Case Comments and Notes

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Chronique de Jurisprudence et Notes

The Impact of Concurrent Liability in Contract and Tortious Negligence Upon The Running of Limitation Periods

INTRODUCTION

Despite the much criticized *dicta* of Pigeon J. in *J. Nunes Diamonds Ltd.* v. *Dominion Electric Protection Co.*[1] to the effect that tortious liability is inapplicable to parties in a contractual relationship in the absence of some independent tort unconnected with the performance of that contract, recent years have witnessed the expansion of tortious liability between contracting parties and the recognition of concurrent liability in contract and tort in many circumstances.[2] Often it will make no practical difference whether concurrent liability is available. In some circumstances, however, the distinction between tort and contract may be of critical significance. In particular, important limitations consequences may flow from a characterization of the plaintiff's cause of action as one in contract or as one in tort.

This paper will not delve into the circumstances in which concurrent causes of action are open to a plaintiff. It will focus instead upon the

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[1][1972] S.C.R. 769, at 777-778.

[2]*E.G. Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201 (C.A.), aff'd without considering this point, *sub nom. Giffels Associates Ltd.* v. *Eastern Construction Co. Ltd.*, [1978] 2 S.C.R. 1346; *Dabous* v. *Zulian et. al.* (1976), 12 O.R. (2d) 230 (C.A.); *Husky Oil Operation Ltd.* v. *Oster* (1978), 87 D.L.R. (3d) 86 (Sask. Q.B.); *Corporation of District of Surrey* v. *Carroll-Hatch & Associated Ltd.*, [1979] 6 W.W.R. 289 (B.C.C.A.; *Jacobson Ford-Mercury Sales Ltd.* v. *Sivertz* (1979), 103 D.L.R. (3d) 480 (B.C.S.C.); *Canadian Western Natural Gas Co. Ltd.* v. *Pathfinder Surveys Ltd.* (1980), 15 Alta. L.R. (2d) 135 (C.A.); *Viscount Machine & Tool Ltd.* v. *Clarke* (1981), 34 O.R. (2d) 752 (H.C.). The recent Canadian developments have been heavily influenced by English decisions, such as *Esso Petroleum Co. Ltd.* v. *Mardon*, [1976] Q.B. 801 (C.A.), *Batty* v. *Metropolitan Property Realizations Ltd.*, [1978] Q.B. 554 (C.A.), *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp*, [1979] 1 Ch. 384 and *Ross* v. *Caunters*, [1980] 1 Ch. 297. There has also been a mass of academic writing on the subject. The following articles are some of the more important: W.D.C. Poulton, "Tort or Contract" (1966), 82 *L.Q. Rev.* 346; C.J.F. Kidd, "The Negligent Professional Advisor: Can the Client Sue in Tort?" (1976), 9 *U. Qld. L.J.* 252; G.H.L. Fridman, "The Interaction of Tort and Contract" (1977), 93 *L.Q. Rev.* 422; C. Considine, "Some Implications from Recent Cases on the Differences between Contract and Tort" (1978), 12 *U.B.C.L. Rev.* 85; J.F. Keeler, "Paying for Mistakes — Professional Negligence and Economic Loss" (1979), 53 *Aus. L.J.* 412; J. Irvine, "Contract and Tort: Troubles Along the Border" (1979), 10 *C.C.L.T.* 281; B. Morgan, "The Negligent Contract-Breaker" (1980), 58 *Can. Bar Rev.* 299; B.J. Reiter, "Contracts, Torts, Relations and Reliance" in B.J. Reiter and J. Swan, *Studies in Contract Law* (1980) 235-311; R.J. Sutton and M.A. Mulgan, "Contract and Tort" [1980] *N.Z.L.J.* 366.

differences, from the standpoint of limitation of actions, between suing in contract and suing in the tort of negligence. It will be seen that it is generally advantageous for a plaintiff to sue in tort if such a course is open to him. The framing of a cause of action may be relevant from a limitations perspective either because a different limitation period is applicable in contract and tort or more likely because the limitation period runs from a different point in time in contract and tort. The second part of this paper will discuss briefly the differences in limitation periods. Most of the problems which have arisen, however, concern the date on which the relevant limitation period should commence. Most limitations statutes state vaguely that time starts to run from the date the cause of action arose. The third, and most important section of this paper, therefore, will deal with the date of accrual of causes of action in contract and tort. A particularly acute problem in this context is whether a plaintiff's cause of action can be statute-barred before he discovers, or could reasonably have discovered, that he has such a cause of action, as for example, where any damage suffered is latent. The final part of this paper will examine briefly statutory reforms which have been implemented or proposed to remedy the problem of the hidden cause of action.

