of the defects in these cases are unnecessary and irrelevant.

As a matter of general principle, then, the vendor is not under a duty to disclose either latent or patent defects of quality. It is no doubt for this reason that in his discussion of defects in quality Professor Laskin makes no reference to the distinction between latent and patent defects. To be sure, however, there are obiter dicta in a number of trial decisions suggesting that the vendor is subject to a duty to disclose latent defects of which it is aware.60 These statements may be the harbingers of a brave new world of vendor disclosure duties. For the moment, however, they do not appear to represent good law. 61 As we have seen, however, the vendor is subject to a duty to avoid misrepresentation and is obliged to disclose defects in quality that indicate either dangerousness or that the property is unfit for habitation. It may be asked, then, whether the fact that a particular defect is patent may have some impact upon or qualification of the vendor’s obligations in these respects. It is at least conceivable that this is the case. Thus, where the purchaser relies on misrepresentation, it may be asked whether the fact that the defect in quality was patent would have any impact on the purchaser’s ability to claim reliance on the misrepresentation. My own view is that if the purchaser has, in fact, relied on the vendor’s misrepresentation, relief for misrepresentation should be available to the purchaser. Certainly, in cases of fraudulent concealment, it has been established that the purchaser can sue for damages caused by reliance on the misrepresentation even though the purchaser had not engaged in a proper inspection of the premises.62 On the other hand, there may be other misrepresentation cases where reliance with respect to particular defects cannot be shown because of their patent nature. Thus, in McCluskie v. Reynolds,63 the purchaser succeeded in a claim for damages for misrepresentation as a result of the vendor’s failure to disclose information concerning the

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61 They are inconsistent with the general approach to disclosure taken by contract law and with the cases visiting the risk of latent defects on purchasers set out above. They are also inconsistent with the decision of the Ontario Court of Appeal in McGrath v. MacLean, supra note 41, which sets out a much narrower duty to disclose latent defects.


63 (1998), 19 R.P.R. (3d) 102 (Ont. C.t. (Gen. Div.)).
instability of a slope of land behind the purchased house. The slope had collapsed in a heavy rain storm and damaged the house. The vendor was not liable, however, for damage to the driveway, which had resulted from the same defect. The damage to the driveway had occurred before the time of the sale and thus constituted a patent defect that must have been apparent to the purchaser at the time of inspection.

Similarly, it may be considered whether the fact that a defect in quality was patent would provide a defence for a claim by the purchaser that a defect in quality relating to dangerousness or fitness for habitation should have been disclosed. Again, to the extent that the purchaser is actually aware of the defect, the purchaser’s claim might be dismissed on the basis that no reliance was placed on the absence of disclosure. When the purchaser fails to inspect, however, or where the inspection was inadequate, it would appear to be harsh to hold that the vendor is released from the obligation to disclose defects relating to dangerousness or fitness for habitation because the defect, though undiscovered by the purchaser, was patent. The argument to the contrary, presumably, would be that the vendor, having made the property available to the purchaser for inspection, should not have the additional burden of specifically communicating with the purchaser with respect to defects that would have been obvious to the purchaser upon inspection.

What then can be said of the sometimes alleged existence of a duty on the part of the purchaser to inspect the property with care? Certainly, as a matter of prudence, a purchaser who is at risk with respect to defects in quality of the land, be they latent or patent, will have a practical incentive to engage in a proper inspection of the property. Further, of course, the purchaser could assume a contractual obligation to engage in such an inspection. If I am correct in suggesting, however, that as a general matter the distinction between latent and patent defects is irrelevant to the determination of whether, at common law, the purchaser is at risk with respect to a defect in quality, it must follow that there is no common law legal duty upon the purchaser to engage in an inspection. In short, if the purchaser is at risk with respect to both latent and patent defects in quality, his situation is not made worse, as a matter of law, by a failure to inspect properly. In cases such as *Tony’s Broadloom & Floor Covering Ltd.* 64 however, the courts appear to assume that the failure to conduct an adequate inspection does have legal significance. Indeed, in this case, the Court of Appeal appears to impose on the purchaser the burden to engage in a reasonably diligent search that

64 Supra note 59.
should have included reasonable inquiries of local and provincial authorities with respect to environmental issues. Such inquiries would have revealed the presence of contamination in the subject property. Again, however, it may be asked what the legal significance of the defect not being discoverable in such a search would be. In the absence of a misrepresentation or non-disclosure of information relating to dangerousness or unfitness for habitation, it appears that the purchaser would be at risk with respect to the defect in any event. Accordingly, it would be misleading to suggest that there exists a common law legal duty thrust upon the purchaser to conduct such a search. Conducting such a search appears to provide the purchaser no protection against the risk of latent defects of quality.

