

COMMENT

Winnipeg Condominium Co. No. 36 v. Bird Construction Co.: The Death of the Contractual Warranty?

CASEY CHISICK*

I. INTRODUCTION

IN 1995, THE SUPREME COURT OF CANADA ruling in *Winnipeg Condominium Co. No. 36 v. Bird Construction*¹ provided some welcome clarification of the law as it applies to non-contractual recovery by property owners against builders for the costs of repairing defects in buildings. Specifically, the court held that where a builder's negligence has resulted in a dangerous defect in a building, which has manifested itself within the reasonable life of the building and has been repaired by the owner or occupant before causing physical harm to persons or property, the builder will be liable for the costs of such repair. Because this duty arises independently of any contract, this will be the case notwithstanding that the repairing owner may not be the original owner of the building and, as such, may not be in contractual privity with the builder.

This area of the law had been in substantial disarray since the court's controversial decision in *Rivtow Marine Ltd. v. Washington Iron Works et al.*², and it might safely be assumed that the court relished the opportunity to set the record straight; or was this in fact the case? Certainly, an argument can be made that the court failed to go far enough in its reasoning and holdings and that the decision raises at least as many questions as it answers. Vagaries as to the scope of the decision abound, as does speculation as to whether this is just a first step

* LL.B., (Manitoba), Law Clerk to the Honourable Mr. Justice Frank Iacobucci, Supreme Court of Canada, 1997-98. This comment was written while the author was a student at the Faculty of Law, University of Manitoba.

¹ (1995), 121 D.L.R. (4th) 193 (S.C.C.) [hereinafter *Bird*].

² (1973), 40 D.L.R. (3d) 530 (S.C.C.) [hereinafter *Rivtow Marine*].

on the road to recoverability in tort for all negligence claims based on defects in product quality.³ The primary question presented by this case is whether Canadian law is about to witness the death of the contractual warranty.

II. BACKGROUND

A. History of the Case

Briefly, the facts of *Bird* may be summarised as follows: in 1972, the defendant contractor Bird Construction Co. Ltd. [hereinafter Bird] was retained by Tuxedo Properties to construct an apartment building in an affluent area of Winnipeg. Bird agreed to construct the building in accordance with plans prepared by a certain architectural firm with whom Tuxedo Properties had already contracted. Bird then entered into a contract with a masonry subcontractor for the application of the required stone cladding to the exterior of the building.

The building was completed near the end of 1974 and originally used as a rental apartment block, but was converted to a condominium in 1978 when Winnipeg Condominium Corporation No. 36 [hereinafter the Corporation] became the registered owner of the land and building. In 1982, defects were first observed in the exterior cladding and the original architects were engaged to inspect the building. Upon the architects' recommendation, the Corporation completed some minor remedial work at a cost of approximately \$8 100. Those repairs proved sadly inadequate, and in May 1989 a section of cladding, approximately 20 feet in length and one entire storey high, fell from the ninth floor of the building. Fortunately, the mishap occurred during the night and no injuries were sustained by passers-by or damage caused to property below. The Corporation had the entire cladding removed and replaced at a cost in excess of \$1.5 million.

An action was commenced in negligence against Bird, as well as against the architects and the masonry subcontractor, alleging inadequacies in design and workmanship. Bird filed a notice of motion for summary judgment and a motion to strike the Corporation's claim as disclosing no reasonable cause of action. Both motions were dismissed by the Manitoba Court of Queen's Bench,⁴ but the Court of Appeal allowed the motion to strike.⁵ The Corporation appealed to the Supreme Court of Canada.

La Forest J., writing for a unanimous court, reversed the Court of Appeal and restored the judgment of the motions judge. For reasons which will be discussed below, he held that to the extent that the damages alleged by the Corpo-

³ P.H. Osborne, "A Review of Tort Decisions in Manitoba 1993-95" (1996) 24 Man. L.J. 409.

⁴ (1993), 84 Man. R. (2d) 23 (Q.B.).

⁵ (1993), 101 D.L.R. (4th) 699 (Man. C.A.).

ration could be found to constitute pure economic loss flowing from the negligence of Bird, they were recoverable from that defendant, and ordered that the case proceed to trial for a determination of the issues raised in the pleadings, including the defendant's negligence. The case is scheduled to go to trial in the fall of 1998.

B. The Traditional Position

The judgment of the Supreme Court is, in many respects, an eye-opener. Quite simply, it turns conventional wisdom on its head with respect to duties of care in the construction industry and has potentially wide-ranging implications for product quality in general.