DIFFERENT LIMITATION PERIODS IN CONTRACT AND TORTIOUS NEGLIGENCE

Various provincial statutes embody an array of limitation periods in the contractual and tortious areas. As a starting point, the statutes employ the same basic limitation periods for actions in contract and tortious negligence and that period is six years from the time the cause of action accrued.[3] Alberta,[4] British Columbia,[5] Manitoba,[6] Prince Edward Island,[7] and Saskatchewan[8] all have a special two-year period for personal injury claims. Whereas in Alberta, British Columbia and Manitoba, it is clear that the two-year period embraces both contractual and tortious claims for personal injuries, it is still an open question in Prince Edward Island and Saskatchewan whether contractual claims are covered by the special period. The answer to that question depends upon whether the phrase "injury to

[3]*Limitation of Actions Act*, R.S.A. 1980, c. L-15 as am., s.4(1)(c)(g); *Limitation Act*, R.S.B.C. 1979, c. 236 as am., s. 3(4); *The Limitation of Actions Act* R.S.M. 1970, c. L150 as am., s. 3(1)(g)(1); *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, s. 9; *The Limitation of Actions (Personal) and Guarantees Act*, R.S.N. 1970, c. 206 as am., s. 2; *The Statute of Limitations*, R.S.N.S. 1967, c. 168 as am., s. 2(1)(e); *Limitations Act*, R.S.O. 1980, c. 240, s. 45(1)(g); *Statute of Limitations*, R.S.P.E.I. 1974, c. S-7 as am., s. 2(1)(g); *The Limitation of Actions Act*, R.S.S. 1978, c. L-15 as am., s. 3(1)(e)(f)(j).

[4]R.S.A. 1980, c. L-15 as am. ss. 51(b) and 52.

[5]R.S.B.C. 1979, c. 236 as am., s. 3(1)(a).

[6]R.S.M. 1970, c. L150 as am., s. 3(1)(d).

[7]R.S.P.E.I. 1974, c. S-7 as am., s. 2(1)(d).

[8]R.S.S. 1978, c. L-15 as am., s. 3(1)(d).

the person . . . from an unlawful act" is broad enough to countenance actions for breach of contract. Alberta,[9] British Columbia[10] and Manitoba[11] also have a special two-year period for claims for property damage. Only the British Columbia statute makes it clear that this period extends to actions for breach of contract. None of the statutes mentions specifically tortious claims for purely economic loss. Such actions must presumably be brought within six years of the accrual of the cause of action pursuant to the various catch-all provisions in the respective statutes.

The similarity in limitation periods in contract and tort has meant that the length of the limitation period alone will not normally be a significant factor in a plaintiff's choice of his cause of action where he is free to make such a choice. One exceptional case in this regard was *Paramuschuk* v. *Town of Meadown Lake*.[12] In that case, the two plaintiffs made a contract with the defendant municipality whereby the defendant agreed to build a drainage ditch across the plaintiffs' lands. The defendant failed to construct such a ditch with the result that the plaintiffs' lands were flooded destroying their crops. The defendant argued that part of the plaintiffs' claims were statute-barred by what was then section 586 of the *Town Act*.[13] That section provided in part that "in cases not otherwise provided for, no action shall be brought against the town for the recovery of damages after the expiration of three months from the date when the damages were sustained".

The Court held that the section applied to actions brought in tort but did not apply to actions brought in contract, which were subject to the general limitation period of six years. Accordingly the first plaintiff, who framed her action in contract was not barred from suing by section 586. The second plaintiff, however, who sued in tort, was statute-barred.

DIFFERENT COMMENCEMENT DATES FOR THE RUNNING OF LIMITATION PERIODS IN CONTRACT AND TORTIOUS NEGLIGENCE

Some limitation provisions, as, for example, those directed at medical and dental practitioners, lay down a specific commencement date, such as the date on which professional services terminated in the matter which was the subject of the complaint.[14] In those cases, it is clear that the commence-

[9]R.S.A. 1980, c. L-15 as am., s. 51 (f).

[10]R.S.B.C. 1979, c. 236 as am., s. 3(1)(a).

[11]R.S.M. 1970, c. L150 as am., s. 3(1)(f).

[12](1964), 47 D.L.R. (2d) 427 (Sask. C.A.).

[13]R.S.S. 1953, c. 138.

[14]For example, *Limitation of Actions Act*, R.S.A 1980, c. L-15 as am., s. 55; *The Statue of Limitations*, R.S.N.S. 1967, c. 168 as am., s. 2(1)(d). For an excellent discussion of the privileged position of the medical profession in this context, see J.P.S. McLaren, "Of Doctors, Hospitals and Limitations — 'The Patient's Dilemma' " (1973) 11 *Osgoode Hall L.J.* 85.

ment date and the special (shorter) limitation period laid down are applicable regardless of whether the plaintiff frames his action in contract or in tort.[15]

In general, however, limitation statutes offer little assistance in determining exactly when time starts to run. The relevant date is that on which the cause of action arose or accrued. It falls to the courts to determine the time of the accrual of causes of action in contract and tortious negligence. The classic general statement of when a cause of action arises was stated by Rose C.J., in *Lewington* v. *Raycroft*:

> The requirement that an action must be commenced within six years after the cause of action arose means that it must be commenced within six years after the occurrence of all the facts which the plaintiff must prove as part of his case, that is, that the time begins to run when the plaintiff could first have brought an action and proved sufficient facts to sustain it . . .[16]

The application of this general principle to actions in contract and tortious negligence must now be examined.

Accrual of a Cause of Action in Contract

It is clear that a cause of action in contract accrues at the time of breach.[17] The result of this rule is that time may start to run and may even expire before the plaintiff suffers any damage and certainly before any damage is discovered.[18] A good example of the injustice which can be wrought by this rule is the decision of the Ontario Court of Appeal in *Farmer* v. *H. H. Chambers Ltd.*[19] The defendant constructed a retaining wall for the plaintiff in 1961. The wall collapsed in 1970 and the plaintiff commenced his action within a few months of the collapse. The Court held that the plaintiff was out of time because the limitation period started to run when the wall was completed in 1961 in breach of contract.

