

**BUILDER BEWARE:  
THE GROWTH IN LIABILITY FOR  
CONSTRUCTION DEFICIENCIES**

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# Builder Beware: The Growth in Liability for Construction Deficiencies

## I. Introduction

*Caveat emptor* (buyer beware) has been part of our legal vocabulary for centuries. A product of the laissez-faire economic order that once prevailed in England, the doctrine of *caveat emptor* encouraged consumers to look out for their own interests, and ensured that merchants were free to conduct their business with minimal interference.

The law kept pace as society evolved from the laissez-faire origins of *caveat emptor* toward greater regulation of the economy and commercial relationships. Exceptions to the doctrine arose, in recognition of its harshness under certain circumstances. These exceptions allow purchasers to sue for building deficiencies:<sup>1</sup>

- (1) where the building was not complete at the time of sale,
- (2) where there was fraud on the part of the vendor, and
- (3) where the building is substantially different from the building that was the subject of the contract of sale.

Recent decisions have continued this erosion of *caveat emptor*. Indeed, in 1995 the Supreme Court of Canada questioned whether it was appropriate to apply *caveat emptor* to buildings at all.<sup>2</sup>

The assumption underlying the doctrine is that the purchaser of a building is better placed than the seller or builder to inspect the building and to bear the risk that latent defects will emerge necessitating repair costs. However, in my view, this is an assumption which (if ever valid) is simply not responsive to the realities of the modern housing market.

The Court stated that builders, because of their knowledge and expertise, are in a better position to ensure the integrity of buildings. Most purchasers are unknowledgable about construction and may fail to notice a latent deficiency even after a diligent inspection. The Court concluded that imposing liability upon builders would deter poor workmanship.<sup>3</sup>

These recent developments have led us to suggest that the doctrine of "buyer beware" has been replaced by the principle of "builder beware". This article will examine this evolution, and conclude by summarising its impact on the doctrine of *caveat emptor*.

## II. When Does Liability Arise?

### A. General Principles

For those unfamiliar with the intricacies of the common law, a few preliminary comments may be in order.

Members of the construction team (i.e. developers, general contractors, subcontractors, suppliers, design professionals and other consultants) may be liable for building deficiencies in *contract* and in *tort*.

Contractual liability arises primarily out of two relationships. The first is the relationship between owner and builder (i.e. a contractor awarded a contract after tender). The second is the relationship between developer and purchaser. The basis of contractual liability is the warranty, a binding promise about the quality of construction. Warranties may also be divided into two categories. The first is comprised of *express warranties* written into the contract. Such warranties range from relatively straightforward addendums in residential Interim Agreements, to more elaborate warranties, such as those found under the CCDC contracts.<sup>4</sup> In the case of a building that is incomplete at the time of sale, the developer may also be liable under an *implied warranty* of habitability (considered below).

Tort liability may be classified as follows:

- (1) Liability for negligent construction (considered below).
- (2) Liability for misrepresentation: This may arise if the builder or other member of the construction team either knowingly or negligently misrepresents the quality of construction to the owner (for example, in promotional materials), and the owner relies on the misrepresentation.
- (3) Liability for fraud: This may arise in a number of ways, all of which are characterised by dishonesty. For example, a developer may deliberately conceal shoddy work, or answer a buyer's questions in a way designed to mislead.

This paper will examine liability in contract and liability in tort for negligent construction, the two principal grounds of liability in building deficiency claims.

## **B. The General Contractor, Subcontractor and Supplier**

### **1. Pure Economic Loss**

Whether a builder or other member of the construction team is liable in negligence for shoddy construction is a simple question. For decades, however, the law failed to provide a simple answer.

This impasse was due to disagreement over whether parties should be liable in tort for "pure economic loss". Pure economic loss is a legal term with a specific meaning. Our Court of Appeal has distinguished it from loss "suffered as a consequence of conduct which causes, or was capable of causing, foreseeable personal injury or physical property damage"<sup>5</sup>.

In other words, pure economic loss is loss of a financial nature which is not accompanied by physical damage to one's person or property. The concept is particularly difficult to apply in the case of property. If the owner is seeking to recover the cost of repairing the deficiency, the claim is for pure economic loss. The rationale is that the owner's only loss is the financial cost of repairing or replacing the property. On the other hand, if the owner is seeking compensation for *other property* damaged as a result of the deficiency (i.e. records destroyed as a result of water damage) then the claim is one for property loss rather than pure economic loss.

The reluctance of some Judges to impose liability for pure economic loss arises out of an important distinction between the law of contract and tort. Parties to a contract are generally responsible for each other's reasonably foreseeable losses, whether they arise from property damage, personal injury, or pure economic loss. Contracting parties have entered into a commercial relationship. It is reasonable to make them liable for pure economic loss and any other loss of a commercial nature.

Parties who have not entered into a contract generally have not entered into a commercial relationship. The law of negligence imposes duties on non-contracting parties to take reasonable care to avoid property damage and personal injury to others. However, it has been wary of expanding the duties of non-contracting parties by making them liable for purely commercial losses, such as pure economic loss.<sup>6</sup>

With the exception of the developer, the members of the construction team are usually not parties to any contract with the ultimate owner of the building. For years, the Courts disagreed over whether owners could sue these non-contracting parties in tort for the financial loss of repairing building deficiencies.

## 2. Winnipeg Condominium v. Bird Construction Co.

The Supreme Court of Canada brought closure to part of this debate in 1995. In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* the Court addressed the following question:<sup>7</sup>

May a general contractor responsible for the construction of a building be held tortiously liable for negligence to a subsequent purchaser of the building, who is not in contractual privity with the contractor, for the cost of repairing defects in the building arising out of negligence in its construction?

The case involved a 15 storey apartment built in Winnipeg by Bird Construction in 1972. The building was converted into a condominium in 1978, at which time the Condominium Corporation became the registered owner of the land and building. In 1982 the directors of the Condominium Corporation became concerned with the exterior stone cladding, which had begun to crack. Acting on the advice of the original architects and a firm of structural engineers, the Condominium Corporation carried out minor repairs in 1982 at a cost of \$8,100.

On May 8, 1989, a 20 foot panel of Tyndal stone cladding fell from the ninth storey. Nobody was injured, and apart from the cladding no property was damaged. The Condominium Corporation hired new engineers who recommended that the entire cladding be replaced. This work was completed at a cost of over \$1.5 million.