It is widely accepted, and remains unchallenged by this case, that a claim of the type advanced by the Corporation would have no footing in contract law. Simply put, the absence of contractual privity between the Corporation and Bird, whose contract was with the Corporation's predecessor in title, means that no claim by the Corporation would be sustainable against Bird in contract for the damage caused. Only if the Corporation had somehow secured from Bird a warranty against this type of defect could any action be maintained in contract.

In tort as well, the traditional view has always been that no action would be sustainable against Bird in negligence under the doctrine of products liability. While it has long been established as a general rule that a manufacturer of a product will be liable to its ultimate consumer for any foreseeable harm sustained by the consumer as a result of the manufacturer's negligence, it has also been generally accepted that such actionable harm is, in the usual case, limited to physical harm, and that pure economic loss will not normally be the subject of a claim in products liability. This is evident even in Lord Atkin's famous words in *Donoghue v. Stevenson*:⁶

[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the customer's life or property, owes a duty to the consumer to take that reasonable care [Emphasis added.]

Thus, in the now infamous case of *Rivtow Marine*,⁷ the Supreme Court was careful to avoid permitting the plaintiff to recover economic loss suffered when the defendant manufacturer negligently failed—until the arrival of the plaintiff's busy season—to warn of a known defect in a crane purchased by the plaintiff through a third party reseller. The danger posed by the crane forced its removal from service for a lengthy period, during which the plaintiff suffered

⁶ [1932] A.C. 562 (H.L.).

⁷ *Rivtow Marine*, *supra* note 2.

extensive loss of profit, for which the majority did allow recovery based on the defendant's breach of its duty to warn. The actual costs of repair, however, remained the burden of the plaintiff alone. The reasoning of the majority was that because no physical harm resulted from the defect, no relief was available in negligence under the heading of products liability. Any possible relief, therefore, would have been in contract—and because there was no privity between the parties, to permit the recovery of these costs would be akin to recognising a non-contractual warranty of product quality.

However, Laskin J., as he then was, in dissent would have allowed the claim for repairs to succeed in negligence. According to his reasons, it would be ludicrous to deny such a claim when the defendant would so clearly be liable for any physical harm that might result from the defect if left in bad repair. He wrote,

The case is not one where a manufactured product proves to be merely defective (in short, where it has not met promised expectations), but rather one where by reason of the defect there is a foreseeable risk of physical harm from its use and where alert avoidance of such harm gives rise to economic loss. *Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury cure.*⁸ [Emphasis added.]

As Professor Feldthusen has indicated, the treatment of *Rivtow Marine* by Canadian courts over the ensuing years has been inconsistent at best. Perhaps motivated by considerations of fairness, courts have often been inclined to ignore the majority decision and to side with the dissenting reasons of Laskin J. whenever possible.⁹ In fact, the Supreme Court itself had, on several occasions prior to the *Bird* decision, expressed considerable sympathy for Laskin J.'s reasoning.¹⁰ In this light, it is not very surprising that when given the opportunity to revisit *Rivtow Marine*, the Supreme Court chose to adopt the dissenting judgment and depart from the traditional approach in this area. Indeed, the opinion of Laskin J., in many respects, forms the very basis of the ground-breaking decision in *Bird*.

⁸ *Rivtow Marine*, *supra* note 2 at 552.

⁹ B. Feldthusen, "Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.: Who Needs Contract Anymore?" (1995) 25 C.B.L.J. 143.

¹⁰ In addition to the cases herein cited, see also *Ontario (Attorney-General) v. Fatehi* (1984), 15 D.L.R. (4th) 132, where the court observed that the law as stated in *Rivtow* was uncertain, as well as *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* (1992), 91 D.L.R. (4th) 289, where La Forest J. remarked, *inter alia*, that "Laskin J.'s concern with safety and the prevention of further damage is justified," and McLachlin J. noted that "the majority's restriction of recovery of economic loss to the duty to warn has been doubted."

C. The Duty of Care Now Owed by Builders to Subsequent Purchasers

La Forest J. put the duty in very clear and unambiguous terms when he wrote,

[W]here a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants.¹¹

A successful claim by the ultimate purchaser against the contractor will contain three essential elements. First, there must have been negligence on the part of the contractor. Second, it must be shown that the defect complained of arose out of that negligence—and not, for example, out of normal wear and tear or failure to care properly for the building. Finally, it must be proven that the defect poses a *real and substantial danger* to the occupant (or, it may properly be argued, to third parties to whom a duty of care is owed by the occupant).

