Citation: Day v. Regional District et al
2000 BCSC 1134

Date: 20000724
Docket: 27357
Registry: Kelowna

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WALLACE ARTHUR DAY and MARY ANNE DAY

PLAINTIFFS

AND:

**REGIONAL DISTRICT OF CENTRAL OKANAGAN,
HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA**

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE DROSSOS

Counsel for the Plaintiffs:	Howard R. Berge
Counsel for the Defendant, Regional District of Central Okanagan:	Frank R. Scordo And L.S. Marchand
Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia:	Thomas H. MacLachlan
Dates and Place of Hearing:	September 1, 2, and 3, 1999 & February 22 and 23, 2000 Kelowna, B.C.

I. OVERVIEW

[1] The Days bring this action against the defendants for damages arising out of the settling of the Days' house, apparently caused by the construction of the house on loose fill. Specifically, the Days submit that the defendants failed to warn them that the lot on which the house was built consisted of uncompacted fill and therefore posed a foreseeable and substantial danger to the health and safety of the house's occupants, including the plaintiffs. This cause of action was argued under the Rule 18A procedures for a summary trial.

[2] The defendant Regional District of Central Okanagan (the "Regional District") denies that it owed a duty of care to the plaintiffs and, in the alternative, claims that the plaintiffs' cause of action is statute barred as a result of the expiration of the applicable limitation period.

[3] The defendant Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Transportation and Highways (the "Department of Highways"), similarly denies that it owed a duty of care to the plaintiffs and claims that the limitation period has expired.

[4] In addition, the Department of Highways submits that only some of the issues before the court can be appropriately

disposed of by way of a hearing under Rule 18A. However, in light of the plaintiffs abandoning that part of their cause of action, i.e. the claim for negligent inspection, which the Department of Highways submitted was inappropriate for disposition under Rule 18A, the suitability of this case under Rule 18A is no longer in issue. In any event, I find that this case is now appropriate to be dealt with under Rule 18A.

II. BACKGROUND

[5] The plaintiffs, Wallace Arthur Day and Mary Anne Day, are husband and wife. They are the registered owners of a fee simple interest in a property at 1219 Sunnybrae Road, which is legally described as Lot 26, District Lot 581, Osoyoos Division Yale District, Plan 17329 (the “Property”). The Property is in the Sunnyside Subdivision (the “Subdivision”) near Kelowna, British Columbia. The house that is the subject matter of this litigation is located on the Property.

[6] The Regional District was originally incorporated by Letters Patent on August 24, 1967 and is now incorporated under the provisions of the ***Municipal Act***, R.S.B.C. 1996, c. 323. On November 30, 1969 the Regional District assumed responsibility for, among other things, community planning and building regulation from the Central Okanagan Regional

Planning Board (the “Planning Board”) by Supplementary Letters Patent.

[7] The Department of Highways has at all material times been responsible for granting approval of the Subdivision.

[8] In the mid 1960s, West Sunnyside Lands Ltd. (“West Sunnyside”), a land developer, approached the Planning Board with a proposal to create the Subdivision, for which no zoning was in place. The Planning Board informed West Sunnyside that approval of the Subdivision relied on the approval of, among other bodies, the Department of Highways.

[9] On April 15, 1966 the Department of Highways received a formal application for the approval of the Subdivision from West Sunnyside. In June, 1967 the Department of Highways approved the Subdivision. The Plan of Subdivision was deposited at the Land Registry Office on July 26, 1967. On or about July 31, 1967 a prospectus relating to the Subdivision was filed with the Provincial Superintendent of Insurance. The prospectus states in part that “Lot 25 and 26 [have] been filled to a depth of 12 feet at the north end …”.

[10] On August 16, 1971 the Regional District issued a building permit for the construction of the house on the Property to Mr. Revill, the owner, together with his wife, of

the Property at that time. The Revills had the house built on the Property.

[11] The plaintiffs purchased the Property from the Revills in April, 1974. The plaintiffs were not informed by anyone that the house had been built on fill nor did they receive a copy of the prospectus.

[12] The plaintiffs first experienced problems with settling of the house in 1977, when they noticed cracks in the ceiling, doors sticking, and water flowing from the bank beneath the house. The plaintiffs consulted their insurers, and in May, 1978 they were instructed to obtain an engineer's report of their property. In June, 1978 the plaintiffs obtained a report from Westside Engineering & Design Ltd. (the "Westside Report"), which attached a report from geotechnical engineers, Interior Testing Services Ltd. (the "Interior Report") dated June 14, 1978.

[13] The Westside Report makes the following conclusions:

> As can be seen in Attachment 5 [the Interior Report] the footings are supported on original ground consisting mainly of silt with some layers of clay.
>
> The silt is characterized by a good bearing capacity in dry condition but when wet, its structure breaks down with a considerable decline in strength as a result.
>
> …

> We have concluded that the settlement and consequent damage to the house resulted from the leak in the 6 inch water main. … Over a period of ten months the ever increasing presence of free water caused a gradual decline of the bearing capacity of the soil finally resulting in settlements.

[14] The Interior Report identified fill in test holes dug around the house to a depth of 5.5 feet at the northwest corner. The test holes were only dug to 5.5 feet. The Interior Report contains the following comments:

> Moisture migrating through the soil found the line of least resistance for travel, the fill area around the building, and has saturated the material.
>
> The soil is basically a silt, which when dry, has good bearing capacity. However, when moistened, the silt breaks down and becomes very compressible.

[15] Based on the conclusions in the Westside Report, the plaintiffs made a claim to their home insurers, Lloyds of London (“Lloyds”), through their underwriters. On behalf of Lloyds, reports were made by structural engineers, Stanley Associates Engineering Ltd., dated October 27, 1978 (the “Stanley Report”), and geotechnical engineers, Golder Associates Ltd. dated October 12, 1978 (the “Golder Report”).

