Woe Unto the Building Inspector (and the Municipality): A Comment on McCrea v. City of White Rock

In *McCrea* v. *City of White Rock*,[1] the roof of the building in which Mr and Mrs McCrea had operated an IGA grocery store for three years collapsed in 1968, damaging stock and equipment and hastening the demise of their business. Seeking reparation, the McCreas brought suit initially against the owner of the premises, a builder who had performed renovations to the building in 1961, a building inspector who had approved the renovations, and the City of White Rock. The death of the builder and the expiry of the limitation period (thus barring action against the municipality) reduced the number of defendants to two: the owner of the building and the inspector. In a potentially far-reaching decision, Berger,J. in the British Columbia Supreme Court absolved the owner but awarded damages in the amount of $7,500 against the building inspector.

The law governing liability for defective premises has been in an unhappy state for many years, primarily because the courts have been unwilling to apply broad negligence principles to what has been regarded as an area more properly within the province of property or contract law. Dangerous or defective buildings have not been analogized to faulty chattels and thus have remained largely unaffected by developing concepts of products liability. Visitors may obtain compensation in tort for injuries suffered while making a business or social call, but redress, if any, will lie only against the occupier. Meanwhile, the tenant or purchaser who suffers damage has usually been left to the less than tender mercies of the law of property, where *caveat emptor* and *caveat lessee* are sentinels which augur ill for most claimants.[2] The law of contract will provide a remedy only when express undertakings are breached, and then only to those who are parties to the agreement. No warranty of reasonable fitness is implied when real property is sold or leased.

This has led to unconscionable results as in the case of *Otto* v. *Bolton*,[3] in which compensation was awarded on the basis of an express contractual warranty to the purchaser of a newly con-

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[1] *McCrea* v. *City of White Rock* (1972), 34 D.L.R. (3d) 227 (B.C.S.C.).

[2] Fleming, *The Law of Torts* 4th ed. (1971), 413ff.

[3] [1936] 2 K.B. 46.

structed house for expenses incurred when the ceiling collapsed six months after its purchase, but denied to the purchaser's mother, who shared the house and was injured by the same collapse. Similarly inequitable was the decision in *Cavalier* v. *Pope*,[4] in which recovery was denied to a plaintiff who fell through a defective floor in premises she occupied with her husband, but who unfortunately (but not atypically) was not a party to the tenancy agreement.

The harshness of such doctrine has prompted criticism from courts and commentators alike,[5] but its foundations remain intact.[6] In 1972, however, the English Court of Appeal handed down a judgment which may well lead to a re-appraisal of the whole area of liability for defective premises. In *Dutton* v. *Bognor Regis United Building Co.*,[7] liability to a subsequent purchaser was imposed on an urban district council whose building inspector had, after a careless inspection, approved the use of foundations which were inadequate to support a house erected upon them. The *Dutton* case was the direct inspiration for Berger,J.'s decision in *McCrea* v. *City of White Rock*, which will now be examined.

The Owner of the Premises

In 1961 Mr Stang decided to expand the grocery business which he operated in one half of a building owned by him. Expansion necessitated removal of a dividing wall, which also acted as a roof support, and its replacement with a beam supported by steel columns. Stang hired a builder, Hughes, to perform the work. Hughes drew up a plan which was approved by Everall, White Rock's building inspector. Unknown to Stang and undetected by Everall, who was only called to inspect earlier stages of the renovation, Hughes departed from the approved plan by suspending the roof trusses from the side of the beam instead of resting them on it. The unsafe method of construction thus adopted led to the collapse of the roof in 1968, by which time the grocery store business was owned by the plaintiffs.

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[4] [1906] A.C. 428 (H.L.). See also *Bottomley* v. *Bannister*, [1932] 1 K.B. 458; *Malone* v. *Laskey*, [1907] 2 K.B. 141.

[5] *E.g.* Fleming, *supra*, f.n.2, 418, and cases cited thereat.