How was this conclusion reached? Significantly, the court eschewed the formalistic approach favoured in the majority decision in *Rivtow Marine*, applying instead the two-branch duty of care test formulated by the House of Lords in *Anns v. Merton London Borough Council*¹². That test had already been adopted by the court in *City of Kamloops v. Nielsen*,¹³ in the following terms:

- (i) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of [one person], carelessness on its part might cause damage to [the other person]? If so,
- (ii) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

La Forest J. answered the first question in the affirmative, noting that there is a strong likelihood that a building will be inhabited by a number of different occupants during its reasonable life, and that as a result, contractors should be aware that their negligence in constructing a dangerously defective structure might cause damage to subsequent purchasers. He adopted Laskin J.'s reasoning

¹¹ *Bird*, *supra* note 1 at 203.

¹² [1977] 2 All E.R. 492 (H.L.) [hereinafter *Anns*]. It should be noted that *Anns*, which, among other things, expressly adopted the reasoning of Laskin J. in *Rivtow Marine*, has since been overruled by the House of Lords; see *D & F Estates Ltd. v. Church Commissioners for England*, [1988] 2 All E.R. 992, and *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908. Although this fact appears to have been taken into account by Huband J.A. in allowing Bird's appeal, La Forest J. found, at page 210, that the principles in *Anns* have become well-settled law by virtue of their application by the S.C.C. on several occasions; see, for example, *Rothfield v. Manolakos* (1989), 63 D.L.R. (4th) 449.

¹³ (1984), 10 D.L.R. (4th) 641.

in *Rivtow Marine* when holding that just as the contractor would be liable under traditional products liability law for physical harm caused to persons or property as a result of such defects, so too should it be held responsible where the dangerous defect is discovered and repaired before such harm results. The underlying policy is clear: why should the law discourage people from behaving in a safe and responsible manner by failing to indemnify them for the costs of such behaviour in situations where they would be entitled to recover their expenses if damage did occur?¹⁴ Quite the contrary, the court should encourage responsible behaviour on the part of property owners; a policy of accident prevention which underlies the entire decision in *Bird*.

As for the second question—whether policy factors exist which ought to mitigate the duty suggested by the proximity test—La Forest J. concluded that the primary concern in this area, that allowing recovery for economic loss in tort will result in liability of the builder “in an indeterminate amount for an indeterminate time to an indeterminate class,”¹⁵ ought not to concern the court in this type of case. He disposed of the argument by noting that each of its constituent elements is limited: the amount of liability is restricted to the reasonable cost of repairing the building, the class of potential claimants by the common thread of subsequent ownership of the building, and the time of potential claims to the useful life of the building—that is, once the building has been used beyond reasonable expectations of durability, it will not be possible to show that its deterioration is the result of the builder’s negligence and not of normal wear and tear. As a result, he concluded that “no adequate policy considerations exist to negate” this duty in tort.¹⁶

Aside from the aforementioned policy of accident prevention which pervades the decision, at least two other policy considerations may have influenced La Forest J. in his judgment. First among these is a concern based on morality and fairness, and the notion that contractors ought not to be permitted to profit by the construction of dangerously defective structures.¹⁷ Additionally, La Forest J. may have been motivated by the fact that the contractor is *ex hypothesi* better able to absorb the risks of dangerous defects or at least to protect itself through liability insurance than is the consumer, and so the allocation of risk to the contractor in this case is a sound policy choice.

In the result, it is clear that Canadian law now provides for a product quality remedy where none previously existed. By recognising a duty owed by the builder to subsequent purchasers “to take reasonable care in constructing the

¹⁴ *Bird*, *supra* note 1 at 212–13.

¹⁵ *Ultramares Corp v. Touche*, 174 N.E. 441 (N.Y. Ct. App. 1931).

¹⁶ *Bird*, *supra* note 1 at 218–21.

¹⁷ *Rivtow Marine*, *supra* note 2 at 149.

building and to ensure that the building does not contain defects that pose foreseeable and substantial danger to the health and safety of the occupants,"¹⁸ what the court has created, in essence, is a non-contractual warranty against dangerous defects in buildings. The only limitation on this warranty is that the defects must arise out of the negligence of the contractor—a limitation that cannot be said to be very onerous in light of the high standards of safety and precision expected of the construction industry.

