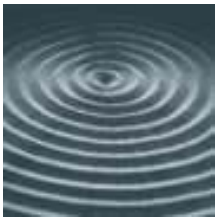
Robson Court
1000-840 Howe Street
Vancouver, B.C.
Canada V6Z 2M1
Tel. 604.687.2242
Fax.604.643.1200
www.millerthomson.com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STILL EXPOSED?

THERE ARE NO EASY WAYS TO DETERMINE WHEN LIABILITY ENDS

By Wendy A. Baker

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By Wendy A. Baker, Miller Thomson, LLP

Still Exposed?

There are no easy ways to determine when liability ends

The work is done. The relationship with the client has ended successfully — you hope. But when can you breathe a sigh of relief and be satisfied that the project is truly over? When do you no longer have to be concerned about any potential liability flaring up? This is a question that is becoming more serious in today's age of leaky buildings, mould claims and other "dangerous defects."

In 1995, the Supreme Court of Canada, in Winnipeg Condominium Corp. No. 36 v. Bird Construction Co., conclusively decided that the duty of care of anyone involved in a construction project will extend to any future user or owner of the building, at least to the extent that a defect related to his work has resulted in a real and substantial danger to the occupants of the building.

Before the Winnipeg Condominium decision, there was no overreaching duty of care to future occupants or owners unless the consultant had an express contract with the owners. After the Winnipeg Condominium case, consultants' potential legal exposure to future owners and occupants is a real issue and they need to be concerned.

Our legal system attempts to provide some certainty with limitation periods and the concept of finality to litigation. However, as two recent cases illustrate, the unique facts of each case can produce surprising results.

In Valley Agricultural Society v. Behlen Industries, a 2003 case heard by the Manitoba Queen's Bench, an engineer certified design plans for the construction of steel panel systems for a recreation complex in the town of Morris, Manitoba. The roof of the complex collapsed nine years after construction. Manitoba has a six year statutory limitation period, which starts to run at the date the cause of action arises. Indeed, in this case the court focused on the "date the cause of action arose." Did the clock begin to run when the work was performed, or when the damage occurred?

The plaintiff i.e. the building's owner, Valley Agricultural Society, took the position the clock did not start to run until the collapse of the roof, i.e. when the cause of action was complete. They were relying on a substantial body of case law to the effect that existence of damages beyond *de minimis* must be present — there must be some concrete evidence of damage before the cause of action could be said to arise.

This was a strong legal position for the plaintiff, but the court found in favour of the engineer on the limitation issue i.e. that the six-year clock had run out. It found that the engineer erred in failing to specify the means to secure the roof to an interior firewall. Because the plans did not specify the correct type of pins to use, the contractor had improvised on site but used the wrong type of pin, which was a critical factor in the roof detaching from the firewall resulting in the failure. The court found that the mere presence of the incorrect pins on the project created a manifest risk to the safety of the building. Therefore the cause of action arose from the moment the pins were employed in the construction and not from the moment the pins failed and the roof collapsed, nine years after construction. Based on these facts the court found that the statutory limitation period was exceeded and by virtue of that time lapse the owner's claim against the engineers was barred.

"The owners continued to have various problems with the building, however, and in the mid-1990s commenced a second lawsuit against the builder-developer and the structural engineers."

In a 2004 case, Carleton Condominium No. 21 v. Minto Construction Ltd., the Ontario Court of Appeal affirmed a trial decision allowing a second lawsuit against the same defendants over a wall system on a building in Ottawa that was already the subject of litigation and settlement a few years earlier.

The condominium was constructed in 1972 using concrete block construction for the inner load bearing wall and brick masonry as the exterior finish. Almost immediately after construction the occupants noticed problems with moisture and signs of distress on the exterior brick work. In 1986, the owners commenced litigation against the builder-developer and the structural engineer for faulty design and construction of the exterior walls. That action was settled and a consent dismissal order was entered in 1987. Normally, all defendants would breathe a sigh of relief at this point.

The owners continued to have various problems with the building, however, and in the mid-1990s commenced a second lawsuit against the builder-developer and the structural engineers. The defendants applied to strike out the claim, asserting the defences of *res judicata* and *issue estoppel*. The essence of these defences is that a defendant ought to be vexed only once with the same legal complaint and, to that end, litigants are obliged to bring forward their whole case

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when they bring an action. These defences will apply to not only the claims expressly articulated in the statement of claim, but also those claims which, with reasonable diligence, could have been brought forward at the time of the first claim.

The court reviewed the details of what was known to the owners at the time of the first action. It determined that the focus of the first lawsuit was the exterior brick facing and that no consultants employed to investigate it had any reason to suspect there were also problems with the inner concrete block wall. Because the consultants had no reason to investigate the inner wall, the court found that issues with the concrete block inner wall were not reasonably known to the owners and could not have formed part of the initial lawsuit. This is a surprising result given that the inner block wall was exposed at various places during the remedial work associated with the initial lawsuit. As well, there were many engineers involved in the initial remedial work, and the lawsuit was framed in language that was broad enough, on its face, to include the problems with the inner block wall.

These cases show we can make no assumptions about the general application of seemingly simple legal concepts. A defect that could be said to be obvious at the time of construction but goes unnoticed for many years could give engineers relief under our statutory limitation periods. Meanwhile legal settlement documents, if not crafted in broad enough language, may not provide the finality we think we are bargaining for. **CCE**

Wendy Baker is a partner in the Vancouver office of Miller Thomson LLP. E-mail wbaker@millerthomson.ca