The Condominium Corporation sued Bird Construction, its masonry subcontractor and the architects, claiming that they were liable under the law of negligence for the cost of replacing the cladding. Bird Construction and the subcontractor responded with an application to dismiss the claim. They argued the law of negligence does not impose liability for pure economic loss. The progress of this application through the legal system illustrates the controversy over pure economic loss:

- (1) The Trial Judge held that the Condominium Corporation's losses were recoverable, and refused to dismiss the Condominium Corporation's action.
- (2) The three Justices of the Manitoba Court of Appeal unanimously disagreed with the Trial Judge and dismissed the Condominium Corporation's action.
- (3) The nine Justices of the Supreme Court of Canada unanimously<sup>8</sup> overruled the Court of Appeal and held that there was a valid basis for the Condominium Corporation's claim. They also expressly disagreed with all five members of the English House of Lords, whose two earlier decisions had been followed by the Manitoba Court of Appeal.<sup>9</sup>

Mr. Justice La Forest, writing for the Supreme Court, struck a Canadian compromise between the alternatives of allowing recovery in negligence for every kind of pure economic loss, and denying recovery altogether:<sup>10</sup>

In my view, where 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 costs of repairing the defects and putting the building back in a non-dangerous state are recoverable in tort by the occupants. 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. (emphasis added)

This principle appealed to the Court's common sense:<sup>11</sup>

It would seem only common sense to take steps to avoid a serious loss by repairing a defect before it will cause physical damage; and rather extraordinary if the greater loss when the building falls down could be recovered from the careless builder but the cost of timely repairs could not.

The Court concluded that the principle "serves an important preventative function by encouraging socially responsible behaviour."<sup>12</sup>

### **3. How Far Does the Duty Extend?**

The Court recognised one limit on liability for construction deficiencies, and left a second to be decided in later cases. These limits are best understood if one arranges deficiencies along a spectrum, from most serious to least. We have seen that builders are liable in negligence for deficiencies at the serious end of the continuum, where the work poses a substantial risk of danger. What about the remainder of the spectrum?

Consider deficiencies at the opposite end. These do not fall below industry standards for workmanship and materials. However, this work is deficient because the builder has failed to honour a promise to deliver a luxury or unique product. These promises are found in contractual warranties or promotional documents stating the building is of exceptional quality, and in specifications to suit the wishes of a particular owner. The Court concluded that the law of negligence does not extend this far:<sup>13</sup>

... a contractor who enters into a contract with the original home owner for the use of high-grade materials or special ornamental features in the construction of the building will not be held liable to subsequent purchasers if the building does not meet these special contractual standards.



An owner who wants luxury or special features must buy a product marketed on this basis, or negotiate the appropriate specifications or warranty with the builder. If the building does not comply the original owner can sue the builder for misrepresentation or breach of contract. But it is only the original owner, who relied on the representations or is a party to the contract, that has a right to sue for deficiencies at this end of the spectrum. The law of negligence does not require a builder to exceed reasonable standards of good workmanship or materials with subsequent owners.

What about deficiencies in the middle of the spectrum? These fall below reasonable standards of workmanship or materials, but are not dangerous. Most claims involve deficiencies of this kind.

Mr. Justice La Forest noted that Australia, New Zealand, several jurisdictions in the United States, and Quebec under its *Civil Code*, have recognised a duty to subsequent purchasers for the cost of repairing non-dangerous defects. However, he observed that the last time the Supreme Court of Canada considered the question it was cool to the idea of extending liability this far.<sup>14</sup> Mr. Justice La Forest chose to leave the issue for another day.<sup>15</sup>

#### **4. To Whom Does the Duty Apply?**

Liability for dangerous deficiencies extends not only to general contractors such as Bird Construction, but also to the other members of the construction team. The Supreme Court expressly noted that the duty under the law of negligence was also owed by subcontractors, architects and engineers who take part in the design and construction of a building.<sup>16</sup> Elsewhere the Court observed that the duty applied "where a contractor (*or any other person*) is negligent in *planning or constructing* a building"<sup>17</sup> (emphasis added). It is therefore safe to assume that the duty encompasses other consultants, managers and suppliers.

### **C. The Developer**

#### **1. Liability in Negligence**

As we saw in the *Winnipeg Condominium v. Bird Construction* case, developers and the other members of the construction team are liable in negligence for dangerous deficiencies. In addition to any duty to the original owner which may arise under the contract of sale, a developer is therefore liable to both original and subsequent owners for deficiencies which pose a real and substantial danger to the occupants of the building.

## 2. Liability in Contract

### a. Express Warranties

Many developers provide a warranty on workmanship and materials in the contract of sale. A typical residential warranty covers deficiencies within the first year. For homes under the New Home Warranty Program of British Columbia and the Yukon, the standard warranty provides coverage up to certain monetary limits for latent defects in workmanship and materials which become apparent during the first year after possession, and major structural defects which become manifest during the next four years. The New Home Warranty is subject to mandatory notice and mediation requirements. Sometimes other warranties also prescribe time limits within which notice of a claim must be given to the developer. These provisions should be carefully reviewed, since failure to comply may result in forfeiture.

The scope of each warranty depends on its wording. Quite often not enough attention is paid to drafting, and costly ambiguities arise. The following is a typical example:

The developer warrants workmanship and materials for a period of one year from the date of possession.

Most developers would assume that they are obliged to repair only those deficiencies which are reported during the first year. But consider the following:

- (1) What if the deficiency becomes apparent during the first year but is not reported until later?
- (2) What if the deficiency existed during the first year, but did not become apparent to the owners until later (i.e. a structural problem)?

Given the trend toward increasing liability, a developer would be well advised to pay close attention to warranty wording.

### b. Implied Warranty

- (1) *The Nature of the Implied Warranty*

The leading British Columbia decision on implied warranties is *The Owners, Strata Plan NW 2294 v. Oak Tree Construction Inc.*<sup>18</sup>, a 1994 decision of our Court of Appeal.

The *Oak Tree* decision involved a five unit condominium in White Rock. The prospectus provided that there was no warranty. The units were sold between November and December 1985, and occupied by January 1986.

By the spring, the Owners had made a number of complaints to the developer about leaking. Oak Tree failed to make adequate repairs. The leaks led to staining of carpets and walls, deterioration of exterior stucco, tile debonding and cracking, and dry rot.