[16] The Golder Report is based on two boreholes that were made to depths of 21.5 feet to 23.5 feet, two hand auger holes made to depths of 6.0 to 7.5 feet, and a review of historic

aerial photographs. The following conclusions are made in the Golder Report:

> Based on the results of the investigation and a study of the air photographs it is our opinion that the lot is overlain by loose fill deposits and loose natural deposits. …
>
> The loose fills and natural deposits have been saturated at several levels. The degree of saturation appears a maximum under the north end of the house. The loose fills would be expected to consolidate on saturation. The natural loose silty deposits are also such that saturation would break down the artificial bonds or structure and result in settlement.
>
> We believe that the settlement profile which has developed to date represents the extent of loose fills which have been saturated. The settlements have been excessive along the west and north walls. If the loose deposits are not further saturated no further settlements would occur. However, voids may be present between the structure and the loose fill and further subsidence could take place in limited areas.

[17] The Stanley Report comments on the remedial measures that were recommended in the Golder Report. The Stanley Report also provides recommendations for limiting the introduction of water to the site, noting that "[a]nother injection of water into the supporting soils may result in further settlements".

[18] The plaintiffs received and reviewed each of the Westside, Interior, Stanley, and Golder Reports in late 1979 or early 1980.

[19] Lloyds instructed N & H Contracting Ltd. to repair the foundations of the house. The repairs were completed under the supervision of Golder Associates Ltd. at a cost of $60,000.00.

[20] Lloyds commenced a subrogated action against several parties, essentially alleging that the defendants in that action had negligently caused a water leak from a water main that resulted in the settlement of the house. The subrogated action was settled during the course of trial.

[21] Despite the repairs made to the house, more settlement occurred in the driveway and patio, and cracks appeared in the basement walls, the exterior of the house and in the carport.

[22] In September, 1987 the plaintiffs sold the Property to Frederick and Margaret McKague (the “McKagues”).

[23] On April 27, 1989, the McKagues commenced an action against the Days alleging that the house was built on unstable fill soils, the house was actively settling, and the Days had actively concealed these facts from the McKagues. The Days denied the allegations and actively defended the McKague action essentially on the basis that:

(a) The Days had fully disclosed the previous settlement of the home and had made all of the previous engineer’s reports available to the McKagues;

(b) The settlement problems experienced by the McKagues resulted from further water infiltration; and

(c) The McKagues were negligent in failing to control further water infiltration or identify the source of the further water infiltration.

[24] During the course of the McKague action, and no later than June 4, 1990, the McKagues provided the Days with a report prepared by Interior Testing Services Ltd. dated October 5, 1988 (the "Second Interior Report"). This report generally indicates that new substantial settlements of the house had occurred as a result of water infiltrating fills under the house, and includes the following statements:

> It is understood that this house has previously been repaired after it was discovered to be partially supported on deep loose FILLS. From the information reviewed, it appears that the house walls were probably underpinned to suitable native grade, and the floor slab was left to be supported by the FILL, with precautions against water infiltration recommended to minimize further FILL settlements.
>
> It is apparent that substantial settlements have now occurred under the parking garage floor slab. From the previous information, it appears highly likely that water infiltration has been the primary cause of the new substantial settlements.
>
> …
>
> On September 9, 12, and 21, 1988, a series of four hand auger holes were dug down to 9' to 13' below grade. …
>
> …

> As anticipated, each hole encountered FILL soil. It is possible that native soil was encountered at the base of test holes two and three, but this is not certain.

[25] As part of his preparation in the McKague action, on January 16, 1991 Mr. Day met with Mr. Carlsen, who prepared the Golder Report. Mr. Day took notes of the conversation and delivered those notes to his counsel, Mr. Watts. In discovery, Mr. Day stated that it "could be" that he understood from his conversation with Mr. Carlsen that some of the house's original footings may have still been on fills.

[26] After receiving Mr. Days' notes of his conversation with Mr. Carlsen, Mr. Watts wrote to the Days by letter on January 17, 1991. In that letter, Mr. Watts expressed the following concerns:

> I am very concerned with the way in which this matter appears to be developing. Based upon Wally's notes, it appears that the problems with the house may be much more substantial than we had previously understood. It may be that the engineers who reviewed the original problem and recommended repairs were negligent in the advice that they provided at that time in the sense that the original problem that they were retained to fix has repeated itself. This would mean that we would have to take action on your behalf against the engineers by issuing a Third Party Notice in the presently pending action.

[27] The Days, as defendants in the McKague action, issued a Third Party Notice against the engineers responsible for the

1978 repairs on April 5, 1991, but not against the Regional District or the Department of Highways.

[28] On March 13, 1991, Mrs. Day wrote to Mr. Watts:

> It is only now that I understand that Mr. Hardwick [counsel for the McKagues] believes that "the basement slab & garage slab are on loose fill soils." That was never my understanding. He asked me a question on this towards the end of my discovery & I didn't understand the question. I thought that he was referring to the underpinnings of the foundation. I know that my knowledge of the repairs are limited but I always have understood about the danger of water & clay soils.
>
> (Emphasis in original)

[29] On December 19, 1991, Mr. Watts received an engineer's report prepared by M.S.S. Engineering Ltd. (the "M.S.S. Report") from Mr. Hardwick, who was counsel for the McKagues. The Days received a copy of this report shortly thereafter. On the basis of a review of the previous engineer's reports, a level survey, and a site inspection, the M.S.S. Report made the following conclusions:

> 1. Except for the south east quadrant, the house was constructed on loose fill deposits and loose natural deposits of silt, sand and clay.
>
> 2. The footings, both interior and exterior, except for the east wall and the easterly portion of the south, initially, were constructed to bear on the loose soil. …

[30] The M.S.S. Report recommended further underpinning of the foundation walls and the replacement of loose fills underlying the basement floor slab with compact structural bulk fill.

[31] After reviewing the M.S.S. Report, Mr. Merkley, Mr. Watts' partner, wrote to Mr. Hardwick on December 24, 1991. This letter was copied to the Days. Mr. Merkley wrote:

> On the assumption that this is the engineering evidence on which the Plaintiffs [the McKagues] rely to establish their claim, we see no basis upon which this claim can be maintained against our clients. Firstly, MSS Engineering concludes that the house was constructed on loose fill. If that is actionable, then our clients are not "to blame" for the approval of the construction base. That would fall upon the building contractor and the Municipal Inspectors. In that regard, we would suggest that those entities be joined to this lawsuit.
>
> If the water infiltration problems are the continuing cause of the alleged settlement then, again, those problems arise from the failure of proper engineering to have been carried out at the time the infiltration was detected. This was addressed by the work done by the Third Parties. …

[32] On December 29, 1991 Mrs. Day wrote to Mr. Watts, stating that she "found an old copy of the Prospectus of West Sunnyside Lands Ltd. …". She then reproduced the portion of the prospectus that indicates that Lots 25 and 26 had been filled.