It may be, as suggested above, that the patent nature of a defect in quality may have some impact on the operation of the doctrine of misrepresentation, perhaps excluding active concealment, and the duty to disclose defects relating to dangerousness and unfitness for habitation. If so, the failure to conduct a reasonably diligent inspection could have some impact in this regard. I have proposed above, however, that a claim for misrepresentation should fail only if the purchaser has actual knowledge of the defect and that the same approach should be followed in cases of non-disclosure of defects relating to dangerousness and fitness for habitation. If these views were accepted, the failure to engage in a reasonably diligent search would be irrelevant in this context as well.

In summary, then, it appears that as a general matter, the distinction between latent and patent defects is irrelevant to the determination, at common law, of the purchaser’s liability with respect to defects in quality. From this conclusion it must follow that the purchaser’s failure to engage in a reasonably diligent inspection of the property, though obviously prudent for practical reasons, is of no legal consequence at common law. The fact that the defect would not have been revealed by reasonably diligent inspection will be of no assistance to the purchaser. Accordingly, failure to conduct such inspection does not increase the purchaser’s common law risk with respect to defects in quality.

3) The Doctrine of Merger

A survey of the doctrine of caveat emptor in the context of defects of quality is likely to establish purchaser enthusiasm for extracting warranties from the vendor or seizing upon misrepresentations made by the vendor as a basis for rescission. As we have seen, however, the ability of the victim of an innocent misrepresentation to rescind will expire upon the
closing of the transaction. A similar difficulty confronts the purchaser with respect to the vendor’s warranties in the form of the doctrine of merger. In its traditional form, this doctrine held that warranties normally merge in the deed in the sense that only such warranties as are contained in the deed will survive the closing of the transaction. The classic position was stated and justified by Duff J. in Redican v. Nesbitt in the following terms:

Representation which is not fraudulent, and does not give rise to error in substantialibus, could only operate after completion as creating a contractual condition or a warranty. Finality and certainty in business affairs seem to require that as a rule, when there is a formal conveyance, such a condition or warranty should be therein expressed, and that the acceptance of the conveyance by the vendee as finally vesting the property in him is the act which for this purpose marks the transition from contract in fieri to contract executed; and this appears to fit in with the general reasoning of the authorities.

This language is strongly suggestive of the existence of a presumption in favour of merger, regardless of the actual intention of the parties. To the extent that this is so, Duff J.’s statement of the merger doctrine no longer represents the law of Canada. In Fraser-Reid v. Droumtsekas the Supreme Court of Canada had an opportunity to reconsider the merger doctrine. The Court rejected any presumption of merger and rooted the doctrine in the intention of the parties. Dickson J. made the point plainly:

There is no presumption of merger. The proper inquiry should be to determine whether the facts disclose a common intention to merge the warranty in the deed; absent proof of such intention, there is no merger.

As it may often be the case that the purchaser will have assumed that a warranty or warranties survive closing, Fraser-Reid establishes an important and perhaps far-reaching revision of the merger doctrine. This is especially so if the new intention test applies to collateral warranties arising from oral statements made by the vendor during the negotiation of the agreement of purchase and sale.

66 Ibid. at 146–47.
68 Ibid. at 146–47.
69 Thus the collateral warranty enforced in Yorke v. Duval, supra note 53, survived closing.
III. DEFECTS OF TITLE

Defects in title are those deficiencies that impair the quality of the vendor’s ownership in the land as opposed to defects in the quality of the property to be conveyed. In the typical case, the vendor is under an obligation to convey a marketable title in fee simple. A defect in title will disable the vendor from doing so. It may be asked, then, whether the doctrine of caveat emptor will save the vendor in any such circumstance, thus imposing the risk of the particular defect upon the purchaser. Once again, we confront some obscurities produced by the distinction between latent and patent defects. Indeed, in the context of defects of title, we discover what may be the source of the confusion that has bedevilled discussions of latent and patent defects in the context of defects in quality. It is in the context of defects of quality that the traditional rule emerged that, at least in the context of what are referred to as open contracts for the sale of land, the vendor assumes responsibility for latent defects in title. Accordingly, if the vendor fails to disclose a latent defect in title, the purchaser will be entitled to rescission or other appropriate relief. Under the traditional rule, however, if the defect in title is patent, the purchaser must accept the vendor’s title subject to the impairment resulting from the defect.