There is also a number of cases dealing with the liability of professionals where the breach date rule has caused a plaintiff to be statute-barred before he had any reason to sue. In the early case of *Short* v. *McCarthy*,[20] for

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[15]*Letiec* v. *Rowe* (1981), 130 D.L.R. (3d) 379 (Nfld. C.A.).

[16][1935] O.R. (c. 2) 440, at 442 (H.C.), aff'd [1935] O.R. 474 (C.A.).

[17]For example, *Long* v. *Western Propeller Co. Ltd.* (1968), 67 D.L.R. (2d) 345 (Man. C.A.).

[18]There is often a dispute as to the point in time at which damage is sustained. This dispute will be examined below in section III B 1.

[19][1973] 1 O.R. 355 (C.A.).

[20](1820), 3 B. & Ald. 626, 106 E.R. 789 (K.B.) *See also Brown* v. *Howard* (1820), 2 Brod. & Bing. 73, 129 E.R. 885 (C.P.); *Howell* v. *Young* (1826), 5 B. & C. 259, 108 E.R. 97 (K.B.); *Smith* v. *Fox* (1848), 6 Hare 386, 67 E.R. 1216 (V.-C.); *Hughes* v. *Twisden* (1886), 15 L.J. Ch. 481; *Schwebel* v. *Telekes*, [1967] O.R. 541 (C.A.) (notary public); *Melanson* v. *Leger* (1798), N.B.R. (2d) 632 (Q.B.); *Power* v. *Halley* (1981), 124 D.L.R. (3d) 350 (Nfld. C.A.).

example, a solicitor was sued in assumpsit for failing to search diligently when verifying the title to certain stock in which his client, the plaintiff, wished to purchase an interest. The defective title came to light more than six years from the time at which the defendant had negligently rendered his services. The Court held that the plaintiff's suit was barred because his cause of action "accrued from the time of the breach of duty by the defendant, and not from the time of its discovery".[21]

A similar conclusion was reached with respect to architects *Bagot* v. *Stevens Scanlan & Co. Ltd.*[22] The defendant was employed by the plaintiff to supervise the construction of drains on the plaintiff's property. The contract was completed by February 1957 but it was not until the end of 1961 that several of the pipes in the drainage system broke. It was held that the plaintiff's cause of action in contract arose at the latest in February 1957 with the result that the plaintiff was out of time when he sued in April 1963.

Some devices are available to enable courts to avoid the rigours of the breach date rule. A contractual obligation may, for example, be characterized as a continuing one such that the breach occurs continuously until either the obligation is performed or becomes impossible of performance. Such a conclusion was reached by Oliver J. in *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp.*[23] The defendant solicitors drew up an option to purchase land in favour of one Geoffrey Green in March 1961. The option was exercisable over a ten year period. The defendant, however, omitted to register Geoffrey's interest in the land pursuant to the *English Land Charges Act*, 1925[24] with the result that his option was defeated by the disposal of the property in August 1967. Geoffrey commenced an action, which was continued by his executors, against the defendant in July 1972 in both contract and tort. To defeat the contractual action, the defendant argued that it was under an obligation to register the option within a reasonable time of the drafting of the agreement in March 1961 and that, therefore, the breach occurred and the cause of action arose substantially more than six years before the suit was commenced. Oliver J. dismissed that argument and determined that the defendant was under a continuing obligation to register the option right up until August 1967 when it became impossible to fulfil that obligation. The plaintiff's cause of action in contract, therefore, accrued as late as August 1967 and the action was in time.

A court can sometimes find that a defendant has fraudulently concealed a plaintiff's right of action. In such a case the limitation period will

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[21](1820), 3 B. & Ald. 626, at 631, 106 E.R. 789, at 791-792.

[22][1966] 1 Q.B. 197. See also *Terrace Board of School Trustees* v. *Berwick et. al.* (1963), 38 D.L.R. (2d) 498 (B.C.S.C.); *McLaren Maycroft & Co.* v. *Fletcher Development Co. Ltd.*, [1973] 2 N.Z.L.R. 100 (C.A.).

[23]*Supra*, footnote 2.

[24] 1925, 15 & 16 Geo. V c. 22.

not commence until the plaintiff has, or with reasonable diligence ought to have, discovered the fraud. Many provincial limitation statutes contain general "fraudulent concealment" provisions as will be identified in section IV of this paper. Such provisions may not be essential, however, because there seems to be a doctrine of fraudulent concealment in equity. This Doctrine was invoked recently in *Vienneau* v. *Solicitor*[25] to delay the running of a limitation period against a lawyer being sued for breach of contract.

In the majority of cases a court will be unable to escape from the position that a cause of action in contract arises on the date of breach and that the limitation period runs from that time. It should be pointed out, however, that there have been a few exceptional cases where the courts have held that a cause of action in contract arises only when the breach is discovered. One such case is *McBride* v. *Vacher*.[26] The plaintiff purchased from the defendant a house in the course of completion. He later sued for a breach of the implied warranty that the house would be completed in a good, proper and workmanlike manner. The Court agreed that the general rule was that a cause of action in contract dates from the breach. In a building contract, however, the cause of action would not accrue in respect of latent defects in the property until those defects were, or ought to have been, discovered by the plaintiff.

Accrual of a Cause of Action in Tortious Negligence

It is a much more difficult question to determine when a cause of action arises in tortious negligence.[27] Authority can be found for any of three dates, namely the date of breach of duty, the date of suffering the consequent damage or the date of discovery of such damage. In many cases, such as a typical traffic accident case, these three dates will coincide and hence there will be no problem. It is not unusual, however, for a considerable period of time to elapse between each of these dates and, in such a situation, it may be vital to determine which date is the relevant one.