[33] The next letter of significance was one from Mr. Day to Mr. Watts on January 7, 1992, in which Mr. Day recounted the "highlights" of his meeting with Mr. Williams, the author of the Second Interior Report. Among the "highlights":

> …
>
> 6. All of Sunnyside is loose fill soils.
>
> 7. Geo-tech is required for new buildings because the Regional Dist. lost a case to Sid Pratt, 3395 Sunnyside for allowing his house to be built on fill. Pratt was awarded $100,000.00 by the Kelowna Supreme Court. …
>
> 8. Pratts [*sic*] house is two blocks above McKague.
>
> …

[34] The plaintiffs Day then began investigating Mr. Pratt's case against the Regional District. On January 22, 1992 Mrs. Day wrote to Mr. Watts, briefly relating the results of their research into Mr. Pratt's case. She then speculated as to why Mr. Hardwick would not add the Regional District to the McKague's case:

> Maybe Hardwick won't add the Regional District to our case because Golder and Associates investigated that lot and made recommendations for the reconstruction of the foundations on that particular land in 1978.

[35] On March 23, 1992, Mr. Watts wrote to the plaintiffs. A portion of that letter reads:

> I note that the file has taken a new twist in the sense that a major part of the problem may in fact have resulted from the fact that the house was originally constructed on unstable material, which may be a significant cause of the present difficulties. This leaves an important question as to whether the repairs that were carried out to the house have contributed to or perhaps have minimized the present difficulties.

[36] Later, on May 4, 1992, Mr. Watts wrote to Mr. Hardwick, noting:

> When I visited the subject property I noted that other residences in the same neighbourhood have also experienced problems with soil movement or soil settlement. Have you considered whether the authorities who approved the original subdivision of this property for residential building purposes may have some liability in the matter?

[37] The Days received a copy of this letter.

[38] As part of their defence to the McKague action, the Days retained C.O. Brawner Engineering Ltd. to prepare a site report and received the Brawner Report on September 16, 1992 (the “Brawner Report”). Under the heading “Cause of Settlement”, the Brawner Report states:

> No serious problems occurred with the house settling for about five years after construction. Hence the house foundations were adequately designed for the original site conditions. Whether the foundations were on fill or original ground did not influence the performance. In order for the large magnitude of settlement to occur, an extraneous event was required. All engineers who were involved in the investigation have agreed excess water from the

> broken water main upslope was that event. I support that conclusion.
>
> …
>
> From an engineering standpoint, I consider nothing that Mr. Day has done has contributed to the settlements that the house has experienced after the house was sold to the McKagues.

[39] On October 8, 1992, Mr. Watts wrote to the Days, expressing his opinion that, on the basis of the Brawner Report, neither they nor the Third Party engineers would likely be liable to the McKagues. On June 18, 1993, the Third Party action against the engineers in the McKague action was dismissed by consent without costs.

[40] After some negotiation, the McKagues' action against the Days was settled. In exchange for the McKagues dismissing the action, the Days agreed to repurchase the house for $400,000.00. An appraisal of the house in an "undamaged" state valued the house at $530,000.00. In discovery, Mr. Day stated that he believed the house was worth $500,000.00 in an undamaged state and that the necessary foundation repairs would cost approximately $100,000.00.

[41] The settlement was completed with the transfer of the Property to the Days in August, 1994.

[42] The foundation repairs were completed in February, 1995. All necessary permits and inspections were made, and no complaint is made concerning these repairs.

[43] As part of the repairs to the house, the plaintiffs obtained a further engineering study of the soils underlying the house, which culminated in a report from Vickars Developments Co. Ltd. (the "Vickars Report") dated February 15, 1996. The Days submit that it was on the basis of the Vickars Report that they learned that the house had been constructed on uncompacted fills to a depth of 30 feet. The Vickars Report states in part:

> … The house sits astride a perimeter concrete foundation heavily reinforced quite deep and has undergone differential settlement on two or three occasions with finally a definitive repair occurring done by Vickars Developments in the summer of 1994. Since that time the house has remained stable though there is some geotechnical opinion that the infilled ravine to the west side of your house and indeed the slope between your house and the lake itself is unstable. … Since there were signs of movement on the slope in the past as well as the marked amount of fill material we found placed on the west and north sides of your lot we elected to place a slope indicator tube …
>
> As you know following the old ravine up from your house there are multiple houses which are undergoing large amount [*sic*] of differential subsidence in the area. This appears to be exacerbated by large amounts of water run off which is being added to the ground flowing down this ravine past the south and west sides of your property …

> We examined your house and its environs on many occasions and we concur that there is an increase in water on the slope as well as a higher water table than there was in 1989 when the initial settlement analysis and slope stability was done by Golder Associates. Re-examination of this problem in 1994 shows that the water table is much higher and the fills beneath the house have a larger amount of water now than in 1989 …

[44] The plaintiffs gave the Regional District written notice of their intention to commence an action against the Regional District, pursuant to section 286 of the ***Municipal Act***, for damages for the repairs to the foundation on March 6, 1995.

[45] The plaintiffs commenced this action on July 26, 1995.

III. ISSUES

[46] The issues in this case are:

(1) Is the plaintiffs' action against either of the defendants statute barred because of the expiration of the applicable limitation period or failure to give timely notice of the cause of action?

(2) Is either the Regional District or the Department of Highways liable to the plaintiffs due to their failure to warn the plaintiffs that the house was constructed on loose fill?

IV. THE LAW

A. Limitation Period

[47] There are limitation periods within the ***Municipal Act*** that would normally apply to a cause of action against the

Regional District. However, for failure to warn cases, the limitation periods are set by the ***Limitation Act***, R.S.B.C. 1996, c. 266, not the ***Municipal Act***: ***Grewal* v. *District of Saanich*** (1989), 38 B.C.L.R. (2d) 250, 60 D.L.R. (4th) 583 (C.A.). That case also stands for the proposition that although section 285 is not applicable in failure to warn cases, section 286 of the ***Municipal Act***, which requires timely notice in writing of a cause of action against a municipality to be delivered to that municipality, still applies.