In late 1988 the Owners retained an engineer who concluded the leaking was due to inadequate caulking of certain louvred openings and failure to apply sealant to a porous stucco wall. Oak Tree again made inadequate repairs. The Owners hired a contractor who undertook the necessary repairs at a cost of approximately \$18,000. The Owners sued the Oak Tree for this amount. The Owners won at trial and Oak Tree appealed.

The Court of Appeal ruled in favour of the Owners. It held that the leaking breached the implied warranty of habitability. It described this warranty as follows:<sup>19</sup>

In relation to latent defects in a building intended for habitation, but which is *not completed* when the purchase and sale commitment is made, the law imposes on the builder, in favour of the purchaser, *an implied warranty that the work, (both the work already done and the work not yet done) will be done in a good and workmanlike manner, that the materials will be suitable, and that the building will be fit for its purpose, namely, habitation.* (emphasis added)

The warranty applies only to latent defects. It does not apply to visible defects in work that has been completed, which are deemed to be accepted by the purchaser.<sup>20</sup> In a separate concurring judgment, Mr. Justice Taylor observed that commercial necessity required that this warranty be in effect for a limited period of time, perhaps one year for buildings of this sort.<sup>21</sup>

(2) *Completeness*

As we have seen, *caveat emptor* precludes the implied warranty in the case of completed structures. However, there has been a growing dissatisfaction with the distinction between complete and incomplete structures. In *Fraser-Reid v. Droumtsekas* the Supreme Court of Canada noted its irrationality:<sup>22</sup>

Take the case of the prospective home buyer who views a model home in a subdivision development and decides to buy a house yet to be built on a lot in that subdivision. In his case, the Courts will be willing to imply a warranty as to fitness for habitation and workmanship. But the unfortunate who buys the 'show' home is without warranty even if both models reveal the same structural defects.

Mr. Justice Lambert, writing for the majority of the Court in the *Oak Tree* decision, confirmed that the warranty applied only if the building was not complete at the time of sale. However, the majority observed that "the test is not 'substantial completion', but 'completion'."<sup>23</sup> Lambert J.A. agreed with the Trial Judge's ruling that the building was not complete when the Owners purchased their units simply because some caulking and sealing work had not been done at all. Mr. Justice Taylor, in a concurring opinion, went even further.<sup>24</sup>

It must today be regarded as manifestly unacceptable that the vendor of newly-built residential accommodation can be relieved of responsibility for construction deficiencies simply because a municipal inspector or the vendor itself has determined to treat the construction as 'complete' or 'substantially complete' prior to the date of sale. A new residence which in fact requires further work before it will be reasonably fit for habitation cannot, in my view, properly be described as complete simply because the incompleteness was not recognised, or not apparent on normal inspection, unless the parties agreed to accept the house as 'complete' or agreed that any further work required to be done will be done by the purchaser.

Essentially, Mr. Justice Taylor concluded that a building is incomplete if it contains any latent deficiencies at the time of purchase which prevent it from being reasonably fit for habitation.

(3) *Exclusion of the Implied Warranty*

Perhaps the most surprising part of the *Oak Tree* decision was its analysis of whether the implied warranty had been negated by the Interim Agreements between the Owners and the developer. The Interim Agreements purported to exclude implied warranties in two ways. First, they contained the standard exclusion:

*This agreement offers no representations, warranties, guarantees, promises or agreements other than those contained herein. (emphasis added)*

Second, the Interim Agreements specifically incorporated the terms of the prospectus. This meant that the representations in the prospectus became express terms of the sales agreements. One of the terms of the prospectus read as follows:

Construction Warranty

There is no warranty by or on behalf of the developer in respect of the Development, including Lots or Common Property.

The developer argued that the Owners had agreed in the Interim Agreements that the implied warranty of habitability did not apply.

Concerning the prospectus, the majority replied:<sup>25</sup>

The warranty implied by operation of law cannot be excluded except by clear contractual terms. The contractual term in this case did not clearly exclude the implied warranty. The heading suggests that there is a construction warranty and indeed would have been grossly misleading if it had been the intention of the clause to exclude the implied warranty.

Again, Mr. Justice Taylor went even further:<sup>26</sup>

There is nothing at all in the prospectus which would alert the purchaser to the consequence contended for by counsel for the vendor - that the vendor is under no obligation in law to correct any construction defects or deficiencies which may be found.

It would, of course, have been a simple matter for the vendor to have stated in the prospectus that any work required to complete the premises, or to correct construction defects or deficiencies, would be the responsibility of the purchaser and that the premises were not warranted fit for habitation. But the heading of paragraph 4.01(e), 'Construction Warranty', suggests instead that there *is*, in fact, a construction warranty. Had the paragraph had the meaning for which the appellant contends it would surely have been headed 'No Construction Warranty'. (original emphasis)

The majority judgment did not comment on the standard exclusion of warranties in paragraph 6 of the Interim Agreements. Presumably, the Court adopted the reasoning in an earlier decision, which held that the standard exclusion did not apply to the implied warranty.<sup>27</sup> Mr. Justice Taylor refused to give the exclusion any effect because, in his opinion, the prospectus gave the impression that there was a warranty.<sup>28</sup> He added that, by inviting the Owners to present deficiency lists, the developer had acted consistently with this impression.<sup>29</sup>

### **c. Liability Under the Disclosure Statement**

Section 50(7) of the *Real Estate Act* requires developers to deliver a prospectus or disclosure statement to every prospective purchaser of subdivided land or a time share interest. Section 51(1) requires the prospectus or disclosure statement to contain "full, true and plain disclosure". Section 59(1)(b) of that *Act* provides that if any "material false statement" is contained in the prospectus or disclosure statement then the developer, its directors, and every person who authorised the issuance of the prospectus or disclosure statement is liable to compensate purchasers for any loss they have sustained, unless certain exclusions apply.

The *Guide to Disclosure Statements* prepared by the Financial Institutions Commission requires disclosure statements for strata developments to include "the particulars of any construction or equipment warranties".

Consider a disclosure statement which states that the development is subject to the following warranty:

The Developer will remedy any defects in workmanship and materials which appear during a period of one year from the date of occupancy.

If the developer neglects or refuses to repair deficiencies that arise during the first year, does the disclosure statement contain a "material false statement" for which the directors

of the developer and those who have authorised the issuance of the disclosure statement are personally liable?