Date of Damage

After some initial doubts, it is now reasonably clear that a cause of action in tortious negligence accrues at the earliest upon the occurrence of damage.[28] The plaintiff has no right of action beforehand and hence "to choose any earlier period would be to leave the plaintiff in the thoroughly

[25](1981), 36 N.B.R. (2d) 214 (Q.B.).

[26][1952] 2 D.L.R. 274 (Ont. C.A.). See also *Intermountain School Division No. 36* v. *Gadboury, Lussier, Sigurdson & Venables* (1980), 6 Man. R. (2d) 264 (Q.B.).

[27]See generally J.P.S. McLaren, "The Impact of Limitation Periods on Actionability in Negligence" (1969), 7 *Alta. L. Rev.* 247.

[28]See McLaren, *Ibid.*, at 248-252.

invidious position of not only not knowing that time was running but also of having no substantive claim to bring within the prescribed period".[29] The leading decision is that of the Manitoba Court of Appeal in *Long* v. *Western Propeller Co. Ltd.*[30] The plaintiffs were owners of and passengers in an aircraft which crashed. They sued for the property damage and personal injuries sustained in the crash allegedly caused by negligent repairs performed by the defendant. There was no contractual nexus between the parties and the action was launched solely in tortious negligence. The question arose as to whether the limitation periods involved should run from the date when the negligent repairs were carried out or from the date when the damage and injuries were suffered. More than four years had elapsed between the two dates. The Court was in doubt that damage was required to complete the cause of action in negligence and that the relevant date for limitation purposes was the date of the crash. To have held otherwise would have resulted "in the anomaly that the cause of action of the [passengers] was extinguished before it arose".[31] The relevant Manitoba limitation period for personal injuries was two years and no personal injuries had been sustained two years after the performance of the repairs.

The fact that a cause of action in tortious negligence does not accrue until the time of damage rather than at the time of the breach of duty means that, for limitations' purposes, it will generally be advantageous for a plaintiff who has a choice to sue in tort rather than contract. There has been a number of cases where a finding of liability in tort has enabled the running of a limitation period to be retarded substantially.[32]

There is, however, a body of case law, which will be examined below,[33] to the effect that, where concurrent causes of action in contract and tort are open to a plaintiff, he cannot extend a limitation period by framing his action in tort rather than contract. Moreover, the whole concept of concurrent liability has not been accepted universally and there is still a body of opinion favouring the view that, if there is a contract between the parties, any action must be brought in contract, in the absence of some tort quite independent of that contractual relationship. This view is particularly strong in the field of solicitors' liability.[34]

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[29]*Ibid.*, at 248.

[30]*Supra*, footnote 17.

[31]*Supra*, footnote 17, at 348.

[32] For example, *Lemesurer* v. *Union Gas Co. of Canada Ltd.* (1975), 8 O.R. (2d) 152 (H.C.); *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp*, *supra*, footnote 2; *Viscount Machine & Tool Ltd.* v. *Clarke*, *supra*, footnote 2.

[33]Section III B3.

[34]For example, *Schwebel* v. *Telekes*, *supra*, footnote 20; *Smith* v. *McInnis*, [1978] 2 S.C.R. 1357 *per* Pigeon J.; *Messineo* v. *Beale* (1978), 20 O.R. (2d) 49 (C.A.); *Royal Bank of Canada* v. *Clark* (1978), 88 D.L.R. (3d) 76 (N.B.S.C. App. Div.); *Melanson* v. *Leger*, *supra*, footnote 20; *Page* v. *Dick* (1980), 12 C.C.L.T. 43 (Ont. H.C.)

Problems such as these have led two Canadian law reform bodies to recommend the removal of disparities between contract and tort where a claim is based on negligence, whether contractual or tortious. The starting point for a limitation period in such a case should be the occurrence of the damage. The running of a limitation period should not depend upon the fact that an action is framed in tort rather than contract and, more importantly, two plaintiffs in similar positions should not be treated differently merely because in one case there is a contract and in the other there is not. Thus, in 1969, the Ontario Law Reform Commission made the following recommendation:

> In cases which are based on a breach of a duty to take care, whether that duty arises in tort, contract or by statute, time should run from the occurrence of damage.[35]

It is not always a simple matter to determine the exact date of the occurrence of damage. It can and has been argued, for example, that, where a solicitor negligently allows his client to advance money on a defective security, negligently fails to check the title of property his client is purchasing or negligently drafts an unenforceable contract, the damage occurs at the time when the client receives the defective security, title or contract.[36] If such a view is accepted, then the damage occurs at the same time as the breach of duty and the limitation periods in both contract and tort will commence running at the same time. This was the interpretation of *Howell* v. *Young*[37] favoured by Lord Pearce in *Cartledge* v. *E. Jopling & Sons Ltd.*[38] In *Howell*, the defendant solicitor failed to ensure that certain mortgages were adequate security for money his client, the plaintiff was advancing on a loan. The defendant was sued in both contract (assumpsit) and tort (case). The Court held that the cause of action accrued at the time of the breach of duty and not at the time that the plaintiff actually lost money as a result of the deficient securities.

The same interpretation has been suggested for other negligent solicitors' cases.[39] Most recently this question was considered by the English Court of Appeal in *Forster* v. *Outred & Co.*[40] The plaintiff claimed that the

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[35]Ontario Law Reform Commission, "Report on Limitation of Actions" (1969) 93. See also Alberta Institute of Law Research and Reform, "Working Paper on Limitation of Actions" (June 1977) 4-10.