III. QUESTIONS ARISING OUT OF THE DECISION

A. Does this Reflect Usual or Reasonable Business Practice?

With regard to the evident allocation of risk to the contractor, as alluded to above, Professor Feldthusen argues that this is in fact a *reallocation* of risk, as the contract between the contractor and the original purchaser will previously have allocated the risk. He posits that if it is true that the builder is best able to avoid the damage and/or to protect itself in the event that such damage occurs, then the original buyer should have negotiated a warranty from the builder in the contract of sale, but that if such a warranty was not obtained there is no reason to displace the contract by interposing an inconsistent duty in tort. The subsequent purchaser, he argues, should also be expected to protect itself—by purchasing warranty protection either directly from the builder or from the first buyer, whose contract with the builder might include a warranty that would run to future buyers. If this is in fact the standard market practice, he concludes, then the policy underlying the *Bird* decision is unsound; if the plaintiff was merely an improvident and impecunious buyer who entered into an aberrant transaction in disregard of an industry standard that would have afforded it more protection, there is no reason to recognise a general duty in tort as a protection for the deviant purchaser alone. If this is not common practice, however, the court should not be so quick to trample on well-established industry norms.¹⁹

Beyond the merits of that particular argument, which is framed in a much broader criticism of the *Bird* decision for its supposed ignorance of contractual realities, Professor Feldthusen does raise an interesting question: what is the usual practice in the construction industry with respect to warranties? Do building warranties typically run beyond the first buyer to subsequent purchasers? Regardless of whether such a practice would serve as ample justification to marginalise a duty in tort, it is worth examining whether the court's vision of an appropriate standard for the industry is at all consistent with the actual practice.

¹⁸ *Bird*, *supra* note 1 at 221.

¹⁹ *Rivtow Marine*, *supra* note 2 at 150–153.

1. *The New Home Warranty Program of Manitoba*

In Manitoba, all new homes constructed by a registered builder are accompanied by a warranty under the New Home Warranty Program of Manitoba, a third-party guarantor which contracts either with the individual builder or with the Home Builders' Association to provide such a warranty on behalf of the builder. The relevant clauses of this warranty read as follows:

1. In this New Home Warranty Certificate

(d) "Defects in Workmanship or Materials" means any construction carried out by the Builder which is below the standards prescribed by the Manitoba Building Code in force at the time of construction;

(e) "Major Structural Defects" means Defects in Workmanship or Materials which have an adverse effect on the performance of the load bearing portion of the Home ... provided always that structural defects ... that are caused by any reason not due to the negligence of the Builder are excluded from the warranty herein provided;

3. [T]he Builder agrees, upon written notification (*sic*) to repair defects in workmanship in the construction of the Home and to repair or replace defective materials and appliances supplied by the Builder where such defects become apparent within one (1) year from the Date of Possession.

8. The Program shall repair any Major Structural Defects in the construction of the home which become manifest during the four (4) year period commencing on the first anniversary date of the Date of Possession until the end of the fifth (5th) year next following the Date of Possession.

14. The warranties contained herein shall extend to the original Purchasers named in this certificate and to the parties who subsequently become the registered owners and occupiers of the Home during the period of Warranty.

Clearly, the general practice in Manitoba (insofar as private homes are concerned) is to provide a reasonably comprehensive warranty for the first five years after the home is constructed, that this warranty extends not only to the first buyer of the house but also to subsequent purchasers, and that actual physical harm need not have occurred before the builder's responsibility to repair a defect is triggered. In these respects, it may be said that *Bird* is at least partially consistent with construction industry norms. However, it is equally clear that the duty recognised in *Bird* goes considerably further in protecting the purchaser, and that even if the New Home Warranty Program had applied to the plaintiff in general terms, it would not have compensated the loss suffered in that case.²⁰

²⁰ While it is recognised that the apartment building that was the subject of the litigation in *Bird* would not be considered a "home" such as to be covered by the New Home Warranty, it is suggested that the Warranty is still a useful tool by which to measure both the overall willingness of the construction industry to warrant in respect of defects in newly-constructed buildings and the approximate scope of such protection.

First, it is immediately noted that “ordinary” defects in materials or construction are the responsibility of the builder only during the first year after the date of possession, and that even major structural defects are protected against only for a period of five years. Clearly, this is quite different from the protection throughout the useful life of the building that is contemplated by *Bird*; it can hardly be argued that the usefulness of a home should be expected to last five years or less. In the case of the defective apartment building in *Bird*, it was 17 years old at the time of the loss and there was no suggestion that it had outlived its useful life as yet. In fact, many people live in homes or buildings that are more than 25 years old without incident or reasonable expectation thereof.