There are no decisions on point, but the wording of the legislation should give some developers cause for concern. Developers can avoid this problem through careful drafting of their disclosure statements.

#### **D. Design Professionals**

The express duties of an engineer or architect are defined by the terms of the contract of engagement with the owner. These duties will vary depending on the nature of the project and the extent of expected involvement of the design professional. They will usually involve participation in the design and planning of the building, and a degree of site supervision to ensure that the construction of the building is in accordance with the plans.

It is an implied term of these contracts that the engineer or architect will exercise the skill, care and diligence which may reasonably be expected of a person of ordinary competence in the profession, measured by the professional standards of the time.<sup>30</sup> These standards take into consideration the risks that are inherent in any construction project and the extent to which design professionals must rely upon judgement in carrying out their duties. This implied term does not serve as a guarantee that the work will be without flaw. Where an architect or engineer has exercised due care and reasonable judgement he or she will not be liable for errors or omissions.

A higher standard of care applies to architects or engineers who belong to a specialized group within the profession or who hold themselves out to possess specialized skills. These individuals are expected to exercise the skill and competence reasonably expected of members of that specialized group.<sup>31</sup>

Design professionals may also, through the terms of the contract, bind themselves to a higher standard of care. Some contracts contain provisions which expressly define the standard of care design professionals must exercise in carrying out their duties. In these cases design professionals will be liable for deficiencies resulting from conduct which falls beneath this standard. In *B.C. Rail v. C.P. Consulting Services Ltd.*<sup>32</sup> the contract with the consulting engineers contained the following term:

##### Standard of Care

The Consultants covenant to perform their services hereunder with reasonable skill, care and diligence and in accordance with the standards of care practised by leading international consulting engineers engaged on similar projects providing similar services.

Mr. Justice Gibbs held that through the contractual warranty:<sup>33</sup>

[the engineers] assumed a two-fold standard of care: what might be called the common law measure of reasonable skill, care and diligence; and an additional standard tested by measuring the performance of their services against the practice of 'leading international consulting engineers'....

He held that the test of negligence in this case was not whether the engineers had met the standard of care of the ordinary engineer but whether they had met the more stringent standard of care expressly assumed in the warranty.<sup>34</sup>

One of the major sources of liability for design professionals is the preparation and certification of designs and plans. Their duties include assessment of the site, and investigation of soil conditions to ensure that the design of the proposed development is appropriate for the site. Where the completed building is structurally unsound or inappropriate for the site, the design professional may be liable to compensate the owner.

In *Dha v. Ozdoba*<sup>35</sup> an engineer was retained by the plaintiffs to oversee the design and construction of foundations for their home. The construction site had been partially filled with peat. The foundation design was not appropriate for these soil conditions and differential settling eventually rendered the house virtually uninhabitable. Mr. Justice Finch held that the engineer failed to discharge his duty to study the backfill conditions of the land, and to ensure that the foundations were sufficient for the particular site of the proposed construction.<sup>36</sup>

...the fact that he agreed to design, or to approve a design for, the foundation on the plaintiffs' building site was sufficient to place him on his inquiry as to the soil and fill conditions which existed. He could not design an adequate foundation without knowing those conditions....

The Courts have recognized the limitations on a design professional's ability to detect and anticipate every possible problem with the site. In *White Rock Lodge Properties v. B.C. Hydro & Power Authority*,<sup>37</sup> an owner hired engineers to assist planning and construction of a condominium project which was to be built on a steep slope. The engineers conducted soil strength and density tests but failed to detect a horizontal weak zone through the site. After construction was underway a landslide occurred on the site, causing damage to the project and delay. The owner sued the engineers. Madame Justice Saunders considered the investigative methods used by the engineers and concluded that these methods met the standard of the profession. Although the tests conducted by the engineers had been unsuccessful, and the owner suffered damage as a result, the Court held that the engineers had met the required standard of care and were not liable.<sup>38</sup>

I cannot find any evidence from which I may conclude a thin, weak, pre-existing, horizontal zone was reasonably foreseeable by the defendants, or any average person in the engineering profession skilled in the science of soil mechanics.... There is simply no evidence before me to show that keener supervision would have avoided the slope failure.

In many contracts, the architect or engineer will have an ongoing supervisory duty to ensure that construction is carried out in accordance with the plans. The extent of the design professional's responsibilities will depend upon the terms of the contract with the owner. The Courts have held that in the absence of an express term the standard of care will vary with the complexity of the project and the risks associated with inadequate inspection and supervision.<sup>39</sup> In carrying out duties of site supervision, an architect or engineer is not expected to guarantee the work of the contractor, but only to detect and correct departures from design that would be discovered upon reasonable inspection.<sup>40</sup>

Architects and engineers may also undertake to ensure that building plans and construction comply with relevant by-laws and regulations. A breach of this duty will result in liability for the expenses incurred to effect compliance. The Courts have held that engineers and architects who certify plans and provide representations to municipal officials regarding compliance with the relevant by-laws are not entitled to rely upon approvals obtained from municipal officials who have relied on these representations. In *Dha v. Ozdoba*, the engineer made a third party claim against the municipality that approved his negligent plan and issued a building permit. Mr. Justice Finch rejected this claim:<sup>41</sup>

In effect, the [engineer] alleges that the defendant municipality is responsible for failing to save him from the consequences of his own negligence. It would be contrary to authority and common sense to hold that a professional advisor who was negligent should be indemnified by a third party who received and acted upon the professional's advice....

As we have seen in the *Winnipeg Condominium v. Bird Construction* case, a design professional may also be liable in negligence for defects which pose a real and substantial danger to the occupants of the building or their property.<sup>42</sup> Most often however, the liability of the design professional for building deficiencies will arise out of a breach of the express or implied terms of the contract with the owner.

## **E. Municipalities**

The liability of municipalities for building deficiencies arises out of municipal regulation and inspection of buildings at various stages through the planning and construction process. The role of municipalities in this process is determined by legislation. The relevant legislation for Vancouver is the *Vancouver Charter*. All other municipalities operate under the *Municipal Act*. The by-laws of individual municipalities also outline the powers and obligations of municipal authorities in the area of building construction and repair. The Courts have held that in carrying out these duties, municipalities owe a duty of care to an owner and may be liable for building deficiencies which could have been detected and ordered remedied through the appropriate exercise of these duties.