[48] Of course, the limitation periods in the ***Limitation Act*** apply to the Department of Highways.

[49] Section 3 of the ***Limitation Act*** provides a two year limitation period for failure to warn cases sounding in tort involving damage to property:

> 3 (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
>
> (a) subject to subsection 4(k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

[50] Section 6 of the ***Limitation Act*** postpones the running of limitation periods in certain circumstances:

> 6 (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
>
> …
>
> (b) for damage to property;
>
> (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
>
> …
>
> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[51] Section 286 of the ***Municipal Act*** states:

> (1) A municipality is in no case liable for damages unless notice in writing, setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality

> within 2 months from the date on which the damage was sustained.
>
> …
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in case of appeal, the Court of Appeal, believes
>
> (a) there was reasonable excuse, and
>
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[52] The plaintiffs concede that the limitation period for bringing the present action would have expired before they commenced this action but for the operation of section 6 of the ***Limitation Act***. The plaintiffs argue that the running of the limitation period should be postponed for two reasons: (1) the plaintiffs did not discover the true cause of the settlement, the use of deep fills, until 1995; and (2) the plaintiffs did not have a reasonable prospect of success until the common law concerning the duty to warn changed in 1995 with the judgment of ***Winnipeg Condominium Corp.*** **v.** ***Bird Construction Ltd.***, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193.

[53] In arguing the first branch, the plaintiffs submit that the limitation period does not run from the discovery of the injury but from the discovery of the cause of the injury: ***355022 B.C. Ltd.*** **v.** ***CCS Properties Inc.*** (1995), 14 B.C.L.R.

(3d) 107, [1996] 2 W.W.R. 622 (C.A.), at para. 29. The plaintiffs argue that they did not know of the use of deep fills in the Subdivision until after they repurchased the Property from the McKagues and carried out more testing as part of the repairs to the house.

[54] The defendants submit that on the evidence the plaintiffs should have been aware of the potential cause of action generally, and the cause of the settlement specifically, in 1979 and 1980 or, in the alternative, by no later than the spring of 1992. They argue that the limitation period began to run from either of those times and therefore expired before the plaintiffs commenced this action.

[55] In arguing the second branch, the plaintiffs rely on the reasons in ***Edgeworth Construction Ltd.*** **v.** ***Thurber Consultants Ltd.*** (1996), 18 B.C.L.R. (3d) 127, [1996] 5 W.W.R. 730 (S.C.). In that case, the plaintiff Edgeworth submitted that ***Winnipeg Condominium*** changed the law so that the limitation period did not begin to run until it was released. In finding for the plaintiff that the limitation period had been postponed, Errico, J. cited, at para. 28, this passage from the minority judgment of Lambert, J.A. in ***Perron*** **v.** ***RJR-MacDonald Inc.*** (1990), 43 B.C.L.R. (2d) 178 at 191, 66 D.L.R. (4th) 132 (C.A.):

> The sixth point also relates to the words "a reasonable prospect of success". It is possible for such things as the overruling of a previous decision to change a lawyer's or a layman's perception of whether an action has a reasonable prospect of success. An action may, on undisputed facts, be thought to have no reasonable prospect of success when the cause of action arises. But ten years later it may, for the first time, be considered to have had, when it arose, a reasonable prospect of success. On the basis of the present wording of the postponement provisions, there is, in my opinion, no alternative but to conclude that in those circumstances the limitation period would be postponed throughout the period when the action was reasonably thought to have no reasonable prospect of success, and to start to run only when the action was reasonably thought to have a reasonable prospect of success. Changes in the general knowledge about the significance of relevant facts might have a somewhat similar effect.

[56] Errico, J. noted, at para. 37, that Newbury, J. had expressed concern about Mr. Justice Lambert's reasoning in ***Edgeworth Construction Ltd.*** **v.** ***N.D. Lea & Associates Ltd.*** (1995), 5 B.C.L.R. (3d) 263, [1995] 6 W.W.R. 343 (S.C.), where she stated:

> I confess to finding this suggestion surprising, given the balance sought by the Act between certainty and finality, and fairness to the plaintiffs who notwithstanding reasonable efforts to protect themselves are discouraged from suing by reason of what proves to be only a temporary difficulty in the law. The result envisaged by Lambert J.A. would, subject to the thirty-year "ultimate" limitation, permit the "revival" of causes of action long abandoned, while litigants who in the meantime had pursued their claims unsuccessfully would be unable to take advantage of later changes in the law.

[57] I have similar concerns with the present state of the law. Although the reasons of Lambert, J.A. were not mentioned in the majority decision of the Court of Appeal, Newbury, J., as she then was, followed the same. Errico, J. subsequently made a similar determination at para. 39 of his reasons:

> I have concluded that a claim as framed as a claim for economic loss incurred in correcting a negligent design so as to arrest the likelihood of future physical harm or property damage would not have a reasonable prospect of success prior to May 30, 1989. There is no evidence that the plaintiff sought or received that advice at that time but as I read section 6(3) of the *Limitation Act* that is not necessary for the limitation period to be postponed. Accordingly, I conclude that the plaintiff's claim framed in this manner is not barred by section 3 of the *Limitation Act*.

[58] I accordingly feel constrained to follow the reasons of these eminent jurists.

[59] In reply to the plaintiffs' second branch of argument, the defendants submit that "duty to warn" cases have been well established since at least ***Rivtow Marine Ltd.*** **v.** ***Washington Iron Works***, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530. The defendants also note that there have been a great number of cases involving allegations of the failure of municipal authorities or vendors to warn unsuspecting purchasers of real property hazards: *e.g.*, ***District of Surrey*** **v.** ***Church et al***

(1977), 76 D.L.R (3d) 721 (B.C.S.C.), aff'd [1979] 6 W.W.R. 289 (B.C.C.A.); and ***Grewal* v. *District of Saanich*** (1986), 43 R.P.R. 207 (B.C.S.C.), rev'd on other grounds (1989), 38 B.C.L.R. (2d) 250 (C.A.).