Second, to the extent that “Defects in Workmanship and Materials” are limited to violations of the *Manitoba Building Code*, the New Home Warranty ignores the fact that defects not expressly prohibited by the *Code* might be equally serious and costly to repair. The *Bird* decision does not suggest a particular statutory peg for the definition of “dangerous defects”, which is a preferable, more flexible approach. There is no reason to believe that the policy of accident prevention addressed by *Bird* would be advanced at all by the standard required by the New Home Warranty, as builders are already obliged to follow the *Code* and yet accidents still happen. Being subject to a duty that is less rigid and more circumstance-based, as tort duties are wont to be, the builder is forced to ensure that its conduct is especially safe and responsible—because hiding behind the *Code* is no defence at all.

Third, the “Major Structural Defects” warranted against are severely limited by restriction to those having “an adverse effect on the performance of the load bearing portion of the Home.” This limitation, if applied to the facts in *Bird*, might have prevented plaintiff recovery, as it is not at all clear from the facts that the loss of the cladding posed any danger to the structural well-being of the building as a whole. Such “major structural defects” are only one subset of the dangerous defects contemplated by *Bird*; the decision is concerned with defects that pose real and substantial danger to persons and property, and appears to recognise that such danger may manifest itself in various forms, with various results. The danger posed by the fallen cladding was more in the nature of danger to passers-by or surrounding property which might have been damaged as a result of their unfortunate positioning in the path of the debris. The New Home Warranty makes it quite clear that such defects would not be covered by the warranty it provides: a major weakness in its scope and which allows a strong argument either for the expansion of the warranty or for a duty such as that recognised in *Bird*—or both.

Therefore, to the extent that the New Home Warranty fails to provide protection comparable to that afforded in tort by the *Bird* decision, the decision is neither a mere declaration of usual business practice nor an unnecessary obfuscation of the appropriate builder-purchaser relationship. The policy considerations employed by La Forest J., particularly accident prevention and preven-

tion of improper profit by the builder, are not adequately addressed by a warranty that limits so severely the scope of the defects it contemplates and the period during which they are warranted against. Despite Professor Feldthusen's legitimate criticism—that the risks of the construction relationship are already allocated by contract and should not be disturbed by the intervention of tort—it is obvious that the Supreme Court of Canada had other, broader goals in mind when deciding *Bird*, policy objectives that simply could not be satisfied by standing firm on the sanctity of contract.

B. Will this Reasoning Extend to Chattels?

Is there any reason why this doctrine should not be extended to protect against dangerously defective chattels, rather than just buildings? La Forest J. declined to deal with this point in *Bird*, limiting the scope of his inquiry to buildings only; he is quite explicit in restricting the doctrine, at least for the moment:

The underlying rationale for this conclusion is that a person who participates in the construction of a *large and permanent structure* which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care.²¹ [Emphasis added.]

However, in expressly adopting²² the dissenting reasons of Laskin J. in *Rivtow Marine*, a case involving a dangerously defective chattel, La Forest J. left the door open to further speculation on this point. Further, as observed by Professor Feldthusen, it may be argued that by allowing dangerous defects in buildings as falling within the general category of economic loss arising out of “negligent supply of shoddy goods or structures [emphasis added],”²³ La Forest J. implicitly recognised the existence of a duty of care with respect to chattels as well as buildings.²⁴

No principled reason appears to exist for drawing a distinction between dangerously defective realty and chattels. To apply the test in *Anns*, the proximity giving rise to the duty in regard to chattels is the same as in the case of buildings, as the subsequent purchaser of a chattel is equally a foreseeable victim of the manufacturer's negligence. Particularly when the types of chattels which might contain dangerous defects are considered—automobiles, kitchen appliances, heavy equipment—it will be readily noted that chattels are no less transmissible and just as often resold as buildings, thus making it clearly foreseeable that a *subsequent* purchaser of such an item may suffer damage caused by a shoddily-made item.

²¹ *Bird*, *supra* note 1 at 203.

²² *Ibid.* at 212.

²³ *Ibid.* at 199.

²⁴ *Rivtow Marine*, *supra* note 8 at 149.

It is equally difficult to find a policy reason to exclude chattels from the *Bird* doctrine, as the policy underlying the decision applies with equal force to the chattel scenario. It could not seriously be argued, for example, that there is any more reason to discourage a consumer from undertaking the pre-emptive repair of faulty brakes in an automobile—failure to attend to which could cause serious harm both to the owner and to third parties—than there is to discourage him from repairing a structural defect in his home. Moreover, the same considerations of morality and fairness which prevailed in the case of the faulty building should also govern the sale of chattels; a manufacturer of dangerous goods should not profit unfairly from their sale. Finally, presumably the deep-pocketed manufacturer is better able to absorb the risk than is the unfortunate consumer, or at least the manufacturer will have better access to (and will be more likely than the consumer to purchase) liability insurance to protect himself in such a situation. As for the concern respecting indeterminate liability, the manufacturer's exposure will again be restricted to the limited class of subsequent purchasers for no more than the cost of repairing or replacing the dangerous item, and then only during the reasonably useful life of the chattel.