[36]For example, A.M. Dugdale and K.M. Stanton, *Professional Negligence* (1982) para. 40.18.

[37]*Supra*, footnote 20.

[38][1963] A.C. 758, at 782-783 (H.L.). See also Oliver, J. in *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp*, *supra* footnote 2, at 406-407; Poulton, *supra*, footnote 2, at 361; Keeler, *supra* footnote 2, at 428.

[39]For example, H.B. Radomski, "Actions against Solicitors — Contract or Tort?" (1979-81) 2 *Advocates' Quarterly* 160, at 162 interpreting *Schwebel* v. *Telekes*, *supra*, footnote 20; J. Holland J., in *Robert Simpson Co. Ltd.* v. *Foundation Co. of Canada Ltd.* (1981), 34 O.R. (2d) 1 (H.C.), interpreting his own earlier judgment in *Page* v. *Dick*, *supra*, footnote 34. Mr. Justice Hollands' judgment was subsequently reversed by the Court of Appeal (1982), 36 O.R. (2d) 97.

[40][1982] 1 W.L.R. 86 (C.A.).

negligent advice of the defendant solicitors resulted in her mortgaging her house as security for a loan to her son. The mortgage was executed some seven years before she brought her action. The case proceeded on the basis that the plaintiff had a cause of action in tort as well as in contract. The defendant argued that the limitation period had expired. The plaintiff responded that the limitation period did not start running until damage had been suffered and that did not take place until, at the earliest, the mortgagee threatened to enforce the security by foreclosing on the property. The threatened foreclosure was within the six year limitation period. The Court followed *Howell* v. *Young*[41] and held that the plaintiff suffered damage as soon as she encumbered her property by executing the mortgage. Dun L.J. said:

> In this case, as soon as she executed the mortgage the plaintiff not only became liable under its express terms but also — and more importantly — the value of the equity of redemption of her property was reduced. Before she executed the mortgage deed she owned the property free from encumbrances; thereafter she became the owner of a property subject to a mortgage. That, in my view, was a quantifiable loss and as from that date her cause of action against her solicitor was complete, because at that date she had suffered damage.[42]

Similar difficulties have been encountered in a number of cases dealing with actions relating to defects in real property brought against negligent architects, builders and municipal authorities for negligent design, supervision, construction or inspection. In *Terrace Board of School Trustees* v. *Berwick*,[43] for example, an action was brought against an architect in both contract and tort for the negligent design and supervision of the building of a school which led to the construction of a defective roof. The Court held in part that any cause of action in tort accrued when the bad design was made or the lack of supervision occurred because it was at that time that the damage was done even though it was not discovered until much later.

The same suggestion was made by Diplock L.J. in *Bagot* v. *Stevens Scanlan & Co. Ltd.*[44] where it alleged that the defendant architect had failed to exercise reasonable care in the supervision of the construction of a drainage system on the plaintiff's property with the result that, more than four years later, several of the pipes in the drainage system broke with consequent damage to the plaintiff's property. Diplock L.J. said:

> [I]t seems to me that, having regard to the nature of the duty which is alleged to have been breached in this case, namely, in effect to see that the drains were properly designed and built, the damage from any breach of that duty must have occurred at the time when the drains were improperly built, because the

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[41] *Supra*, footnote 20.

[42] *Supra*, footnote 40, at 100.

[43] *Supra*, footnote 22.

[44] *Supra*, footnote 22.

> plaintiff at that time was landed with property which had bad drains when he ought to have been provided with property which had good drains and the damage, accordingly, occurred on that date. What happened later, in 1961, when the settlement took place was merely a consequence of the damage resulting from the original breach which occurred when bad drains were installed on the plaintiff's property.[45]

In both *Terrace Board of School Trustees* v. *Berwick* and *Bagot* the primary ground for decision was that the architect's sole duty lay in contract and that no concurrent action in tort was available. In this respect, these two decisions may have been overtaken by more recent events.[46] The finding, however, that the occurrence of damage coincided with the breach of duty was adopted in later cases where there was no contractual nexus.[47]

The recent English cases of *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.*[48] and *Anns* v. *London Borough of Merton*[49] have signalled a retreat from this development. In *Sparham-Souter*, the purchasers of two houses which had become uninhabitable because of defective foundations sued the builder and local authority in tort for the negligent construction and inspection of the foundations respectively. The local authority raised, as a preliminary issue, the question of whether the claim was statute-barred, relying upon *Bagot* v. *Stevens Scanlan & Co.*[50] The Court rejected the defendant's argument that the damage was suffered and time began to run when the negligent inspection was carried out and refused to follow the *dicta* of Diplock L.J. in the *Bagot* case. Lord Denning M.R. concluded that "when building work is badly done — and covered up — the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought with reasonable diligence, to have discovered it."[51]

Despite the breadth of this statement, it is far from clear that the Court in *Sparham-Souter* was saying that a cause of action in tort does not arise until the damage is reasonably discoverable. One interpretation is that the decision merely lays down that in the negligent building cases no damage is sustained until the defective state of the property becomes apparent.[52] The Court accepted the validity of the House of Lords decision in *Cartledge*

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[45]*Ibid.*, at 203.

[46]See cases cited *supra*, footnote 2.