[60] In the alternative, the defendants submit that ***Winnipeg Condominium*** was not concerned with a duty to warn or recovery of costs to repair actual physical damage to a building. Instead, the defendants argue that it was only concerned with the recovery of damages flowing from a dangerously defective good where there has been no actual physical harm. The defendants note that an argument which they say is similar to the plaintiffs' argument in this case was rejected in ***Strata Plan No. VR 1720* v. *Bart Developments Ltd.*** (1998), 53 B.C.L.R. (3d) 289 at 301 (S.C.).

[61] Furthermore, the defendants submit that the plaintiffs were aware that neighbours with homes built on fill in the same Subdivision commenced actions against the Regional District for failure to warn as early as 1982, so that the plaintiffs' contention that they had no reasonable prospect of success until ***Winnipeg Condominium*** is untenable.

[62] As for the operation of section 286 of the ***Municipal Act*** in relation to the Days' cause of action against the Regional District, the plaintiffs Day submit that relief should be

granted on the same basis as the postponement of the running of the limitation period under the ***Limitation Act***. In making this submission, the plaintiffs rely on ***Petrie*** **v.** ***Groome*** (1991), 4 M.P.L.R. (2d) 182, 45 C.L.R. 132 (B.C.S.C.), ***Myriad Projects Ltd.*** **v.** ***Vernon (City)*** (1994), 99 B.C.L.R. (2d) 278, 24 M.P.L.R. (2d) 132 (C.A.), and the Court of Appeal's decision in ***Grewal*** **v.** ***District of Saanich*** (1989), 38 B.C.L.R. (2d) 250, 60 D.L.R. (4th) 583.

[63] ***Petrie*** and ***Myriad Projects Ltd.*** rely on the reasoning in ***Grewal*** in assessing section 755, the predecessor to section 286. In ***Grewal***, the court said the following concerning the operation of section 755 (at page 256):

> The first thing to be noticed about s. 755 is that it does not limit the time within which an action is to be brought. But the section has the same draconian effect as a limitation period because it bars recovery if notice has not been given, and if the saving provisions based upon reasonable excuse and no prejudice are not met.
>
> Secondly, s. 755 is not confined to giving notice that damage has been sustained but also the notice must provide information of: "the time, place and manner in which the damage is sustained".
>
> The object of the section, like the provisions contained in s. 23(2) of the Insurance (Motor Vehicle) Act, is to provide an early opportunity for the municipality to examine the place where the damage has occurred, to interview witnesses, and to consider whether to settle or contest the matter.
>
> In order for the section to fulfill its purpose a claimant must be in a position to know what and who

> has probably caused or contributed to the damage which has been sustained.
>
> The duty to give notice to the municipality of a possible claim does not arise merely from the discovery of the damage. The complainant must be able to give particulars of the time, place, and manner of the damages.
>
> Furthermore, the complainant must be in a position to know that the municipality has committed some act or has omitted to do something which may make it liable, in whole or in part, for the damage sustained by the complainant before the duty to give notice can arise.

[64] In response to the plaintiffs' arguments concerning section 286, the Regional District submits that the plaintiffs ought to have been aware of the potential cause of action for failure to warn in 1979 and 1980, or, alternatively, in the spring of 1992, or, in the further alternative, upon the plaintiffs' repurchase of the house in 1994. Therefore, the Regional District submits that the two month notice period under section 286 was not observed by the plaintiffs.

B. Failure to Warn

[65] The plaintiffs abandoned their claim for negligent inspection. Their claim for failure to warn is all that remains.

[66] Causes of action for failure to warn have existed at common law for some time. In fact, the decision of the Supreme Court of Canada in ***Rivtow Marine Ltd.***, *supra*, was a

failure to warn case. In that decision, Ritchie, J. reviewed the history of the duty to warn. I need not repeat that review here.

[67] However, I note the two questions that must be asked in order to establish whether or not a private law duty of care exists as set out in ***Anns* v. *Merton London Borough Council***, [1978] A.C. 728, [1977] 2 All E.R. 492, and adopted by the Supreme Court of Canada in ***Kamloops (City)* v. *Nielsen***, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641:

> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (2) 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?

[68] It is important to note that, although courts often gloss over them in their reasoning in failure to warn cases, all of the elements of negligence must be present in order for a plaintiff to make out a claim for failure to warn.

[69] I adopt the elements of negligence enumerated by Allen M. Linden in ***Canadian Tort Law***, 6th ed. (Vancouver: Butterworths, 1997), at page 99:

(1) the claimant must suffer some damage;

(2) the damage suffered must be caused by the conduct of the defendant;

(3) the defendant's conduct must be negligent, that is, in breach of the standard of care set by the law;

(4) there must be a duty recognized by the law to avoid this damage;

(5) the conduct of the defendant must be a proximate cause of the loss or, stated in another way, the damage should not be too remote a result of the defendant's conduct; and

(6) the conduct of the plaintiff should not be such as to bar recovery, that is the plaintiff must not be guilty of contributory negligence and must not voluntarily assume the risk.

[70] In reply to the plaintiffs' cause of action for failure to warn, the defendants submit that the duty to warn only extends to unsuspecting purchasers and submit that the plaintiffs Day were not unsuspecting purchasers because when they repurchased the house in 1994 they knew or ought to have known that the house was built on uncompacted fill.

[71] In support, the defendants rely on the decision of Burnyeat, J. in ***444601 B.C. Ltd.*** **v.** ***Ashcroft (Village)*** (18 August 1998), Kelowna 25036 (B.C.S.C.), [1998] B.C.J. No. 1964 (Q.L.). In that decision, the plaintiffs sued in negligence, among other causes of action, alleging that the defendant failed to properly carry out inspections of a building that

was purchased by the plaintiff. Burnyeat, J. held that there were factors that negated the existence of a duty of care owing to the plaintiff from the defendant and dismissed the negligence claim. Among the factors cited by Burnyeat, J. were: the plaintiff's knowledge that the building had suffered extensive damage and was in an obvious state of disrepair; and the building had a replacement value of $748,000.00 and an assessed value of $171,500.00 but the price paid by the plaintiff for the land and building was only $75,000.00.

[72] In the alternative, the defendants, the Department of Highways and Regional District, submit that, in light of the knowledge of the plaintiffs Day of the presence of uncompacted fill when they repurchased the house in 1994, there can be no causal connection between any failure on the part of the defendants to warn the plaintiffs of the fill and any damages incurred by the plaintiffs as a result of the existence of the fill.