[6] There have been judicial attempts to alleviate the severity of this area of the law. A notable example was a decision by Richardson,J. in the Ontario Supreme Court, holding the builder and vendor of a house liable to a visitor who was struck on the head by a kitchen cupboard which fell off the wall: *Lock* v. *Stibor* (1962), 34 D.L.R. (2d) 704.

[7] [1972] 1 All E.R. 462 (C.A.).

At the time of the remodelling in 1961, the owner had failed to comply with s.15 of the building by-law, under which he was required to notify the inspector to come and inspect the roof beam. His failure to do this was an omission that contributed to the collapse of the roof and, together with the negligence of the contractor and inspector, was categorized as an effective cause of the roof's collapse and the damage suffered by the plaintiffs.[8] However, it was held that, in contrast to the position of the inspector, no civil right of action against the owner was conferred by the by-law. Instead, his liability depended upon the general law of negligence.[9] While Berger,J. acknowledged the force of criticisms of the *Cavalier* v. *Pope* doctrine, he was not prepared to disregard those Canadian decisions which continued to limit the liability of the owner of premises through application of the privity of contract rule.[10] The present situation was not one of privity, as the McCreas (although owners of the business) occupied the building on a sub-lease from a firm of wholesalers. Accordingly, the Court was not prepared to hold that a duty of care was owed by the owner of the building (the lessor) to the plaintiffs (the sub-lessees). Berger,J. held that even if *Donoghue* v. *Stevenson* were applicable, the owner had discharged any duty he owed by hiring a contractor whom he thought competent.

By comparison with the vendors of other products, the person who disposes of an interest in real property is treated with notable benevolence by the law. He continues to benefit from the often dubious proposition that defects in realty are ordinarily discoverable if the purchaser or lessee exercises due diligence on his own behalf. The doctrine of *caveat emptor* is clearly anachronistic in this context, and to require that an owner should exercise reasonable care to ensure an adequate standard of safety in his premises would seem both desirable and not unduly burdensome, particularly if, as Berger,J. suggests, he may discharge his duty by hiring a contractor whom he reasonably believes to be competent.

The Builder

In *McCrea* the builder had died before the trial, so the question of his liability was not directly in issue. Nonetheless, Berger,J. felt constrained to indicate that, since *Dutton,* a negligent contractor

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[8] *Supra,* f.n.1, 240.
[9] *Ibid.,* 241.
[10] *Ibid.,* 242-243.

would be liable to subsequent occupiers.[11] In fact, it is clear that the supposed immunity of the builder had been eroded before *Dutton*.[12] It was the residual question of whether the builder who also happened to own the property would continue, by virtue of his ownership, to fall outside the mainstream of tort liability which was there answered in the negative. Accordingly, the conclusion reached by Berger,J. in *McCrea* can be regarded as unexceptional. As one Canadian court had earlier concluded,[13] there seems no valid reason why a workman whose dubious skills are applied to realty should be in a different position from his colleagues who direct their efforts towards the wide array of personal property.

The Building Inspector and the Municipality

Prior to *McCrea* there appears to be no Canadian authority to support the proposition that a building inspector and the municipality which employs him are subject to tort liability for inadequate performance of the inspection function; in fact, as recently as 1967 an Ontario court had explicitly rejected a similar contention.[14] Nonetheless, the plaintiffs successfully asserted that a duty of care, for the breach of which they could sue, was owed to them by the inspector.

The City of White Rock had established a building code in the form of a by-law which required authorization through the grant of a permit by the city's building inspector before construction work could be undertaken. The role of the inspector in the implementation of the building code was therefore a key one. Although the by-law did not on its face require him to inspect all construction, it imposed upon him an express duty to enforce the by-law and gave him broad powers to enter any building in the performance of his duties. This combination of factors led the court to conclude that there could be no meaningful enforcement without a positive duty of inspection.[15]

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[11] *Ibid.*, 240. In *Dutton,* the plaintiff, doubting a favourable outcome in the face of a line of cases which seemed to confirm a broad immunity for building contractors, had settled her claim against the builder. In the event, the Court of Appeal gave short shrift to these authorities, expressly disapproving such decisions as *Bottomley* v. *Bannister* (*supra,* f.n. 4) and *Otto* v. *Bolton* (*supra,* f.n.3): see *supra,* f.n.7, 472.