In *Rothfield v. Manolagos*,<sup>43</sup> the Supreme Court of Canada held that a municipality acting under a by-law owed a common law duty of care to an owner/builder to ensure that the structure is sound and complies with applicable building regulations. The Court considered the scope of the duty of care.<sup>44</sup>

It must be borne in mind that a municipality, once it has made the policy decision to inspect construction, is not bound to discover every latent defect in a given project, nor every derogation from applicable standards. That would be to hold the municipality to an impossible standard. Rather a municipality is only called upon to show reasonable care in the exercise of its powers of inspection.

In many cases, building owners engage architects or engineers to participate in plan development, and to supervise and inspect the construction of the building. Municipal inspectors often rely upon representations and certification by design professionals in issuing the required permits and approvals. The Courts have held that reliance upon a design professional does not relieve a municipality of its duty to carry out its own inspection of building plans and sites. In the past municipalities have been held to share liability with design professionals for deficiencies arising out of negligently prepared plans, where the plan errors could have been detected by the municipality on reasonable inspection.

The clear judicial articulation of the duty of care owed by municipalities and the increased liability of municipalities for building deficiencies has prompted recent amendments to the both the *Municipal Act*<sup>45</sup> and the *Vancouver Charter*.<sup>46</sup> As a result of the 1990 amendment of the *Municipal Act*, municipalities are no longer liable for the negligence of their officials in inspecting and approving building plans, where the plans have been certified by a registered architect or engineer, and where the municipality, in issuing the building permit, has indicated in writing to the applicant for the permit that it relied on the certification. The exemption from liability effected by a 1987 amendment to the *Vancouver Charter* is significantly broader. It protects the City from any legal action arising out of negligent inspection at both the planning and construction stages of a development.

In *Kaiser v. Bufton's Flowers Ltd.*<sup>47</sup> the Court upheld the broad exemption from liability in the *Vancouver Charter*. The owner claimed the City was liable for failing to enforce its sprinkler by-law. In particular, he alleged the City was negligent in approving plans that did not include sprinklers, and in failing to demand on inspection that sprinklers be installed. The Court applied the exemption provision to bar the owner's claim against the municipality. While the negligent acts occurred before the amendment, the action was extinguished because the loss occurred after the amendment came into force.

Outside Vancouver, the duty of care owed by municipal officials in inspecting work sites and giving approvals at the appropriate stages of construction remains unchanged. The failure to exercise due care in carrying out this duty will continue to attract municipal liability for building deficiencies that could have been detected on routine inspection.

The case of *Petrie v. Groome*<sup>48</sup> offers an example of this liability. The municipality had a policy of accepting an architect's design as appropriate for a site without requiring specifications on soil conditions. Municipal officials followed up with inspections of the excavation to determine whether revisions were required. The municipality approved plans for the foundation of a house that were prepared by an architect. The plans were inappropriate for the soil conditions on which the house was constructed, and the consequent subsidence caused significant damage. Mr. Justice Collver held it was reasonable to initially accept the architect's plans. However, the inspector was negligent in carrying out follow-up inspections.<sup>49</sup>

...if the District is going to rely upon the permit applicant's knowledge of the site in this way, I am satisfied that the District thereby assumes a more onerous responsibility in the subsequent inspection process.

In holding that the municipal inspector failed to use due care in his inspection, the Court noted the absence of any reference to soil conditions in the inspector's reports, as well as evidence concerning the site, which should have invited careful examination as to its suitability for foundation placement.

## **II. Compensation for Building Deficiencies**

The purpose of an award of damages is to put an aggrieved party as nearly as possible in the position he or she would have been in had the wrong not occurred. In assessing damage awards for building deficiencies the Courts use two methods to calculate the loss suffered by a building owner:

- (1) diminution in market value;
- (2) cost of repairs.

The ordinary measure of damages for building deficiencies is the amount by which the market value of the building has been diminished as a result of the deficiency.<sup>50</sup> This measure is an objective basis for assessing an owner's loss. It reflects the owner's ability to replace the building in the marketplace to recover part of that loss.

However, the Courts have recognized that in many cases the diminution in market value does not reflect the nature of an owner's interest in the property, or the more likely prospect that an owner will undertake repairs to remedy the deficiency rather than replace the property in the market place. The Courts will award the cost of remedying a defect where two conditions are met:

- (1) the cost of the repair is reasonable in the circumstances, and

- (2) the Court is satisfied that the owner has undertaken, or will undertake the remedial work.<sup>51</sup>

In assessing the reasonableness of the cost of repair, the Courts compare this cost to the diminution in the property value resulting from that deficiency. Where the cost of repair is significantly greater than the diminution in value, the Courts are more reluctant to award the cost of the repairs.<sup>52</sup>

However, this factor is not determinative. The Courts will also consider the nature of the defect and the interest of the owner in carrying out the repairs. Where the defects are such that repairs are necessary to allow the owner full use and enjoyment of the property, or to prevent further damage, the Courts will generally order the cost of repairs even where this exceeds the diminution of market value. Conversely, where the deficiencies relate to cosmetic rather than functional or safety aspects of the building, an owner will not generally be entitled to recover more than the diminution of the value of the building.<sup>53</sup>

In cases where the cost of remedying a deficiency in a completed building is significantly higher than the original cost of completing the work the Courts may limit the amount of the award to allow the cost of reasonable remedial work. In *Strata Corporation NW 1714 et al. v. Winkler*<sup>54</sup> the contractor departed from the specifications by failing to waterproof the concrete walls, and installing a concrete slab floor which was too thin and had begun to crack. The Owners sought damages based upon the cost of having the work redone to comply with the specifications. The cost of undertaking the proposed remedial work was \$170,000. This figure included compensation for disruption to the Owners' business while the work was being undertaken. The contract price for the construction of the building was \$200,000. The Court held that the cost of bringing the building into conformity with the specifications would grossly exceed the benefit which could be obtained from such repairs. While the Court did not dispute the reasonableness of repairing the deficiencies, it held that they could be effectively remedied by repairing the floor cracks, and patching the walls to achieve an adequate level of waterproofing. The court awarded \$12,000, the cost of these more moderate repairs, with an allowance for minor inconvenience to the Owners as the work was being carried out.