[73] In support of this alternative submission, the defendants cite ***Harris* v. *Hartwell*** (15 October 1992), Prince George 21063 (B.C.S.C.), [1992] B.C.J. No. 2194 (Q.L.). In that case, the plaintiffs brought an action against a regional district for failing to warn the plaintiffs that they proposed

to build a house in a flood area. In dismissing the action for failure to warn, Meiklem, J. held that there was no causal connection between the plaintiffs' loss and the defendant's failure to warn because the plaintiffs knew or ought to have known that they were building in a flood area (at page 3).

V. ANALYSIS

A. Limitation Period

[74] As mentioned above, the two year limitation period under subsection 3(2)(a) of the ***Limitation Act*** applies to the action against both of the defendants. The plaintiffs started this action on July 26, 1995. The plaintiffs concede that the limitation period would have expired by that time unless the running of the limitation period was postponed by section 6.

1. Discovery of the True Cause of Settlement

[75] First, the plaintiffs argue that the running of the limitation period is postponed because they did not discover the true cause of the settling of the house until 1995. After a review of the evidence, I cannot agree. In my view, the defendants knew or ought to have known enough about the true cause of the settling of the house by 1992. A review of the evidence shows:

[76] The defendants submit that the plaintiffs should have been aware of the cause of the settlement of the house in 1979

and 1980 by virtue of the engineer's reports prepared in conjunction with the first set of repairs made to the house. I do not agree with this submission.

[77] The first report prepared, the Westside Report, recognizes that the house was built on silt and clay, but stresses the introduction of water into the soil, resulting from a leak in a water main, as the reason for the settlement and the consequent damage.

[78] The second report, the Interior Report, recognizes the existence of some fill up to a depth of 5.5 feet, which was the maximum depth of the test holes. The defendants appear to argue that this should have been enough to put the plaintiffs on notice of the existence of the deeper fills so that the limitation period should have begun to run. In my view, that is not sufficient in this case, especially in light of the fact that the Interior Report also finds that the introduction of water into the soil was the main reason for the settlement.

[79] The Golder Report is based on deeper boreholes, 21.5 feet to 23.5 feet, than the Interior Report. It recognizes the existence of loose fill deposits and loose natural deposits under the Property. However, like the Westside and Interior Reports, the Golder Report ultimately finds that the

main cause of the settlement is the saturation of these fills, not the existence of the fills itself.

[80] Similarly, the Stanley Report recommends limiting the introduction of water onto the site in order to prevent further settlement of the house.

[81] Although the reports prepared in 1979 and 1980 acknowledge the presence of fills on the Property, they all stress the introduction of water into the soil as the main reason for the settlement of the house. In my view, it would be too harsh to find that the plaintiffs ought to have known or suspected that the existence of fills was the actual reason for the settlement of the house. Such a finding would, in my opinion, be based on hindsight, and not on the evidence that was available to the plaintiffs at the time. Accordingly, I do not find that the plaintiffs knew or ought to have known the true cause of the settlement in 1979 and 1980. Therefore, I do not find that the limitation period began to run from that time.

[82] In the alternative, the defendants submit that the plaintiffs knew or ought to have known the true cause of the settlement in 1992. On the whole of the evidence before me, I agree with this submission.

[83] Like the reports reviewed above, the Second Interior Report, dated October 5, 1988, recognizes the existence of fills in the Property. In fact, it goes so far as to recognize the existence of “deep loose FILLS”. However, like the previous reports, the Second Interior Report ultimately blames water infiltration for the settlement of the house experienced after the original repairs.

[84] However, during the course of the correspondence between the plaintiffs Day and their lawyer, Mr. Watts, and Mr. Watts and the lawyer for the McKagues, Mr. Hardwick, and other enquiries, discussions, and documents, it is evident that the plaintiffs and Mr. Watts became aware, or ought to have, that the true cause of the settlement of the house could be the existence of deep fills on the Property.

[85] In early 1991, Mr. Day met with the author of the Golder Report and admitted that he may have understood after that meeting that the house’s original footings could have still been supported by fill. Mr. Day wrote to Mr. Watts concerning this meeting.

[86] In his reply, Mr. Watts recognized that “the problems with the house may be much more substantial than we had previously understood”. On the basis of that recognition, the engineers responsible for the earlier repairs were issued a

Third Party Notice in the McKague action, but as stated earlier no such Notice was issued against the Department of Highways or the Regional District.

[87] In a letter dated March 13, 1991 sent to Mr. Watts, Mrs. Day acknowledged her understanding that it was Mr. Hardwick's belief that the basement and the garage of the house were built on loose fill soils.

[88] In late 1991, the plaintiffs Day and Mr. Watts received a copy of the M.S.S. Report, dated December 11, 1991, which unequivocally concludes that "the house was constructed on loose fill deposits and loose natural deposits …", and recommends that the loose fills under the basement be replaced with compact bulk fill.

[89] On the basis of the M.S.S. Report, Mr. Watts' partner, Mr. Merkley, wrote to Mr. Hardwick, as already mentioned, on December 24, 1991. In that letter, Mr. Merkley explicitly recognized that the house was built on loose fill. As a result, Mr. Merkley queried Mr. Hardwick as to the liability of the Regional District which for convenience of reference, I repeat:

> On the assumption that this is the engineering evidence on which the Plaintiffs [the McKagues] rely to establish their claim, we see no basis upon which this claim can be maintained against our clients.

> Firstly, MSS Engineering concludes that the house was constructed on loose fill. If that is actionable, then our clients are not "to blame" for the approval of the construction base. That would fall upon the building contractor and the Municipal Inspectors. In that regard, we would suggest that those entities be joined to this lawsuit.
>
> If the water infiltration problems are the continuing cause of the alleged settlement then, again, those problems arise from the failure of proper engineering to have been carried out at the time the infiltration was detected. This was addressed by the work done by the Third Parties. …

[90] The plaintiffs Day received a copy of Mr. Merkley's letter.

[91] In late 1991, Mrs. Day acquired a copy of the prospectus, which states that Lot 26 is constructed on loose fills. In early 1992, Mr. Day's meeting with Mr. Williams, the author of the Second Interior Report, revealed the fact that all of the Subdivision was built on loose fills. The plaintiffs relayed this information to Mr. Watts by letter.