[12] See, for example, *Sharpe* v. *Sweeting and Son Ltd.*, [1963] 2 All E.R. 455.

[13] Richardson,J. in *Lock* v. *Stibor, supra,* f.n.6.

[14] *Neabel* v. *Town of Ingersoll,* [1967] 2 O.R. 343. The decision is not referred to in *McCrea.*

[15] *Supra,* f.n.1, 233.

Having recognized a statutory duty to inspect, the Court next considered whether failure to discharge the duty could give rise to a private right of action. It would have been relatively simple to deny the plaintiffs' claim by drawing a negative inference, as judges in the past have done, from the failure to include in the by-law any reference to a private right. Instead, the judge emphasized that a primary aim of the by-law was the establishment of a building code for the protection of occupants. He found that the right to claim in tort for damage incurred through inadequate enforcement was a necessary corollary of the statutory duty to inspect.

At no stage in this reasoning is there any acknowledgment by Berger,J. that he is in fact breaking new ground and opening up a potentially fruitful source of litigation for the not insignificant number of persons who are the victims of inadequate building construction or repairs. The building inspector knew, said the judge, that if the bearing wall was not replaced with adequate means of support, those occupying or coming on the premises might be injured, and damage might result. Consequently, "he ought to have done what was reasonable to see that the building was remodelled safely".[16]

Having decided that a right of action existed, the next question to be considered was the nature of the duty owed by the inspector. It had been the practice of the city (and, presumably, of other municipalities) to inspect on call. The inspector relied upon the owners to notify him at certain specified stages in the construction, as required under the by-law.[17] This approach to enforcement did not satisfy Berger,J., who was of the view that the practice of the municipality did not live up to the purpose and requirements of its own by-law.[18] He acknowledged the implications of this conclusion:

> I realize this may mean that White Rock will have to employ additional staff to ensure that inspections are carried out wherever it is necessary to ensure the safety of a structure. But the legislation is there. The by-law is there. By the passage of the by-law the municipality assumed a duty of inspection.... That duty had to be discharged with reasonable care. It was not.[19]

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[16] *Ibid.*, 237.

[17] Building By-Law of City of White Rock:

s.15 *Duties and Responsibility of the Owner.*
The owner of the property shall...
(c) Notify the Building Inspector
(iii) when ready for lathing.

(Section 15(c)(iii) was construed to require notification before the beam was covered.)

[18] *Supra*, f.n.1, 236.

[19] *Ibid.*, 237.

There remains some uncertainty as to precisely what steps are necessary for the city and the inspector to adequately discharge their duty. Clearly they are not free to set up the failure of the owner to notify the inspector as a justification for not making an on-site inspection, at least at important stages in the work. In *McCrea,* this duty dictated inspection of the installation of the beam upon which the safety of the building and its occupants depended.[20]

The judgment in *McCrea* emphasizes, however, that the inspector need only exercise a standard of reasonable care, and is not in the position of an insurer.[21] The possibility is left open that the reputation of the builder (of which there was no evidence in the present case) could have a bearing upon the duty to inspect. The apparent implication is that a lesser degree of supervision might suffice where the work is undertaken by a builder of established repute.[22] However, if there are certain crucial stages in construction where the positive duty to inspect is of particular importance (as the by-law seems to indicate), there would appear to be little justification for modifying the duty in some instances but not in others.

In imposing liability on the building inspector, Berger,J. couched his judgment in the traditional terms of duty and foreseeability of damage. In so doing he effectively ensured the success of the plaintiff's claim. A finding that the inspector should have foreseen damage of the type which occurred as a likely consequence of his failure to inspect, though unexceptional on the facts, would have been equally supportable ten or thirty years ago, at which time liability clearly did not sound. Hence, as the judge himself acknowledged, the result reached in the present case must be explained in terms of policy considerations. In this regard, Berger,J. reiterated the views expressed by Lord Denning in *Dutton* v. *Bognor Regis*[23] on the supposed incentive to better enforcement which would result from tort liability. This is a restatement of the oft-asserted deterrence argument, which is likely to prove of limited

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[20] It should perhaps be noted that Farwell, the building inspector, had paid three visits to the site when notified by the owner at certain earlier stages of the construction.