It was significant in this case that the Owners had neither begun any of the remedial work nor committed themselves to do the work. The Court was not satisfied that if the amount claimed were awarded, the proposed repairs would be undertaken. In order to avoid awarding a windfall to an owner the Courts will not award the cost of repairs where there is evidence that the owner is unable or unlikely to actually carry out the proposed repairs.

The proper measure of damages in cases involving building deficiencies is determined on the facts in any given situation. In assessing a damage award the Courts attempt to achieve a balance between an owner's entitlement to compensation, and the need to protect the members of the construction team from exposure to unreasonable liability.

### III. Procedural Concerns: The Limitation Act

Many owners are unaware of the *Limitation Act* and the devastating effect it can have on their claim. Briefly, the *Limitation Act* sets out certain time limits (known as "limitation periods") within which an action must be commenced.<sup>55</sup> If a plaintiff fails to commence his or her action within the prescribed limitation period, the defendant will have a complete defence to the claim, regardless of how meritorious the action may have been.

As there are special limitation periods applicable to municipalities, it is useful to distinguish them from those applicable to the construction team.

#### A. The Construction Team

The *Limitation Act* determines how limitation periods apply to claims against a builder, developer, and other members of the construction team. Two issues arise under this legislation:

- (1) Which limitation period applies?
- (2) When does time under the limitation period begin to run?

#### 2. Which Limitation Period Applies?

The *Limitation Act* provides:

- 3.(2) After the expiration of two years after the date on which the right to do so arose a person shall not bring an action
  - (a) for damages in respect of injury to ... property, including economic loss arising from the injury, whether based on contract, tort, or statutory duty....
- (5) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.

It might appear on first reading that building deficiency claims are actions "for damages in respect of injury to property", and therefore governed by a two year limitation period. Indeed, this argument was raised by defendants in several cases preceding the British Columbia Court of Appeal's 1986 decision in *Workers' Compensation Board v. Genstar Corp.*<sup>56</sup> That case involved a claim by the WCB, which retained Genstar in 1973 to design,

supply and install concrete beams in a parkade. The claim sought damages as a result of cracking in the beams. WCB applied to add Genstar as a defendant in the action. Genstar replied that the claim against it was brought beyond the applicable limitation period, which it claimed to be two years under s.3(1)(a).

Madame Justice McLachlin, writing for all five members of the Court, considered whether the claim was one for "injury to property" within the meaning of that section, or whether it fell into the six year basket clause.<sup>57</sup>

I cannot accept Genstar's contention that the action against it is for 'injury to property'. I am persuaded by the authorities that 'injury to property' refers to the situation where property is damaged by an extrinsic act, and not the situation where a claim is made for damage occasioned by defects in the property itself. (emphasis added)

The *WCB v. Genstar* decision established that the limitation period for "defects in the property itself" is six years, and that only injury to property from an "extrinsic act" is governed by the shorter two year period.<sup>58</sup>

This distinction did not curtail the creativity of defence counsel. In *Placzek v. REM Construction Ltd.*<sup>59</sup> the owner's claim included damage caused to an attic from moisture escaping from a sun room which had been added to the home by the defendant builder. The builder argued that the damage to the attic was the result of an "extrinsic act", namely, the addition of the sun room. This argument, sometimes described as the "complex structure" theory, divides complex structures into parts, and argues that damage caused to one part by the failure of another is an extrinsic act. The Court in *Placzek* rejected this theory, and concluded that all deficiencies are governed by the six year limit:

It is illogical that claims arising from alterations or additions to buildings be governed by a two-year limitation period while those arising from initial construction are governed by a six-year period.

Other proponents of the complex structure theory have also met with disappointment.<sup>60</sup>

### **3. When Does the Limitation Period Begin to Run?**

#### **a. Postponement**

If limitation periods began to run as soon as the plaintiff's right to sue arose the results would often be unfair. Consider the example of inadequate ventilation causing structural beams to deteriorate and fail without warning ten years after occupancy. If the limitation began as soon as the right to sue arose, the plaintiff's action might be barred by the time the problem is discovered.

To address this problem, the *Limitation Act* provides that the running of time is postponed under certain circumstances:

6.(3) The running of time with respect to the limitation periods fixed by this Act for an action

- (b) for damage to property;
- (c) for professional negligence;
- (d) based on fraud or deceit;
- (e) in which material facts relating to the cause of action have been wilfully concealed;

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

- (i) 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
- (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

Subsection (4) goes on to define "appropriate advice" and "facts".

It is clear that this section applies to claims for professional negligence, and claims in which there has been fraud or concealment. But what about other deficiency claims? We have seen that building defects are not governed by the two year limit applicable to "*injury to property*" under s.3(1)(a) of the *Limitation Act*. Are they also not "*damage to property*", and outside the scope of s.6(3)(b)?

The argument that the limitation period for inherent defects cannot be postponed was accepted by the British Columbia Supreme Court in *Ridley Terminals Inc. v. Mitsubishi Canada Ltd.*<sup>61</sup> The action involved a claim against a supplier of two stacker-reclaimers which collapsed owing to a fatigue crack in one of its structural members. The Court considered the application of the *Limitation Act* and concluded, firstly, that the collapse was due to an inherent defect, rather than "*injury to property*" to which a two year limitation period applied. Secondly, the Court dismissed the possibility of postponement:

Section 6(3) does not apply to inherent defect; only to 'damage to property'. I have previously found the damage to be caused from inherent defect and rejected it occurred as a result of 'damage to property'.

The Court equated "*injury to property*", which is governed by a two year limitation period, with "*damage to property*" under s.6(3)(b). The result is that only the two year limitation period for injury caused by an extrinsic act may be postponed under s.6(3).

This conclusion may be challenged on a number of grounds. First, it is generally assumed that if a statute intends the same meaning in two sections it will use the same words. It is therefore reasonable to infer that "damage to property" in s.6(3)(b) means something different from "injury to property" in s.3(1)(a). In particular, damage to property may include inherent defect while injury to property does not.

Second, *Ridley Terminals* does not appear to consider the reasoning in the earlier *WCB v. Genstar* case where Madame Justice McLachlin commented on whether the WCB's claim for structural defects could be postponed. The Court specifically noted that s.6(3)(b) allowed the postponement of claims for "damage to property". Her Ladyship observed there was "evidence before the chambers judge from which he could conclude that the Workers' Compensation Board acted reasonably in postponing commencement of its action." The Court of Appeal appeared to assume that claims for inherent defects may be postponed in the appropriate circumstances.