[92] Early in 1992, the plaintiffs began investigating Mr. Pratt's case against the Regional District, forwarding the results of their research to Mr. Watts. On March 23, 1992 in a letter replying to the plaintiffs, Mr. Watts stated (*supra*, page 13):

> I note that the file has taken a new twist in the sense that a major part of the problem may in fact have resulted from the fact that the house was

> originally constructed on unstable material, which may be a significant cause of the present difficulties. This leaves an important question as to whether the repairs that were carried out to the house have contributed to or perhaps have minimized the present difficulties.

[93] Then Mr. Watts wrote to Mr. Hardwick on May 4, 1992. The plaintiffs received a copy of this letter. That letter states, in part (*supra*, page 14):

> When I visited the subject property I noted that other residences in the same neighbourhood have also experienced problems with soil movement or soil settlement. Have you considered whether the authorities who approved the original subdivision of this property for residential building purposes may have some liability in the matter.

[94] I find that by this point in time the plaintiffs knew or ought to have known that they could bring an action against the defendants for failure to warn of the existence of deep loose fill on the Property. By May 4, 1992, it is clear that the plaintiffs and Mr. Watts had received several indications that the existence of deep fill may have been the cause of the settlement of the house, including the various engineer's reports, the prospectus, the information received from meetings with the authors of the engineer's reports, and the knowledge of other lawsuits by homeowners in the Subdivision. In addition, the correspondence preceding that date reveals that the plaintiffs or their counsel, Mr. Watts and Mr.

Merkley, may have or had in fact realized that the "authorities who approved the original subdivision" may be liable. For example, see Mrs. Day's letter of March 13, 1991, Mr. Merkley's letter to Mr. Hardwick of December 24, 1991, and Mr. Watts' letters to the plaintiffs and Mr. Hardwick on March 23, 1992 and May 4, 1992 respectively.

[95] While this correspondence does not reveal perfect knowledge of the existence of a cause of action against the defendants, perfect knowledge is not what is required. Instead, what is required is knowledge that is sufficient to put a plaintiff on notice that it ought to commence an action against a defendant. The plaintiff can then acquire more evidence pointing to the liability of the defendant during the discovery process in contemplation of a trial.

[96] I recognize that the Brawner Report, released on September 16, 1992, concludes that the existence of fills on the Property did not influence the performance of the original foundations of the house and that the introduction of water was the cause of the settlement. However, I note that the Brawner Report is based on a review of the previous engineer's reports and an inspection of the house and Property on August 27, 1992. No test holes were made in order to further test the soil beneath the house. Under these circumstances, in

light of the previous recognition that the existence of fills may have been the cause of the settlement of the house, it would not be reasonable for the plaintiffs to rely on the Brawner Report. Therefore, despite the existence of the Brawner Report, I find that the plaintiffs knew or ought to have known of the actual cause of the settlement of the home by, at the very latest, May 4, 1992.

[97] If May 4, 1992 is the appropriate date from which the postponed limitation period should run, it is clear that the two year limitation period would have expired long before the commencement of this action on July 26, 1995.

[98] However, in my view the limitation period could not have begun to run on May 4, 1992 despite the fact that the plaintiffs had the requisite knowledge of the actual cause of the settlement of the house, the existence of deep fill on the Property. Although not argued by the plaintiffs in this action, my reading of the ***Limitation Act*** reveals that the limitation period in the present action could not have begun to run until the plaintiffs repurchased the house in 1994.

[99] I reproduce in part section 6 of the ***Limitation Act***, which governs postponement (*supra*, page 19):

> (4) Time does not begin to run against a plaintiff with respect to an action referred to in

> subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[100] Before the plaintiffs repurchased the house, they could not have had a reasonable prospect of success in an action against the defendants because they obviously could not have demonstrated that they had suffered any loss as a result of the defendants' alleged failure to warn of the existence of fill on the Property. Therefore, it was not until the plaintiffs repurchased the house from the McKagues in 1994 that the two year limitation period would begin to run, and, having commenced this action on July 26, 1995, the plaintiffs were within that limitation period.

[101] It may be argued that the limitation period should begin to run from 1992 because at that time the plaintiffs were involved, as defendants, in the McKague action and could have initiated third party proceedings against the defendants in

the present cause of action. However, that is not my reading of the ***Limitation Act***.

[102] In my view, section 4 of the ***Limitation Act*** clearly prevents the expiry of a limitation period from barring, among other things, a third party proceeding. Section four states in part:

> 4 (1) If an action to which this or any other Act applies has been commenced, the lapse of time for bringing an action is no bar to
>
> …
>
> (b) third party proceedings,

[103] It appears that if the expiration of a limitation period is not a bar to commencing third party proceedings, then surely the postponement of the running of limitation periods under section 6 is not applicable to third party proceedings for indemnity or contributions, and other responsive proceedings. Therefore, the discovery by the plaintiffs of those facts which should have put them on notice to commence third party proceedings against the defendants in this action cannot have caused the limitation period to begin to run.

[104] This analysis of the ***Limitation Act*** as it applies to third party proceedings supports my finding that the postponed

limitation period did not begin to run until the plaintiffs repurchased the house in 1994. Accordingly, I conclude that the plaintiffs commenced this action within the limitation period.

2. Change in the Common Law

[105] The plaintiffs argued in the alternative that the limitation period did not start to run until the release of ***Winnipeg Condominium,*** *supra*. In light of my finding that the plaintiffs commenced this action within the limitation period because they could not have had a reasonable prospect of success until they repurchased the house, it is not necessary for me to consider this submission. However, I proceed to do so in case my previous conclusion is incorrect.

[106] The plaintiffs argued that ***Winnipeg Condominium*** changed the law concerning the duty to warn. In actuality, ***Winnipeg Condominium*** was concerned with and changed the law with respect to recoverability in tort for pure economic loss. However, the plaintiffs' submission remains the same: they could not have had a reasonable prospect of success until the release of ***Winnipeg Condominium***. I agree with this submission.