[21] *Supra,* f.n.1, 237.

[22] *Ibid.,* "In some cases it might be reasonable for the building department to take into account the reputation of the builder, and not to inspect except on call."

[23] *Supra,* f.n.7, 476; cited *supra,* f.n.1, 236. The *Dutton* case involved an inspection performed by a municipal surveyor which led him to approve the foundations of a house being constructed on land fill. The foundation proved inadequate to withstand subsidence which occurred soon after completion.

value in cases where the defendant is a municipality or insurance company.

Of greater significance for the broader issues presented by the *McCrea* case is another passage from Lord Denning's judgment in *Dutton*, which was not referred to in *McCrea*. After proclaiming the expanding role in tort law of policy in general and loss distribution in particular, the Master of the Rolls considered the claim before him:

> First, Mrs. Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet, they failed to protect them. Their shoulders are broad enough to bear the loss.[24]

As a general proposition, any improvement in the inadequate legal protection afforded those who suffer damage or injury as a result of defective building construction is to be welcomed. We may also agree with Lord Denning that the legitimacy of the loss distribution function in the law of torts has gained increasing, if sometimes tacit, recognition in recent years. Nevertheless, the judgment of Berger,J. in *McCrea* v. *City of White Rock* leaves certain residual questions unanswered.

A preliminary *caveat* needs to be entered concerning the loss distribution rationale. It is true that a municipality will usually be in a better position than injured individuals to absorb and spread losses resulting from sub-standard construction. If the *McCrea* case gains wide acceptance in Canada, cities and townships will be faced with the choice of employing additional inspection staff (a move which may not be feasible for smaller municipalities) or insuring themselves to meet possible liability, either through commercial underwriters or by self-insurance. However, loss distribution or deep pocket arguments are not applicable to a situation (as in *McCrea*) where action against the municipality is statute-barred, leaving the building inspector to assume full liability. In such a case, the loss incurred will be shifted but, in the likely absence of personal liability insurance, will not be distributed.

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[24] *Supra*, f.n.7, 475.

More significant than the particular immunity afforded the city by a short limitation period is the general question of the time factor in actions involving real property. In many instances defective workmanship will not manifest itself until a considerable period has elapsed. However, in most jurisdictions the limitation period for tort actions is six years.[25] Consequently it may be of crucial importance to determine the moment at which the cause of action accrues. In *Dutton* this point was not directly in issue as the damage occurred only two years after construction, but Denning, M.R. suggested *obiter* that the limitation period began to run at the time the work was done rather than when the effects of the inadequate construction became manifest.[26] His colleague Sachs,L.J. significantly preferred to express no opinion "as the point may be susceptible of argument".[27] The point would indeed seem open to argument in light of the result reached in *McCrea*.

A bedrock principle in applying statutes of limitation has been that the period runs from the accrual of the cause of action, *i.e.* from the earliest time at which an action could theoretically have been brought.[28] For an action to lie in negligence some damage must occur. If we adopt the reasoning of Denning,M.R. in *Dutton*, the owner of the premises subsequently leased to the McCreas suffered damage in 1961 when he was left with an unsafe roof, although he was not aware of its dangerous condition. Consequently, his right of action against the building inspector (and the city) accrued at that time and expired six years later in 1967. The McCreas did not take a lease on the premises until 1965, so that any right of action enjoyed by them could not have accrued until that year and would then presumably run for a six year period, expiring in 1971. Arguments advanced by the defendants in *Dutton* (though apparently not by the building inspector in *McCrea*) can therefore be seen to express far from groundless fears of a potentially open-ended liability. Such indeed would seem to be the situation if the limitation period were to be revived by each subsequent sale or lease of the property, bringing into the picture new plaintiffs with fresh rights of action.[29]

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[25] See Williams, *Limitation of Actions in Canada* (1972), 57.