In any event, whether or not La Forest J. intended the doctrine to apply to chattels, Canadian courts have since interpreted his judgment in that manner. In *Privest Properties Ltd. v. Foundation Co. of Canada*,²⁵ the plaintiff alleged that asbestos insulation produced by the defendant manufacturer posed a serious health risk to the tenants of the plaintiff's apartment building. The court, though finding no negligence on the part of the manufacturer, acknowledged that if negligence had been found, the defendant would have been liable under *Bird* to remove and replace the dangerously defective product.

Additionally, in *Del Harder v. Denny Andrews Ford Sales Inc.*,²⁶ the master dismissed a motion for summary dismissal where the question to be tried was whether a mechanic could be held liable to a subsequent owner of an automobile on which he had performed maintenance, for the costs of repairing shoddy work—where there was neither damage to person or property nor danger inherent in the defect. The master found that this was an issue of law which could be tried by the courts, while noting that the state of the Canadian law in this area was “in chaos.”

C. Is this the First Step Toward Allowing Claims for All Deficiencies in Product Quality?

The decision in *Del Harder*, where no inherent danger was alleged in the defective work complained of, leads nicely into the substantial question of whether *Bird* will eventually lead to a much more liberal approach to product quality

²⁵ (1995), 18 D.L.R. (4th) 577 (B.C. S.C.).

²⁶ [1995] A.J. No. 608 (Alta. Q.B.) [hereinafter *Del Harder*].

claims. Other jurisdictions, including New Zealand,²⁷ Australia,²⁸ and several American states,²⁹ have already begun to allow such claims in cases of non-dangerous defects. Will Canada be next in line?

La Forest J. declined in *Bird* to deal expressly with the issue of dangerous chattels, but his refusal to discuss the matter of non-dangerous defects of any kind was even more pronounced. He wrote,

Given the presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings.³⁰

It should also be noted that he did not even *acknowledge* the possibility of recovery for the repair of non-dangerous defects in chattels.

In declining to deal with the matter, however, La Forest J. also noted,

[T]he present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or substandard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, the former class of cases bring into play the questions of quality of workmanship and fitness for purpose.³¹

This statement highlights some of the most predominant doctrinal and policy concerns involved in considering the extension of the *Bird* doctrine to non-dangerous defects. First, and perhaps most vexing, is whether the matter is simply best dealt with under the law of contract. The question is whether the creation of a non-contractual warranty—and the inevitable erosion of contract principles that would result—is justified when there is no concern regarding physical harm of any kind. Whereas the classification of the repair of a dangerous defect as “economic loss” is really only a matter of timing—the hypothesis being that failure to repair the defect would in time give rise to physical harm—there is no such concern with respect to non-dangerous defects. The only loss that would ever be suffered at the hands of such a defect would be economic. The *only* reason to acknowledge a duty of care in respect of non-dangerous defects would be to provide a non-contractual warranty of product quality, of which the courts have until now been so sceptical, to guard against economic loss—where recovery in products liability has rarely been possible at all.

²⁷ *Bowen v. Paramount Builders Ltd.*, [1977] 1 N.Z.L.R. 354.

²⁸ *Bryan v. Maloney* (1995), 69 A.L.J.R. 375 (H.C.).

²⁹ For example, *Lempke v. Dagenais*, 547 A.2d 290 (N.H. Sup. Ct. 1988); *Richards v. Powercraft Homes Inc.*, 678 P.2d 427 (Ariz. Sup. Ct. 1984).

³⁰ *Bird*, *supra* note 1 at 215.

³¹ *Ibid.* at 215.

Certainly, the policy reasons to support such a move are significantly less compelling; traditionally, bodily integrity has received far heavier protection by the common law than have economic interests.³² To this may be added the further observation that non-dangerous defects pose a purely personal burden to the owner, whereas dangerous defects may affect innocent third parties to whom a duty of care is owed in respect of safety.

Another very real policy concern associated with any duty regarding non-dangerous defects is that there is often a market for “shoddy” goods. Some consumers are prepared to accept lesser quality in return for a lower price, particularly if they do not intend to use the goods for long or if they plan to resell the goods quickly. Why, it might be argued, should manufacturers be held to a higher standard of care than the market demands? And more importantly, why should the public be forced to pay more money for goods, in return for a standard of quality greater than that which they desire?