[107] The change in the law brought about by ***Winnipeg Condominium*** is demonstrated by this passage provided by La Forest, J., writing for the unanimous court (at para. 36):

> In my view, the reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to subsequent purchasers of the building for the cost of repairing the defect if that defect is discovered prior to any injury and if it poses a real and substantial danger to the inhabitants of the building. In coming to this conclusion, I adopt the reasoning of Laskin J. in *Rivtow*, which I find highly persuasive. If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building …

[108] In my view the plaintiffs could not have had a reasonable prospect of success in the present action before ***Winnipeg Condominium***. Before the change in law concerning recovery for economic loss, the plaintiffs could not have reasonably expected that they could recover damages from the defendants for the settlement of their house. Therefore, until ***Winnipeg Condominium*** was released by the Supreme Court of Canada, section 6 operated to postpone the running of the two year limitation period.

[109] I should note that I make this finding without deciding whether or not the plaintiffs could in fact recover damages for their economic losses. However, certainty of recovery is not what is required under section 6. The plaintiffs only need to have a reasonable prospect of success, and I find that the reasons in ***Winnipeg Condominium*** provided them with that.

[110] I base this finding on the present state of the law in British Columbia as expressed and reviewed above in ***Perron,*** *supra*, and ***Edgeworth Construction Ltd.,*** *supra*.

3. Section 286 of the *Municipal Act*

[111] As noted above, although the limitation period under the ***Limitation Act*** and not the ***Municipal Act*** apply to the Regional District in this action, section 286 is still applicable. In light of my findings above that the plaintiffs knew or ought to have known of their cause of action against the Regional District and that they had a reasonable prospect of success in that action upon the release of ***Winnipeg Condominium***, I find that the plaintiffs gave timely notice to the Regional District of their cause of action.

[112] Section 286 provides a two month window within which a plaintiff must inform a municipality of "the time, place and manner in which the damage has been sustained …". ***Winnipeg Condominium*** was released on January 26, 1995. The plaintiffs

gave written notice to the Regional District on March 6, 1995, within the two month notice period.

[113] I recognize that section 286 requires notice to be delivered within two months "from the date on which the damage was sustained". However, I note the reasons in ***Grewal***, *supra*, where the Court of Appeal stated (at 256):

> The duty to give notice to the municipality of a possible claim does not arise merely from the discovery of the damage. The complainant must be able to give particulars of the time, place, and manner of the damages.

[114] I also recognize that section 286 does not provide that a plaintiff must have a reasonable prospect of success before the two month period begins running. However, I again rely on ***Grewal*** (at 256):

> Furthermore, the complainant must be in a position to know that the municipality has committed some act or has omitted to do something which may make it liable, in whole or in part, for the damage sustained by the complainant before the duty to give notice can arise.

[115] In my view a plaintiff cannot be in a position to know that a municipality may be liable until the law is such that liability may flow from the action or inaction of the municipality. Therefore, it was not until ***Winnipeg Condominium*** was released that the plaintiffs could have been

expected to provide written notice to the Regional District of their cause of action against the Regional District. Accordingly, section 286 does not operate in this case to bar recovery of damages by the plaintiffs from the Regional District.

B. Failure to Warn

[116] Having decided that the limitation period under the ***Limitation Act*** should not operate to prevent this action from proceeding and the notice requirement under the ***Municipal Act*** should not operate to prevent recovery against the Regional District, I turn to consider the plaintiffs' cause of action on its merits.

[117] In light of the finding of fact that I made above, that the plaintiffs knew or ought to have known of the true cause of the settlement of the house in 1992, well before their repurchase of the house in 1994, the plaintiffs' claim for failure to warn cannot stand. Whether characterized as negating any duty of care that the defendants may have owed to the plaintiffs or as negating any causal connection between the alleged failure of the defendants to warn the plaintiffs and any damage sustained by the Days, I find that the plaintiffs' knowledge operates to prevent them from recovering damages from the defendants.

[118] In so finding, I agree with the defendants' submission that the plaintiffs' knowledge removes them from the class of unsuspecting purchasers, and, therefore, the duty to warn, if indeed the defendants had such a duty in this case, should not extend to the plaintiffs. I note the decision of ***444601 B.C. Ltd.***, *supra*, where Burnyeat, J. held that the plaintiff's knowledge in that case was a consideration to be taken into account under the second phase of the ***Anns*** test which negated the duty to warn which was otherwise owing to the plaintiff.

[119] I make a similar finding in the present case. The plaintiffs' knowledge of the true cause of the settlement of the house before their repurchase operates to negate any duty to warn that the defendants may have owed to the plaintiffs. Without a duty being owed to the plaintiffs, there obviously cannot be a finding of negligence against the defendants for breach of a duty.

[120] I also agree with the defendants' alternative submission that the plaintiffs' knowledge prevents there being a causal connection between the defendants' alleged failure to warn and the plaintiffs' loss. I note the similar finding made by Meiklem, J. in ***Harris***, *supra*.

[121] In the present case, the plaintiffs had or ought to have had knowledge of the true cause of the settlement of the

house, the existence of fills on the Property, well before they repurchased the house. In fact, it appears that the plaintiffs had more information before them than the defendants had. If that is the case, how can the defendants be liable for failing to warn the plaintiffs of the existence of fills? Certainly it cannot be argued that the defendants' failure to warn the plaintiffs was the cause of the plaintiffs' loss when the plaintiffs had better knowledge of the cause of the settlement than the defendants. Further, with full knowledge, the Days allowed for their loss in their settlement of the McKague action on the repurchase of the property. Undamaged, it was appraised at $530,000.00 and valued at $500,000.00 by Mr. Day, who allowed for $100,000.00 for the damage repair on arriving at the reduced repurchase price of $400,000.00 for the property. On considering the whole of the foregoing, the Days cannot now turn around and look to recover any deficiency from the defendants for a failure to warn.

[122] Regardless of how it is characterized, as negating the duty of care owed to the plaintiffs or as preventing the existence of a causal connection between the defendants' failure to warn and the plaintiffs' loss, the knowledge that the plaintiffs had upon the repurchase of the house from the

McKagues prevents the plaintiffs from being successful in this action.

VI. DISPOSITION

[123] The plaintiffs' claim against each of the defendants is dismissed, with costs to the defendants.

"N.A. Drossos, J."
The Honourable Mr. Justice N.A. Drossos