[26] *Supra*, f.n.7, 474.

[27] *Ibid.*, 482. The third judge in the Court of Appeal, Stamp,L.J., did not deal with the question of the limitation period.

[28] Williams, *supra*, f.n.25, 7.

[29] The liability of the builder would appear to be even more elastic if he has covered up his own bad work. He might then be guilty of concealed fraud, in which event the limitation period would not begin to run until the fraud was discovered. See Denning,M.R. in *Dutton*, *supra*, f.n.7, 475. See also Williams, *supra*, f.n.25, 207.

Furthermore, *McCrea* v. *City of White Rock* does not draw parameters around the class of persons who may claim, except to indicate, less than helpfully, that the duty owed by the building inspector and the municipality is limited "to those who may be injured if there is a negligent failure to inspect the repairs".[30] The McCreas sued as owners of the grocery business and tenants of the building, but there is a clear suggestion by Berger,J. that liability would extend to all persons coming on the premises "whether as occupiers or customers".[31] Certainly, from the foreseeability standpoint there seems to be no basis for distinguishing between the shopkeeper and his customers, any one of whom might expect to suffer injury if the roof of the store should collapse.[32]

But again the limitation question arises: will customers and other visitors be able to claim against the municipality ten or twenty (or more) years after the initial careless inspection, provided they bring suit within six years of the date on which they were injured? Such would appear to be the import of the Limitations Acts as they have been applied to other areas of the law. In fact, the practical problems involved in proving instances of inadequate inspection which occurred in the distant past will almost certainly limit the time span of the municipality's liability.

In *McCrea* the failure to inspect, while not the immediate cause of the damage suffered by the plaintiffs, was regarded as sufficiently proximate for the purpose of affixing liability. The causation hurdle had proven insurmountable in at least one earlier Canadian decision involving negligent inspection,[33] and we may expect further argument to be directed to the question of proximate cause. The defendant's conduct would appear to satisfy the so-called "but-for" test,[34] but future claims could be imperilled if the Canadian courts decide to trot out the "last opportunity" warhorse. It is hard to see any justification for such an approach, and it is hoped that reliance will not be placed upon discredited doctrine to camouflage necessary policy choices.

McCrea v. *City of White Rock* breaks new ground in Canada. Emboldened by the *Dutton* decision in England, Berger,J. has opened

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[30] *Supra*, f.n.1, 238.

[31] *Ibid.*, 236.

[32] In *Dutton* the council apparently conceded that it might be liable if the ceiling fell down and injured a visitor, while arguing (unsuccessfully) that it was not liable to the plaintiff for the economic loss he had suffered through diminution in value of his house: *supra*, f.n.7, 474.

[33] *Neabel* v. *Town of Ingersoll*, *supra*, f.n.14, 349.

[34] See Linden, *Canadian Negligence Law* (1972), 254.

up a potentially rewarding avenue for the victims of inferior construction work and inadequately enforced building codes. Undoubtedly, the builder himself will and should remain the primary source for redress.[35] However, liability based upon careless inspection can be seen to fall comfortably within general negligence principles. It is consistent with traditional fault concepts and is likely as well to further the emerging goal of loss distribution. Its deterrent effect upon careless building inspectors may be less than anticipated, but any significant incidence of municipal liability could lead local authorities to conclude that their own interests as well as those of their residents would be well served by keeping a closer eye on the operations of building contractors.

In many ways the judgment in *McCrea* is an example of tort law's capacity to encompass new fields without doing violence to previous patterns of decision. However, concepts such as duty of care and foreseeability do not provide answers to a number of questions arising out of the case. What is needed is a further decision, hopefully at the appellate level, which will canvass fully the policy issues at stake and provide a sound conceptual base for future development.

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[35] Municipalities would clearly be entitled to recoup some and probably all amounts paid out in satisfaction of judgments against them, provided the contractor directly responsible is still in business and is not otherwise exempt from judgment.

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