

D##### BULLETIN

Official Publication of the McInnes Cooper Insurance Defence Group

PROFESSIONAL NEGLIGENCE FOR REALTORS – A RISING TIDE?

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Earlier this year, the Ontario Court of Appeal reversed the Superior Court of Justice's decision in *Krawchuk v. Scherbak*. The Court's reasoning appears to send a signal that real estate professionals will be held to a higher standard of care than has, to date, been enforced against them.

The case of *Krawchuk v. Scherbak* involved the sale of a house that, unbeknownst to the buyer, had significant structural and plumbing defects. The house had been listed for sale with the same real estate agent and brokerage firm that then went on to represent the buyer in the sale.

When the agent and the buyer viewed the house prior to making an offer, the buyer noticed a number of visible defects, including sloped floors, a foam-filled crack in the north wall of the crawl space and sloping brick and block work at the exterior on the north side of the house.

The buyer and agent discussed these defects. The agent told the buyer that the sellers had advised her that the house had settled, been repaired, and that there had been no further problems in the 17 years they lived there. This information was previously set out in the Seller's Property Information Sheet ("SPIS", the Ontario equivalent to a Property Condition Disclosure Statement in Nova Scotia and Prince Edward Island, and a Property Condition Statement in New Brunswick).

At the time of offer, the agent told the buyer that she was entitled to a professional home inspection. There were, however, a number of other offers on the property. The buyer wanted to make her offer more attractive to the sellers. The court accepted that the buyer understood the value and purpose of a professional home inspection. Nonetheless, after some discussion with the agent, the buyer agreed to waive the condition requiring a home inspection. In the end, her offer was accepted at \$110,100, being \$10,100 above asking price.

Shortly after possession, the buyer noticed accumulations of sand near the brick work in the crawl space. Subsequent investigation revealed significant ongoing settling that threatened the integrity of the entire house.

The buyer estimated that she spent \$191,414.94 to make repairs. She sued the sellers and her real estate agent for her costs.

At trial, the sellers were found liable to the buyer in negligence for making false and misleading statements in the SPIS. The claim against the real estate agent was dismissed. The trial court noted that she had made inquiries about the visible defects with the sellers, and passed that information along to the buyer. The court found that the agent had no reason to doubt the information the sellers provided.

COURT OF APPEAL - AGENT'S LIABILITY TO THE BUYER

On appeal, Justice Epstein, speaking for the unanimous court, reversed the trial decision and found the real estate agent liable to the buyer in negligence.

The agent admitted at discovery that she had no expertise as a home inspector. Justice Epstein found, given the agent's admitted lack of expertise in the area, the agent ought to have considered whether the sellers might be mistaken about their impressions of the defects despite their apparent honesty and credibility.

Justice Epstein stated that the repairs the sellers had conducted were "perfunctory". She found that the agent ought to have been put on inquiry by the fact that the sellers had no knowledge of the extent of any repairs prior to their taking ownership, and the agent's knowledge that the existence of a sloped floor might indicate ongoing structural issues. At that point, the agent should have either independently verified the state of the foundation, or recommended "in the strongest terms" that the buyer obtain a professional home inspection.

Justice Epstein noted that in general, courts hearing professional negligence cases ought not to find the breach of a standard of care in the absence of expert evidence. Notwithstanding, the court is free to find a breach where:

- a. it is faced with "nontechnical matters or those which an ordinary person may be expected to have knowledge"; or
- b. where the impugned actions of the defendant are "so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard".

Justice Epstein found that although the trial court did not receive any expert evidence, the agent's conduct was an egregious breach that engaged the second exception.

AGENT'S LIABILITY TO THE SELLER

Equally significant were Justice Epstein's findings concerning the real estate agent's liability to the sellers.

The sellers advanced a cross-claim against the agent at trial. They alleged that they relied upon the agent to advise them of their obligations in completing the SPIS. The trial court was not required to address the cross-claim in view of its dismissal of the buyer's claim against the agent.

The Court of Appeal, however, found that the agent breached her duty to the sellers by failing to provide them with adequate advice. In particular, Justice Epstein found that the agent had a duty to provide specific warnings to the sellers that they might be providing information in the SPIS that they were not legally required to provide. Justice Epstein found that a real estate agent has a duty to warn a seller that the seller is able to rely upon the doctrine of *caveat emptor* where no SPIS is provided.

If, on the other hand, the seller provides an SPIS, *caveat emptor* no longer applies, and the buyer will likely be able to rely upon the truthfulness and accuracy of the SPIS in deciding the extent to which a contractor will be instructed to conduct a home inspection.

CASE SIGNIFICANCE

Krawchuk v. Scherbak is significant to cases involving the liability of real estate agents for at least two reasons: firstly, it signals an expansion of the real estate agent's role in a real estate transaction; secondly, it sounds a warning about the continued use of Property Condition Disclosure Statements and their equivalents.

As to the agent's role in a real estate transaction, the case sends a clear message that courts will treat real estate agents as being much more than mere conduits of information and facilitators of a sale.

While real estate agents have always been under a duty to exercise reasonable care in providing information and advice to property buyers, a buyer's agent has traditionally been entitled to rely upon representations of fact made by the seller. The duties of a buyer's agent have, to date, been restricted. Generally speaking, a buyer's agent has only been required to make independent inquiry where the matter was of particular importance to the agent's client, or the matter was something that a prudent real estate agent would ordinarily verify: see, for example, *Fraser v. Powell River Real Estate Ltd.*, [1998] B.C.J. No. 2281 (C.A.), and *Kisil v. John F. Stevens Limited*, [1980] N.S.J. No. 515 (S.C.).

For buyer's agents, it is significant that the court found that the duty of an agent to verify information from the seller can arise even in the absence of any "red flags" that may raise doubt about the accuracy of that information.

In the case of the seller's agent, the duty suggested by *Krawchuk v. Scherbak* is somewhat greater than previous authorities. It had previously been accepted that a seller's agent has a duty to ascertain and verify all pertinent facts provided by the seller: *Sedgemore v. Block Bros. Realty Ltd.* (1985), 39 R.P.R. 38 (B.C.S.C.). Even so, the duty of a seller's agent could be considered discharged by instructing the sellers to complete a Property Condition Disclosure Statement truthfully, and to the best of their ability, unless the agent had reason to doubt the veracity of the seller's information: *Neill v. Trenholm*, 2000 CanLII 10652 (NBQB). Clearly, this is no longer the case, as the court has found that the agent for a seller must also provide further warning about the legal effect of signing a Property Condition Disclosure Statement.

As to the continued use of Property Condition Disclosure Forms and their equivalents, the Ontario Court of Appeal echoed the following statement by the Manitoba Court of Appeal in *Alevizos v. Nirula* (2003), 180 Man. R. (2d) 186, at paragraph 47:

This judgment should, in my view, be taken as a warning about the routine use of the [Property Condition Statement]. The purchase and sale of a home is for many people the most significant business transaction they will ever enter into. Representations as to the condition of the property are inevitably going to be requested and given. I do not believe that these concerns are ever going to be safely dealt with by filling in the blanks on a short form carried in the real estate agent's briefcase with his or her other supplies.

With the expansion of real estate agents' role and duties toward their clients comes a greater scope for findings of liability. Based on *Krawchuk v. Scherbak*, real estate agents would also be well advised to reconsider their continued use of Property Condition Disclosure Statements and their equivalents.

As always, please feel free to direct any questions to your usual point of contact at McInnes Cooper. Inquiries of a general nature can be directed to any of member of the [McInnes Cooper Insurance Team](#).

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