The traditional rule is illustrated in Yandle & Sons v. Sutton. In this case, the purchaser was unaware that the purchased lands were subject to a public right of way. The purchaser had noted the presence of a footpath across the property but it was unclear from its appearance whether it was a footpath utilized by the owner or as a matter of right by some third person or persons or by the public at large. The vendor argued that the existence of a footpath put the purchaser upon inquiry and that he ought reasonably to have realized that he was not purchasing unencumbered land. Sargent J. accepted that the question of whether or not the purchaser was obliged to accept the encumbered title turned on whether the defect was patent, relying on the following passage from the decision of Chitty J. in Ashburner v. Sewell:

The general rule of law in regard to rights of way may be stated as follows: where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of

70 [1922] 2 Ch. 199 (Ch.D.).
71 [1891] 3 Ch. 40.
way cannot give rise to any objection to the title, as, for example, if the
estate sold as a large one with a public highway running through it, then
it is obvious that it is not intended to sell the property free from such
right of way; but the purchaser would take subject to the right of way.
The right is in such a case patent as opposed to the term “latent”...72

Turning to the evidence at hand, Sargent J. was unmoved by the
vendor’s argument that the mere existence of a footpath of some kind
should put the purchaser on his inquiry. Rather, he was of the view that
the purchaser should take the property only subject to such defects as
are apparent to the naked eye. Sargent J. explained as follows:

In all these cases between vendor and purchaser, the vendor knows
what the property is, and what the rights with regard to it are. The pur-
chaser is generally in the dark. I think, therefore, that, in considering
what is a latent defect and what a patent defect, one ought to take the
general view, that a patent defect, which can be thrust upon the pur-
chaser, must be a defect which arises either to the eye, or by necessary
implication from something which is visible to the eye. It would not be
fair to hold that a purchaser is to be subjected to all the rights which he
might have found out, if he had pursued an inquiry based upon that
which was presented to his eye. I think he is only liable to take the
property subject to those defects which are patent to the eye, including
those defects which are a necessary consequence of something which
is patent to the eye.73

Given that the appearance of the particular footpath at issue in this case
did not constitute even a necessary indication of the existence of a private
right of way, the vendor’s attempt to establish a patent defect concerning
the public right of way failed. The purchaser was entitled to rescind.

The thesis advanced by Professor Laskin in his 1960 lecture was that
the English rule imposing the risk of undisclosed latent defects on the
vendor was very much a product of its time and place and had little re-
levance to the law and practice of conveyancing in contemporary
Ontario. In Laskin’s view, the English duty of disclosure flows from the
initial obligation imposed by English law upon the vendor to provide
an abstract of title. In that context and especially in the absence of a reli-
able registry system, it is not surprising that a rule developed imposing
a duty upon the vendor to disclose latent defects of title. How else could

72 Ibid. at 408–09.
73 Supra note 70 at 210.
the purchaser be made aware of them? The adoption of a principle imposing such a duty in Ontario was, in Laskin’s view, “incompatible with our practice calling for search of title by the purchaser and incompatible with the role played in land transactions by our registry and land titles systems.” Further, a distinction was to be drawn between the doctrines applicable to English “open agreements” and the typical agreement of purchase and sale of land in our jurisdiction, which imposes an obligation on the vendor to transfer an unencumbered fee simple. The open agreement is essentially one in which, though the parties have identified the property to be sold and the price, the other essential terms of the sale agreement are implied. In the context of an open agreement, it may be more reasonable to imply that a purchaser takes the title subject to any patent flaws in the vendor’s title. On the other hand, under the typical agreement in our jurisdiction, where the vendor has undertaken to provide an unencumbered fee simple, the existence of a defect in title would constitute a breach, rather than a modification of the vendor’s obligation. If the vendor’s obligation is unqualified, the purchaser is entitled to object to both latent and patent defects. As Laskin reasoned, “what the purchaser knows and what he has seen or could see must surely be immaterial in such a case.” In determining whether it is the vendor or the purchaser who bears the risk of a particular defect, then, the question is not whether the defect is patent or latent but whether, on a proper construction of the agreement, the vendor’s obligation was qualified with respect to the defect in issue. As Laskin stated:

It seems to me a fairly obvious proposition that if a purchaser who has ostensibly bargained for a marketable title in fee simple is obliged to accept a lesser title because of his knowledge of a flaw or because it is obvious that a flaw exists, it should be only because, as a matter of construction, the Court has found that the bargain was for a title with a flaw. (I exclude cases where the purchaser himself may wish to obtain the land, subject possibly to an abatement of price, and where the vendor is unable to take advantage of his annulment power.) Otherwise he is being forced into a lawsuit or is being required to take something less than what he bargained for. Even if this be so, I am unable to appreciate why such a result should turn on whether the defect of title is latent or patent.”

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74 Supra note 7 at 402.
75 Ibid. at 394.
76 Ibid. at 391.
In other words, the existence of a patent defect in title is not necessarily inconsistent with a binding contractual obligation to transfer an unencumbered fee simple.

Persuasive as Professor Laskin's analysis appears to be, it may well have been controversial at the time of his lecture. In a then recent decision in a case concerning encroachments, the Ontario Court of Appeal had, in obiter dicta, embraced the English rule. In Re Mountroy Ltd. and Christiansen, the subject matter of the sale was a factory that encroached on neighbouring railway lands. The vendor argued that the defect was patent and that the purchaser was therefore obliged to take title subject to the encroachment. The Court of Appeal rejected this argument on the facts as not "something that should have been apparent to the purchasers on their inspection of the property." Relying on Yandle & Sons v. Sutton, the court observed that "[t]he defect was latent rather than patent." More recently, however, Ontario courts appear to have accepted that the critical question in cases of this kind is the proper construction of the nature of the vendor's obligation. In Re Stieglitz and Prestolite Battery Division-Eltra of Canada Ltd., an easement and encroachment case, Lerner J. rejected the vendor's submission that the title defects were patent on factual grounds but went on to observe that the test as to whether a particular easement or encroachment should provide a basis for rescission should not rest on the distinction between latent and patent defects but, rather, on whether the purchaser would be "faced with acceptance of property which would be materially different than that for which he bargained." The purchaser had bargained for an unencumbered title in fee simple. The easements and encroachments were material and the purchaser's objection to title was valid. Similarly, in Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd., Lax J. construed the agreement of purchase and sale as one imposing an obli-

78 Ibid. at 318.  
79 Ibid.  
81 Ibid. at 681. For examples of cases where courts required the transaction to be completed because of the trivial nature of the encroachment, see Martin v. Kellogg, [1932] 2 D.L.R. 496; and Re Marchment Co. Ltd. v. Midanik, [1947] O.W.N. 363.  
gation to convey an unencumbered fee simple. The purchaser did not bargain for a title with a flaw. Accordingly, the vendor was unable to argue that the vendor's obligation was qualified by the easements associated with a highly visible cellular transmission tower on the property.

In summary, Professor Laskin's view that the English rule imposing an obligation on the vendor to disclose latent defects in title is inapplicable in Ontario appears to have gained acceptance. Indeed, as Perell has noted, under our registry system and conveyancing law, it would be somewhat perverse to impose an obligation on the vendor to disclose latent defects. Disclosure of a defect not apparent on the registry would be prejudicial to the purchaser who might otherwise have been able to rely on a bona fide purchaser defence. Professor Laskin did, however, indicate one qualification to his "no duty to disclose" thesis. A vendor who is guilty of "unreasonable or reckless failure of accuracy in describing or representing the land" may be precluded from relying on the annulment or rescission clause of the agreement of purchase and sale. This proposition may be thought to impose a burden of accurate disclosure of a kind on the purchaser. Perell adds another qualification. Title defects such as executions, construction liens, and certificates of pending litigation registered on title after the deadline for making title requisitions has passed and prior to the closing of the transaction, would not be covered by the standard requisition provision in the agreement. That is to say, the purchaser would not be precluded by the passing of the deadline from objecting to such defects. As Perell notes, "the vendor cannot rely on the requisition deadline to diminish its responsibility when the purchaser could not have discovered the title defect during the requisition period. The vendor remains responsible for these latent title defects."

83 Supra note 4 at 46.
84 Supra note 7 at 401.
85 Supra note 4 at 47.
86 Ibid.