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Thomas Heintzman is the author of Goldsmith & Heintzman on Building Contracts, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 182 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

When Does the Limitation Period Start For A Negligent Construction Claim?

The law of Limitations creates a difficult question for those involved in construction projects: When does the limitation period begin for a claim in negligence arising from a construction project? In *Timminco Ltd. v. ABB Industrial Systems Inc.,* an Ontario judge recently held that the answer is: when the plaintiff knew or ought to have known of the particular defect that gave rise to the damage for which the plaintiff sues.

The plaintiff produced magnesium billets. In March 1998, it retained engineers and started the design of a new facility to mill, alloy and refine magnesium. In August 1998, it contracted with the defendant for the supply of the two furnaces for the facility. The furnaces were installed and tested in 1999. In November 2000, molten magnesium spilled out of the furnace, through a gap in the floor and landed on the pipes carrying glycol coolant to the furnace. The glycol was ignited, a fire ensued and the furnaces were damaged.

The plaintiff did not commence an action against the defendant until November 2006 or just within the old six-year limitation period in Ontario if the limitation period started which the fire occurred in November 2000. The plaintiff said that the damage which occurred in November 2000 was an essential element of its cause of action, that the cause of action did not accrue until then and therefore the six year limitation period had not expired when it started its action.

The defendant brought a summary judgment motion to dismiss the action. The defendant asserted that, well before November 2000, the plaintiff knew all about the circumstances which led to the fire. The characteristics of the design of the facility were well understood by the defendant and its engineers during the construction of the facility. Incidents had occurred prior to November 2000 - during the construction project itself, the testing period and the operation period leading up to November 2000. Those incidents had caused damage, including damage arising from spilled magnesium causing a previous fire in September 1999. From those incidents, the defendant said that the plaintiff knew or ought to have known of the very defects which allowed the spilled molten metal to come into contact with the pipes carrying the glycol to the furnaces. Accordingly, the defendant said that, at the very latest, the limitation period ran from the date of those incidences, and that by November 2006 the limitation period had expired.

The problem with the limitation period is that the elements of the tort of negligence contradict the principles relating to limitations of action. The occurrence of damage is an essential element of the tort of negligence. So, the "cause of action" in negligence should only arise when the damage occurs. However, both the courts and the legislatures have said that it is unfair to expect a plaintiff to sue if the damage is unknown. The common law in Canada developed the principle that the limitation period for a claim in negligence only commences when the plaintiff knew or ought to have known of the cause of action. That principle is now contained in Ontario's *Limitations Act, 2004.*

In these circumstances, the question is: What facts must the plaintiff know or ought to know for the limitation period to begin? Any damage arising from the negligent act or omission? Any defects arising from the negligent act or omission? The particular damage for which the plaintiff sues? Or the particular defect which gave rise to the particular damage for which the plaintiff sues?

If the first two answers were correct, then the plaintiff's claim would have been out of time under Ontario's old six-year limitation period. The defendant asserted that the second answer was the correct one. If the third answer was correct, then the plaintiff's action would be in time. This was the theory advanced by the plaintiff. If the last answer was correct, then the facts might establish that the plaintiff did, or did not, know about the particular defect which caused the fire until that fire occurred, or within six years of when the action was commenced.

The motion judge selected the last answer. She held that in *Grey Condominium no. 27 v. Blue Mountain Resorts,* (2008), 90 O.R. (3s) 321, the Ontario Court of Appeal had held that each deficiency in a construction project gives rise to a separate cause of action in negligence. She reasoned that the decision in *Grey Condominium* means that there are separate causes of action "not because there were separate and distinct injuries, but because the deficiencies in question were distinct deficiencies and the discovery of one would not reasonably give rise to the discovery of the other."

Applying this principle, the motion judge held that two questions arose. First, were the defects giving rise to the fire in November 1999 latent or patent? If they were latent, then they were arguably unknown and reasonably unknowable to the plaintiff. Second, even if the defects were known, were they the same defects as those that gave rise to the prior incidents? If not, then this incident in November gave rise to a new limitation period.

The judge held that these questions could not be answered on a summary judgment motion, and accordingly ordered the action to proceed to trial.

In rejecting the third answer, the motion judge refused to apply a Massachusetts' decision – *Cigna Insurance Company v. Ov Saunatec Ltd*, 241 F. 3d 1 (1st Cir 2001). In that case, the court held that each damage gives rise to a separate cause of action, even though caused by the same act of negligence, and that "if there are multiple injuries, there will be multiple causes of action with multiple dates of accrual if the injuries are separate and distinct." The motion judge said that, while the *Grey Condominium* decision appeared to support this approach, its reasoning dictated to the contrary. She held that it was the distinction between the defects, not the distinction between the damages, which led to the result in *Grey Condominium*. Accordingly, if the same defect led to two occurrences causing damage, the first occurrence could well cause the limitation period to run. If the defects were different, then the limitation period relating to the damage for this second occurrence only commenced at the date of that occurrence.

The motion judge did give effect to one part of the summary judgment motion. The contract limited the damage recoverable to the amount of the purchase price for the furnaces. The motions judge granted a declaratory judgment limiting the amount of the plaintiff's recovery to that amount.

Needles to say, these distinctions can make the head spin. Whether the same deficiency led to the same damage, whether the deficiency was latent or patent and whether the plaintiff knew or ought to have known any of this, will confuse even the most sophisticated persons engaged in construction projects. All the more reason to carefully monitor the course of construction and the condition of the constructed project, and to start any claim as soon as possible. This is particularly so since, under the *Limitations Act, 2004*, the Ontario limitation period has now been reduced to two years.

Limitations – Negligence – Limitation clauses:
Timminco Ltd. v. ABB Industrial Systems Inc. 2010 ONSC 6971