If *Ridley Terminals* is correct, then postponement is not available unless the claim is for professional negligence [*Limitation Act* s.6(3)(c)], based on fraud or deceit [s.6(3)(d)], or one in which material facts have been wilfully concealed [s.6(3)(e)]. In the case of breach of contract claims, the six year period begins to run from the date of the breach or from performance of the contract.<sup>62</sup> In negligence, time begins to run when damage occurs.<sup>63</sup>

If *Ridley Terminals* is incorrect, then all building deficiency claims may be postponed under s.6(3). We consider the application of this section below.

## **b. A Hybrid Approach**

Section 6(3) is a hybrid of two approaches to postponement. Under the "subjective" approach, the running of time is triggered by the plaintiff's *actual* knowledge of material facts. The "objective" approach asks when a reasonable person would have been aware of these facts. The subjective part of s.6(3) considers when the plaintiff learned the defendant's identity, and examines the plaintiff's interests and circumstances to determine when a lawsuit ought to be commenced. The objective part considers when a reasonable person, given the plaintiff's *means* of knowledge<sup>64</sup> and seeking the advice that a reasonable person would seek, would conclude that a lawsuit had a reasonable chance of success and was in the plaintiff's interest.

The importance of this distinction is that owners who turn their minds to limitation periods often apply a purely subjective test to postponement. *Tessler v. Telemark Enterprises Ltd.*<sup>65</sup> is an example. The plaintiff purchased recreational property in Whistler in 1980. The plaintiff claimed that soon after the purchase he asked the developer about the unit's sagging floors and was assured there was nothing to worry about. This assurance was repeated in 1984,

at which time the developer added that the sloping floors were not its responsibility. The plaintiff testified that if the developer had admitted there was a problem from the outset he would immediately have taken the necessary steps to enforce his rights.

The Court was not persuaded by this subjective evidence of what the plaintiff would have done, and found the limitation period began to run in 1984.<sup>66</sup>

By 1984, when the plaintiff again complained and was told that the settlement was 'not the responsibility of Telemark', it no longer was reasonable for a person in his circumstances not to take steps to obtain independent legal advice....

So it is enough to find, as I have, that the facts alleged by the plaintiff were within his means of knowledge in 1984 and that the plaintiff, having taken appropriate advice, then would have had a reasonable prospect of success in an action, apart from the expiration of time.

The Court dismissed the action, which was not commenced until 1991.

## **B. Municipalities**

There are special limitation periods applicable to claims against municipalities. The wording of these sections has received careful judicial consideration, and should be consulted as soon as there is a potential claim. The effect of these provisions may be summarised as follows:

- (1) Two Month Notice Requirement: Section 755 of the *Municipal Act* and s. 294(2) of the *Vancouver Charter* require an owner to give written notice to the City Clerk "setting forth the time, place and manner in which the damage was sustained" within two months from the date on which the damage was sustained. Failure to give timely notice does not bar an action if the owner has a reasonable excuse and the City has not been prejudiced by the delay.<sup>67</sup>
- (2) Six Month Limitation Period for Commencing Action: Section 754 of the *Municipal Act* requires that certain actions be commenced within six months of the right to sue arising:

for the unlawful doing of anything purporting to have been done ... under the powers conferred by an Act of the Legislature, and which might have been lawfully done by the municipality if acting in the manner prescribed by law, shall be commenced within six months after the cause of action shall have first arisen, or within a further period designated by the Council in a particular case....



Section 294(1) of the *Vancouver Charter* contains a similar requirement. The Courts have interpreted these sections narrowly, and their application to some building deficiency claims is unclear.<sup>68</sup>

#### IV. Conclusion

The law governing construction deficiencies has evolved considerably. Originally, the law favoured builders and the other members of the construction team. There was uncertainty over whether owners could sue in negligence for the pure economic loss caused by deficiencies, with some leading cases expressly denying the possibility of such recovery. The doctrine of *caveat emptor* severely restricted an owner's ability to sue in many instances.

The passage of time has tipped the scales in the owner's favour. An owner is now able to sue for construction deficiencies in the following circumstances:

- a. An owner or occupant of a building may sue the members of the construction team in negligence for loss caused by dangerous deficiencies which pose a substantial risk of harm.
- b. A purchaser may sue the developer under any express warranties in the contract of sale. These sometimes contain mandatory notice or mediation provisions with which the owner should comply in order to avoid the possibility of forfeiture.
- c. A purchaser may sue the developer if any of the exceptions to the *caveat emptor* doctrine apply, namely:
  - if the building is incomplete at the time of sale the purchaser may sue the developer under the implied warranty of habitability,
  - if there has been fraud on the part of the developer, or
  - if the building is substantially different from the building that is the subject of the contract, or
- d. The implied warranty that arises when an incomplete building is sold is a warranty that the work (both the work already done and the work not yet done) will be done in a good and workmanlike manner, that the materials will be suitable, and that the building will be fit for its purpose, namely, habitation.

It appears from recent decisions that the Courts will enforce the warranty whenever possible:

- the building will be considered to be incomplete if there were any latent deficiencies at the time of sale which rendered it uninhabitable;
  - the warranty cannot be excluded except by the clearest contractual language.
- e. It can be argued in some circumstances that if the developer fails to honour a warranty set out in the Disclosure Statement, the *Real Estate Act* imposes personal liability on its directors and every person who authorised the issuance of the Disclosure Statement, unless certain exemptions apply.
- f. An owner may sue the municipality if it has been negligent in conducting inspections. In Vancouver, this right has been extinguished by the *Vancouver Charter*.

If successful, the owner will be awarded damages equivalent to the diminution in market value of the building or, where appropriate, the cost of repairing the deficiency. In order to preserve his or her rights, an owner must be careful to observe the general limitation periods set out in the *Limitation Act*, and the specialised limitation periods applicable to municipalities.