[47]*Dutton* v. *Bognor Regis U.D.C.*, [1972] 1 Q.B. 373, at 396-397 (C.A.) *per* Lord Denning M.R.; *Robert Simpson Co. Ltd.* v. *Foundation Co. of Canada Ltd.*, *supra* note 39 *per* J. Holland J.

[48][1976] 1 Q.B. 858 (C.A.).

[49][1978] A.C. 728 (H.L.).

[50]*Supra*, footnote 22.

[51]*Supra*, footnote 48, at 868.

[52]See generally English Law Reform Committee, 21st Report (1977 amnd. 6923) at 8-11; *Winfield and Jolowicz on Tort* (11th ed. W.V.H. Rogers 1979) 691-692.

v. *E. Jopling & Sons Ltd.*[53] which had rejected the date of discovery principle in a case involving personal injuries. Lord Denning M.R. distinguished *Cartledge* on the following basis:

> But there the damage to the man was in fact done when the dust was inhaled — even though it was not discovered till later. Here there was no damage to any purchaser of the house until it began to sink and cracks appeared.[54]

It is possible, therefore, that *Sparham-Souter* is merely a decision on the question of when damage is sustained in a negligent building case. The later decision of the House of Lords in *Anns* v. *London Borough of Merton*[55] does not solve the problem, although it does indicate some general approval of *Sparham-Souter*. On similar facts, Lord Wilberforce, speaking for himself and Lords Diplock, Simon and Russell, merely said that the cause of action can arise only "when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it".[56] Lord Salmon considered the problem more fully and treated it as one of determining just when the damage was sustained in these circumstances. He rejected the notion that the damage was sustained at the time of the negligent act but also rejected the notion that the cause of action arose when the damage was reasonably discoverable. He saw *Sparham-Souter* as a decision favouring the view that the cause of action in negligence accrued when the damage was suffered. He said that it was possible for the damage to take place before it manifested itself but that it would be very difficult to prove such a fact in a negligent building case.

Date of Discovery of Damage

It has already been noted that there may be a considerable effluxion of time between the date that damage, however interpreted, is suffered and the date that damage is, or ought reasonably to have been, discovered. If the cause of action in tortious negligence arises upon the occurrence of damage, a plaintiff may find himself in the unenviable position of being out of time before he even knows that he has a cause of action. Section IV of this paper will examine statutory reforms in this area. The question to be determined at the moment is the extent to which the courts have reacted to this problem so as to delay the running of a limitation period in tort. If it is possible for a cause of action to arise only upon the discovery of damage, then a plaintiff who can frame his action in tort will be in a far superior position to one who must rely upon contract. Of course, if, by statute, a limitation period commences at a time other than the accrual of the cause

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[53]*Supra*, footnote 38.

[54]*Supra*, footnote 48, at 868.

[55]*Supra*, footnote 49.

[56]*Ibid.*, at 760.

of action, such as the date of the termination of medical services, a court will have little leeway to deal with the problem of the hidden cause of action.

The leading case of *Cartledge* v. *E. Jopling & Sons Ltd.*[57] expressly rejected any principle of reasonable discoverability. The plaintiff, while employed as a steel dresser for the defendant, contracted pneumoconiosis, an invidious disease in which progressive damage can be done to a person's lungs without his knowledge. It was held that his cause of action arose from the date the disease emerged irrespective of the fact that he had no reason to know at that time that he had contracted such a disease. Lord Reid said:

> It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer . . .[58]

The issue thus seemed to have been settled. The ambiguous judgment of the English Court of Appeal in the *Sparham-Souter* case,[59], however, reopened the whole question. As has been seen, the exact scope of that decision is unclear. It has, however, spawned a few Canadian cases favouring the date of reasonable discoverability of damage, at least in the negligent building area.[60] In *Robert Simpson Co. Ltd.* v. *Foundation Co. of Canada Ltd.*,[61] the Ontario Court of Appeal interpreted *Sparham-Souter* and *Anns*[62] as standing for the following proposition:

> Where . . . the plaintiff's claim is based upon work negligently performed and covered up the cause of action does not accrue, and time does not begin to run until such time as the plaintiff discovers the damage or reasonably ought to have discovered the damage.[63]

Unfortunately the Court implied that the situation might be different where there was a contractual relationship between the parties. This possibility will be canvassed fully below.[64]

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[57]*Supra*, footnote 38.

[58]*Ibid.*, at 771-772.

[59]*Supra*, footnote 48.

[60]For example, *Ordog* v. *District of Mission* (1980), 110 D.L.R. (3d) 718 (B.C.S.C.); *Nielsen* v. *City of Kamloops* (1981), 31 B.C.L.R. 311 (C.A.).

[61]*Supra*, footnote 39.

[62]*Supra*, footnote 49.

[63]*Supra*, footnote 39, at 108-109.

[64]Section III B3.