That is not to say that there may not be some very real arguments in favour of recognising a duty in respect of non-dangerous defects, particularly in buildings. Arguably, the prohibitive cost of repairs and the better ability of the builder to absorb these costs weigh in favour of such a duty. It is difficult, however, to make these same policy arguments in favour of defective but non-dangerous chattels, and yet there is a very real slippery slope concern because there is no *principled* reason to restrict the duty to buildings only; both defective buildings and chattels could foreseeably give rise to economic loss to subsequent purchasers. If the proximity in these relationships is the same, the only probable way to negate the duty of care in respect of chattels would be to argue the undesirability, on policy grounds, of severely eroding contract principles. It is unclear whether such justification would be sufficient to curb the otherwise inevitable widening of the duty.

In any event, the broadening of the duty to encompass non-dangerous defects in buildings, chattels or both is not necessarily a logical extension of *Bird*. The underlying policy of accident prevention is completely irrelevant to the non-dangerous defect; society would gain nothing from the timely repair of such defects, and so there is no real need to encourage such behaviour. Further, La Forest J. was exceedingly careful in his reasons to avoid language suggestive of extending the duty in this way. In defining the scope of the builder’s liability, he did not stop at requiring the builder to repair the defect, but further required that the building be “[put] back into a non-dangerous state.”³³ The duty as articulated can hardly be said to be intended to apply to non-dangerous defects, since by definition no amount of repair can *restore* a non-dangerous defect to its non-dangerous state!

³² See A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) at 378.

³³ *Bird*, *supra* note 1 at 213.

As mentioned above, however, Canada would hardly be alone if it eventually chose to extend the duty to encompass non-dangerous defects. An excellent example is the decision of the Australian High Court in *Bryan v. Maloney*. In that case, a builder's negligence led to defects which, although not especially dangerous, led to significant devaluation in the value of the building. The High Court held that the builder was liable to the subsequent purchaser for the consequential loss suffered, measured as the amount of the decrease in value. Applying the *Anns* test in a manner similar to the approach taken by the Supreme Court of Canada in *Bird*, the court found that the relationship of proximity between builders and purchasers also extended to subsequent purchasers, who are foreseeable victims of the builder's negligence; this proximity was not extinguished by any prescribed lapse of time, except insofar as damage would no longer be reasonably foreseeable after the building's useful life had been outlived.³⁴ With respect to the second branch of the test, even the erosion of halloved contract principles did not provide ample policy justification to restrict this duty to dangerous defects alone, and the builder's superior knowledge, skill, and experience were cited as compelling reasons in favour of such a duty.³⁵

Supposing for a moment that such a duty in respect of non-dangerous defects were to be recognised in Canada; what would be the standard of care in such cases? Professor Osborne has outlined two possible options in this regard.³⁶ The first would be to define the standard by reference to the original contract between the builder and the first purchaser, in effect, to enforce the contract for the benefit of subsequent purchasers. The difficulty with this approach is that it fails to guarantee any reasonable standard of construction,³⁷ which could result in the claim of a subsequent purchaser being nullified by the original purchaser's low standards. Further, such a standard might encourage builders to create sham corporations to serve as first purchasers, for the purpose of defining minimal standards of quality. Moreover, this approach would only provide more ammunition for contract purists such as Professor Feldthusen, who would bristle at such an overt flouting of the principles of privity; why, they might ask, should subsequent buyers enjoy—at no cost—protection that was bargained and paid for by a previous owner?

Some of these problems might be addressed by Professor Osborne's second suggestion: the development of a separate, non-contractual standard of reasonable quality. The standard could be based, for example, on building codes, cus-

³⁴ *Privest Properties*, *supra* note 25 at 381.

³⁵ *Ibid.* at 382.

³⁶ Osborne, *supra* note 3.

³⁷ Other than, perhaps, statutory building codes—which, as discussed above, may be somewhat inadequate as gauges of reasonableness.

tomary practice in the industry, or on the expectations of safety held by a reasonable consumer. This approach, however, is not without problems of its own. Difficulties would certainly arise if the builder's obligation to the first owner under contract were to be higher or lower than that owed under tort to subsequent purchasers; how could the builder adhere strictly to the terms of the contract? Would it be expected to provide, free of charge, features or services for which the customer is unwilling to pay? Conversely, would a higher contractual standard displace the tort standard?