## ENDNOTES

1. *Ordog v. District of Mission* (1980), 31 B.C.L.R. 371, p. 378 (S.C.)
2. *Winnipeg Condominium Corporation v. Bird Construction Co.*, [1995] 3 W.W.R. 85, at pp. 113-14 (S.C.C.).
3. At p. 114, citing Philip Osborne, "A Review of Tort Decisions in Manitoba 1990-93", [1993] Man. L.J. 191.
4. See CCDC 2 (1994) Stipulated Price Contract, GC 12.
5. *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62, p. 69 (C.A.).
6. In the often quoted words of Justice Cardozo, such liability gives rise to the spectre of "liability in an indeterminate amount for an indeterminate time to an indeterminate class": *Ultramares Corporation v. Touche*, 174 N.E. 441 (N.Y.S.C., 1931), p. 444.
7. [1995] 3 W.W.R. 85, pp. 88-89.
8. The unanimity of the Court is significant. Although the Supreme Court of Canada had considered liability in negligence for pure economic loss on several previous occasions, this was the first time that the Court reached a unanimous decision.
9. *D. & F. Estates v. Church Commissioners for England*, [1988] 2 All E.R. 992 (H.L.); *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908 (H.L.).
10. At p. 97.
11. At p. 107, citing the New Zealand Court of Appeal in *Bowen v. Paramount Builders (Hamilton) Ltd.*, [1977] 1 N.Z.L.R. 394, p. 417.
12. At p. 107.
13. At p. 99.
14. At p. 109, citing *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, pp. 729-30.
15. At p. 109.
16. At p. 110.
17. At p. 97.

18. Unreported, June 14, 1994, British Columbia Court of Appeal.
19. At p. 2.
20. *Liddell v. Van-City Electric Ltd.* (1994), 91 B.C.L.R. (2d) 331, pp. 332, 334 (C.A.).
21. At p. 23.
22. [1980] 1 S.C.R. 720, p. 729.
23. At pp. 2-3.
24. At pp. 15 - 16.
25. At p. 4.
26. At pp. 19-20.
27. *Stange v. Manhas* (1982), 46 B.C.L.R. 361, p. 366 (S.C.). The Court in *Stange* held that the standard exclusion could not oust an implied term which is essential to the contract. Whether a term is essential depends on the wording of the contract. The Court therefore left open the possibility that the standard exclusion might override the implied warranty under some circumstances.
28. At p. 21.
29. At p. 22.
30. The Hon. Madame Justice McLachlin, W. Wallace and A. Grant, *The Canadian Law of Architecture and Engineering*, 2nd ed. (Markham: Butterworths, 1994) p. 101.
31. *Bolan v. Friern Hospital Management Committee*, [1957] 2 All E.R. 118, p. 121. in which Mr. Justice McNair articulated the following test:

The test is the standard of the ordinary skilled man exercising and professing to have that special skill.
32. (1988), 29 C.L.R. 30 (B.C.S.C.).
33. At p. 39.
34. At p. 47.
35. (1990), 39 C.L.R. 248 (B.C.S.C.).
36. At p. 266.

37. (1993), 9 C.L.R. (2d) 250 (B.C.S.C.).
38. At p. 260.
39. *Dabous v. Zuliani* (1976), 68 D.L.R. (3d) 414 (Ont.C.A.).
40. *Carl De Wilde Contracting v. Thomas* (1990), 38 C.L.R. 240, pp. 250 - 251 (Ont. S.C.), citing *Hudson's Building & Engineering Contracts*, 10th ed. (London: Sweet & Maxwell, 1970).
41. At p. 274. In this case the municipality was held liable to the owner for failing to exercise due care in approving the plans, and shared liability with the engineer. Recent statutory changes in this Province effectively exempt municipalities from liability in approving plans certified by architects and engineers. This subject will be discussed in greater detail below.
42. At p. 97.
43. [1990] 1 W.W.R. 408 (S.C.C.).
44. At p. 416.
45. Section 755.4.
46. Section 294(8).
47. (1994), 97 B.C.L.R. (2d) 166, aff'd (1995), 2 B.C.L.R. (3d) 85 (C.A.).
48. (1991), 45 C.L.R. 132 (B.C.S.C.).
49. At p. 142.
50. *McGarry v. Richards Akroyd and Gall Ltd.*, [1954] 2 D.L.R. 367 (B.C.S.C.).
51. At p. 389.
52. At p. 391.
53. At p. 392.
54. (1987), 20 B.C.L.R. (2d) 16 (C.A.).
55. As we have seen, warranties may require an owner to notify the developer or commence proceedings within certain time periods. If the owner fails to comply with these coverage under the warranty may be voided.

56. (1986), 24 B.C.L.R. (2d) 157 (C.A.).
57. At pp. 161-62.
58. The Court of Appeal affirmed this reasoning six years later in *Zurbrugge v. Bowie* (1992), 68 B.C.L.R. (2d) 322, p. 329.
59. Unreported, November 26, 1993, British Columbia Supreme Court.
60. For example, in *Winnipeg Condominium Corp. No.36 v. Bird Construction Co.*, p. 95, Mr. Justice La Forest found himself in "full agreement" with the reasoning of Lord Bridge in *Murphy v. Brentwood District Council*, [1990] 2 All E.R. 908, pp. 926-28:

The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent.... Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to `other property'.

Similarly, in *Ridley Terminals Inc. v. Mitsubishi Canada Ltd.* (Unreported, March 3, 1993, B.C.S.C.) Mr. Justice Holmes rejected that argument that damage to a stacker-reclaimer caused by the failure of one of its structural members was damage caused by an extrinsic act:

I reject this divided view of damage. The stacker reclaimer is one machine, and the damage was confined to the machine itself.

The Court held that the damage to the machine was governed by a six year limitation period.

61. Unreported, March 2, 1993, British Columbia Supreme Court.
62. *Ridley Terminals Inc. v. Mitsubishi Canada Ltd.*
63. *Central Trust Co. v. Rafuse* (1986), 37 C.C.L.T. 117, p. 176 (S.C.C.); *Wittman v. Emmott and others* (1991), 53 B.C.L.R. (2d) 228, p. 236 (C.A.).
64. See *Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58. p. 69 (C.A.):

... the facts falling within the plaintiff's means of knowledge are, firstly, those actually known, and secondly, those which would become known if he took such steps as would have been reasonable for him to take in the circumstances.

65. Unreported, November 16, 1992, British Columbia Supreme Court.
66. At p. 9.

67. See *Teller v. Sunshine Coast Regional District* (1990), 43 B.C.L.R. (2d) 376 (C.A.).
68. See *Grewal v. Saanich* (1989), 45 M.P.L.R. 312 (B.C.C.A.).