There has even been some movement towards recognition of the principle that a cause of action in tortious negligence arises upon the discovery of the damage in the general area of professional negligence, even where there is a contract between the parties.[65] It must be admitted, however, that there are many more cases which expressly reject such a proposition. Most recently, the Newfoundland Court of Appeal in *Power* v. *Halley*[66] relied upon the *Cartledge* case[67] to determine that in an action against a solicitor in tort "time runs from accrual of the cause of action, whether known or unknown".[68]

Date of Breach of Duty—Concurrent Liability in Contract and Tort

It has been seen that it may be very advantageous for a plaintiff to frame his action, if possible, in tort rather than contract so as to delay the running of a limitation period at least until the time of damage and perhaps until the time of discovery of damage. It has also been seen that sometimes an alternative claim in tort will prove to be of no assistance to a plaintiff because damage is found to have occurred at the same time as the breach of duty.[69]

A plaintiff who wishes to claim in tort so as to extend a limitation period may be met with a further problem. There is a line of authority which suggests that, even if an action in tort is available against a defendant for the negligent performance of a contract, the cause of action accrues at the time of the breach of duty, whether the plaintiff sues in contract or tort. If this line is accepted, then a plaintiff will gain no advantage, for limitation purposes, by framing his action in tort.[70]

This is one interpretation of *Howell* v. *Young*.[71] *Howell* was followed in this respect by Laskin J.A. in *Schwebel* v. *Telekes*,[72] which itself was followed by McGillivray J.A. in *Farmer* v. *H.H. Chambers Ltd.*[73] More recently, the Newfoundland Court of Appeal in *Power* v. *Halley* stated the following:

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[65]For example, *Jacobson Ford-Mercury Sales Ltd.* v. *Sivertz*, *supra*, footnote 2; *Viscount Machine & Tool Ltd.* v. *Clarke*, *supra*, footnote 2.

[66]*Supra*, footnote 20.

[67]*Supra*, footnote 38.

[68]*Supra*, footnote 20, at 355-356.

[69]For example, *Forster* v. *Outred & Co.*, *supra*, footnote 40.

[70]There are still some cases which seem to favour the view that, even without any contractual complications, the limitation period in tortious negligence runs from the date of the breach of duty, see *Page* v. *Dick*, *supra*, footnote 34.

[71]*Supra*, footnote 20.

[72]*Supra*, footnote 20.

[73]*Supra*, footnote 19.

> It has long been established that the cause of action occurs and the limitation period starts to run, in contract, when the breach of contract occurs. Where one is employed by another to perform a duty, the failure to perform that duty, or negligence in its performance, also gives rise to a cause of action and, on the authorities, the limitation period runs from the non-performance or negligence and not from its being discovered.[74]

The latest and fullest discussion of this issue was given by the Ontario Court of Appeal in *Robert Simpson Co. Ltd.* v. *Foundation Co. of Canada Ltd.*[75] The Court examined *Schwebel* v. *Telekes*[76] at some length and concluded that only in situations where the plaintiff's claim arose out of "a contract for personal services requiring the defendant to exercise his special skill and knowledge arising out of the defendant's calling"[77] did the cause of action in both contract and tort arise at the time of the breach of duty. In other words, the principle was restricted to professional negligence cases. In non-professional negligence cases, such as *Farmer*,[78] it was still very much an open question as to whether a plaintiff could delay the running of a limitation period by framing his action in tort.

Two commentators[79] have recently supported the view that a professional does not owe two duties to his client, one in contract and one in tort. He owes one duty to exercise reasonable care and skill for which he can be sued in either contract or tort. That being the case, the cause of action must accrue as soon as the plaintiff has the opportunity to sue for a breach of that duty. The earliest opportunity to sue is upon the breach of duty because at that time the plaintiff's cause of action in contract is complete.

It is submitted, however, that if courts take the view that, where there is a contract between the parties, the cause of action in both contract and tort must arise at the time of the breach of duty, then they have lost a valuable opportunity to protect a plaintiff against the unfair running of a limitation period. This is so even if *Robert Simpson* is adopted and the principle is restricted to professional negligence cases. Professional negligence will frequently remain undetected until, at the earliest, damage results. The law reform bodies of both Alberta and Ontario have recommended the abolition of the *Howell* v. *Young* line of cases.[80]

There are some decisions which do accept the principle that a plaintiff can frame his action in tort so as to delay the commencement of a limitation

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[74]*Supra*, footnote 20, at 355.

[75]*Supra*, footnote 39.

[76]*Supra*, footnote 20.

[77]*Supra*, footnote 39, at 108.

[78]*Supra*, footnote 19.

[79]Sutton and Mulgan, *supra*, footnote 2.

[80]*Supra*, footnote 35 and accompanying text.

period. The most important of these was *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp*,[81] the facts of which have already been given,[82] where Oliver J., as an alternative ground for decision, held that the plaintiff's action in tort accrued at the time that the damage occurred and not at the time of the negligent act.[83] He distinguished earlier cases, such as *Howell* v. *Young*, on the basis that the occurrence of damage in those cases coincided with the breach of duty.[84]

Finally on this point, the following paragraph from the latest edition of *Halsbury's Laws of England* is interesting. The words italicized were added to take account of the *Midland Bank Trust* case but, as a result, the paragraph makes little sense:

> **Negligence amounting to breach of contractual duty.** Where one person is employed by another to perform a duty and the failure to perform, or negligence in the performance of, that duty gives rise to a cause of action, time runs from the date of the non-performance or negligence, and not from its being discovered or from the occurring of damage, unless there was fraudulent concealment on the defendant's part of the existence of the cause of action, in which case time runs from the discovery of the fraud, *or unless the duty of care arises from the special relationship between the parties, when the cause of action accrues at the date of damage.*[85]

THE HIDDEN CAUSE OF ACTION — STATUTORY REFORMS

It should be a fundamental principle of the law of limitations that time should not run against a person whilst he has no reason to believe that he has a cause of action. It has been seen, however, that, in both contractual and tortious actions, such a psssibility is quite a distinct one. The courts have been able to grant some relief against injustice but ultimately a statutory solution is essential.