Another problem with this latter approach, writes Professor Osborne, is that the law would in essence be demanding of all builders in all cases a reasonable standard of care. This harkens back to the concern, expressed earlier, about the existence of a market for shoddy goods. A builder may be liable for the construction of low-cost, low-quality housing, even if the contractual standard of quality is met. Could this concern be met by stipulating in the original agreement of purchase and sale that any subsequent sale of the building be subject to the subsequent purchaser's acceptance of the lower standard? This would likely be considered an unreasonable restraint on alienation.

Perhaps a third possibility might avoid some of these difficulties. Under this approach, the standard of care would be defined on a case-by-case basis, based on the reasonable expectations of the subsequent purchaser. The standard would be what the reasonable purchaser, in all the circumstances of his acquisition of the property in question, would expect the standard of quality and safety to be. Such factors as the location of the building and the reputation of the builder could be considered, as might any special knowledge possessed by the purchaser at the time of the acquisition. This special knowledge might include information as to a higher contractual standard of quality included as a term of the original purchase agreement; if the subsequent purchaser knew of this, the higher standard would be enforced for his benefit. In answer to the inevitable concerns of contract purists, such enforcement would not be due to any prescribed formula of blanket adherence to the contract itself, but rather, because this would have become the standard of quality reasonably expected by the informed purchaser.

This approach has several advantages. It would address the problem of the market for shoddy goods and allow low-cost housing to be built without unreasonable risk to the builder—still requiring a higher standard in respect of more expensive or prestigious buildings. For the safety of even the least informed consumer, the applicable building code would still remain the minimum standard—for every citizen is deemed to know the law and is presumed to expect at least the standards of quality prescribed in the applicable code—and as such would not be too onerous for the builder, who is already statutorily bound to adhere to such codes. Also, in allowing special knowledge of the original contract to be considered as a factor in the purchaser's expectations, this standard would not

permit the builder to benefit simply because the building is resold before the defect manifests itself.

Of course, like any solution, this approach also creates new problems. First is the uncertainty resulting from a floating standard of care. Arguably, it would be unfair to hold the builder to a standard defined by the expectations of the consumer, which for whatever reason could be well beyond anything ever contemplated by the builder. Additionally, the evidentiary problems involved in proving the basis for the purchaser's reasonable expectations might prove to be numerous and onerous. However, this approach seems as valid as any, and certainly appears to solve more problems than it creates; perhaps, with further refinement through judicial involvement, it could prove to be a useful standard.

IV. CONCLUSION

THE DECISION IN *BIRD* represents a much-needed clarification of the law in situations where a subsequent purchaser suffers economic loss as a result of a dangerous defect in a building—and probably a chattel—where such defect was caused by the negligence of the original builder or manufacturer. The recognition of a duty of care owed by the builder in such an instance is a rational, principled, and sensible development, and it might well be argued that any other holding would have been counterintuitive. Since damages would unquestionably have been recoverable had the defect remained undiscovered or in bad repair until it caused physical harm to persons or property, it would have been pure folly to discourage property owners from taking pre-emptive steps to avoid such damage by denying recovery of the costs incurred in so doing.

However, in declining to go further and provide similar guidance with respect to non-dangerous defects, the court has once again left the law in this area twisting in the wind, suggesting that a change might be in order in an appropriate case without providing any indication of how such situations are to be handled by lower courts. Accordingly, it will be incumbent upon the court in future cases to deal with the matter of non-dangerous defects and to decide whether to follow the examples of other jurisdictions in expanding products liability to this degree or to remain more conservative in this area and leave the dangerous defects restriction in place.

The court would be well-advised to consider the implications of further extending the duty of care to subsequent purchasers of buildings containing non-dangerous defects. The slippery slope thus created would almost certainly lead to total recoverability in tort for defects in product quality, thus obviating the need for contractual warranties in this area (excepting those warranties which do not require negligence by the builder or manufacturer as a precondition for recovery). In the absence of significant danger to life or property, there would seem to be little justification for such an erosion of the principles of freedom and privity of contract. While the promotion of a policy of accident prevention

is a laudable one and properly within the realm of the law of torts, it is a stretch to propose similarly about the prevention of shoddy workmanship. That is the province of contract law and sale of goods legislation, and should remain so. The court must resist the temptation to impose such an unnecessary and unjustified restriction on freedom of contract.

The time has come for the court to eliminate once and for all the uncertainty that continues to pervade the area of claims for product quality defects. Until it does, the contractual warranty remains alive in Canada—but for how long, nobody can be quite certain.