Some statutory reforms are already in place. Alberta,[86] Manitoba,[87] Prince Edward Island[88] and Saskatchewan[89] each has a general provision in its Limitations Act to deal with the problem of causes of action which have been concealed by fraud. Section 7 of the Manitoba statute, for example, provides:

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[81]*Supra*, footnote 2. See also *Jacobson Ford-Mercury Sales Ltd.* v. *Sivertz*, *supra*, footnote 2.

[82]See text, footnote 23.

[83]Contrast *Max Garrett (Distributors) Pty. Ltd.* v. *Tobias* (1975), 50 A.L.J.R. 402 (H.C.).

[84]*Supra*, footnote 2, at 406-407.

[85](4th ed.), Vol. 28, para. 685, at 309.

[86]R.S.A 1980, c. L-15 as am., ss. 6, 57.

[87]R.S.M. 1970, c. L150 as am., s. 7.

[88]R.S.P.E.I. 1974, c. S-7 as am., s. 3.

[89]R.S.S. 1978, c. L-15 as am., s. 4.

> Where the existence of a cause of action has been concealed by fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.

Such provisions are probably not essential because of a doctrine of fraudulent concealment in equity[90] but it is a good idea to give statutory effect to the doctrine so as to resolve any doubts as to its existence and extent.[91]

Three provinces have amended their statutes of limitation to enact broader statutory reforms. In Nova Scotia, the court has the power to disallow a defence based on a time limitation and allow an action to proceed if it appears equitable to do so having regard to the extent to which (1) the time limitation prejudices the plaintiff and (2) the disallowance of the time limitation would prejudice the defendant.[92] In reaching its decision, the court must take into account all circumstances of the case including "the length of and the reasons for the delay on the part of the plaintiff". An obvious example of a situation requiring the court to exercise its discretion is where a plaintiff has no reason to know that he has a cause of action because the damage suffered was latent. It should be noted that the court cannot exercise its discretion where the action is brought more than four years after the expiry of the limitation period in question.

In Manitoba, the court may grant leave to an applicant to commence an action, even though the limitation period would otherwise have expired, if it is satisfied that not more than twelve months have elapsed between the date on which the applicant knew or should have known of all the material facts of a decisive quality on which the action is based and the date on which the application was made to the court.[93] Again, it is quite clear that the provisions are aimed in large measure at protecting the plaintiff against the hidden cause of action. No leave can be granted more than thirty years after the occurrence of the acts or omissions giving rise to the cause of action in question.

The provisions in British Columbia are different from those in the other two provinces in that no judicial discretion is involved; but again it is clear that they are directed at the problem of the hidden cause of action. Subsections 6(3) and (4) of the British Columbia statute[94] provide as follows:

> 6(3) The running of time with respect to the limitation periods fixed by this Act for an action
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> (a) for personal injury;
> (b) for damage to property;

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[90] *Vienneau* v. *Solicitor*, *supra*, footnote 25.

[91] *King* v. *Victor Parsons & Co.*, [1973] 1 All E.R. 206 (C.A.) illustrates the breadth of the doctrine.

[92] R.S.N.S. 1967, c. 168 as am., s 2A.

[93] R.S.M. 1970, c. L150 as am., part II.

[94] R.S.B.C. 1979, c. 236 as am.

(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;
(f) for relief from the consequences of a mistake
(g) brought under the Family Compensation Act; or
(h) for breach of trust not within subsection (1)

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.

6(4) For the purpose of subsection (3),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise in the medical, legal and other aspects of the facts, as the case may require;
(b) "facts" include
  (i) the existence of a duty owed to the plaintiff by the defendant; and
  (ii) that a breach of a duty caused injury, damage or loss to the plaintiff;
(c) where a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person;
(d) where a question arises as to the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.

The ultimate limitation period in British Columbia is thirty years from the time the cause of action arose, except in the case of hospitals and medical practitioners where it is six years.[95]

Some provinces have dealt with the problem of the hidden cause of action in special situations. Thus, s. 17 of Ontario's *Health Disciplines Act*,[96] for example, deals with actions against dentists, doctors, nurses, optometrists and pharmacists by providing for a one year limitation period to run from the date when the plaintiff "knew or ought to have known the fact or facts upon which he alleges negligence or malpractice". Newfoundland's *Law Society Act, 1977*[97] deals with actions against solicitors by providing in s. 95 for a two year limitation period for actions for professional neg-

[95]*Ibid.*, s. 8(1).

[96]R.S.O. 1980, c. 196. See generally G.S. Sharpe, "Periods of Limitation and Medical Malpractice: A New Act for Ontario" (1975), 23 *Chitty's L.J.* 145.

[97]S.N. 1977, c. 77.

ligence to run "from the date when the cause of action for negligence became known to the person affected thereby". Unfortunately, this progressive provision is restricted by the laying down in the same section of an ultimate limitation period of "four years from the date when the professional services giving rise to the action terminated".

In some provinces statutory reforms have been proposed, although not yet implemented, to deal with the problem of the hidden cause of action.[98] The only way to place the law of limitations on a rational footing is by statutory change. Hopefully, it will not be too long before all the Canadian provinces have reformed their laws on limitation of actions. If such action is taken, the way in which a plaintiff can and does frame his cause of action will no longer have such a significant bearing upon the running of limitation periods.

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[98]Ontario, *supra*, footnote 35, at 100-109; Alberta, *supra*, footnote 35, at 56-61.

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