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Concurrent Liabilities and Activities

by Steve Revay

The principal article in this issue describes the increased liability facing designers and builders related to court decisions which up-hold a concurrent liability in both contract and tort (i.e. a civil wrong for which the law requires damages). Whether or not this is "progress" depends on which side one is with respect to a legal action for damages. For example, if one wishes to sue an architect or consulting engineer, there is now the option of a new approach with a larger scope. On the other hand, designers now face increased potential liability and must take appropriate protective actions. The same of course holds true for contractors and others involved in construction.

This development is documented by lawyer R.J. Wright, QC of Toronto who is particularly experienced in construction contract law and is an Associate Professor at Osgoode Hall. Montreal lawyer Peter Blaikie has added a commentary in which he notes that a similar situation exists in Quebec with regard to concurrent liability. Readers who are not themselves lawyers may well wish to send a copy to their own legal counsel.

Here at RAL we have many concurrent activities. The rest of the articles illustrate their diversity with examples in the areas of providing Project Management Services and of conducting National Surveys. "Variety is the spice of life" and we certainly relish our business bill of fare!

LAWSUITS IN TORT WIDEN LIABILITY OF DESIGNERS AND BUILDERS

By Robert J. Wright, QC of Lang, Michener, Cranston, Farquharson & Wright, Toronto

The recent decision of the New Brunswick Court of Appeal in **John Maryon International Limited and John Maryon and Partners Limited v. The New Brunswick Telephone Company**, (1983) 43 N, BR (2d) 469, is the latest in a series of lower and appellate court decisions upholding concurrent liability in contract and tort. The decision distinguished the Supreme Court of Canada's pronouncement in **J. Nunes Diamonds v. Dominion Electric Co.** (1972) SCR 769 that there can be no action in negligence based on the **Hedley, Byrne** principle where there is a contract between the parties, except in those situations where the negligence relied on can properly be considered as being "an independent tort unconnected with the performance of the contract".

In holding that the consulting and design engineers could be sued in negligence despite the existence of a contract, the New Brunswick Court of Appeal also effectively overturned its own earlier decision on Royal Bank v. Clark & Waters (1978) 22 NBR (2d) 693 (affirmed by the Supreme Court of Canada (1980 30 NR 203)) that a solicitor's liability to his client for professional negligence was based on the breach of the teams of his engagement and therefore contractual.

In 1970, the New Brunswick Telephone Company (NB Tel) contracted with the Maryon companies to provide the engineering work and to manage, control and supervise the construction of a concrete tower for the transmission of microwave messages to and from NB Tel's downtown Moncton facilities. Almost as soon as the tower was completed, cracks appeared in the interior of the tower shaft. These worsened in the next few years, causing concrete to break off or spall, inside the tower. The consultant recommended certain remedial action but maintained there was no need for concern about the structure of the tower. Eventually, the NB Tel engaged other consultants who reported serious problems respecting the shaft, the platforms and the foundation of the tower. Repairs were carried out at a cost of almost a million dollars. NB Tel sued the Maryon companies claiming (i) that they were in breach of their contracts in failing to ensure the adequacy of the tower design for its intended purpose and (ii) that they were negligent in the design specifications of the tower.

At trial, it was held that the Maryon companies did breach the contract by failing to perform their responsibilities with the degree of reasonable care and skill ordinarily expected of professional engineers in the circumstances. The claim in tort, however, was dismissed.

While this finding was not directly appealed, it was latent in one of the grounds of the cross appeal which asserted that the trial judge erred in not awarding interest to NB Tel. To award interest, the court had to hold that a cause of action in tort arose after 1973 when the defects in the tower began to be of real concern because prior to 1973, the New

Brunswick courts had no jurisdiction to award interest in respect of causes of action arising prior to October 1, 1973. If NB Tel could only sue in contract, then the cause of action arose in 1971 when the project was completed, and the court had no jurisdiction to award interest. As a result, the court had to decide if actions in contract and tort would exist concurrently.

La Forest, J.A. stated that there were many conflicting opinions with respect to whether or not a tort action could be maintained when the relationship between the parties was based on contract and undertook an extensive review of the Canadian and English cases on the issue. Of these, perhaps the most important was the **J. Nune Diamonds** case referred to above, where Pigeon J., speaking for a 3-2 majority of the Supreme Court of Canada, stated that "the basis of tort liability considered in **Hedley, Byrne** is inapplicable to any case where the relationship between the parties is governed by the contract, unless the negligence relied on can properly be considered as "an independent tort - unconnected with the performance of the contract". **J. Nunes Diamonds** was followed by a number of cases in which professionals were sued in negligence and in contract. In **Carl M. Halvorson Inc.** v. **Robert McClelland & Co.** Ltd. 1973) SCR 65, a case which La Forest J.A. did not consider binding, Pigeon J. again held that an engineer who was sued for negligent modification of a winch system was only liable for negligent performance of its contract and not in tort as was contended.

In **Messineo v. Beale** (1978) 86 DLR (3d) 113 and in **Royal Bank v. Clerk & Waters,** the Ontario and New Brunswick Courts of Appeal respectively held that a solicitor's liability to his client for professional negligence was based on the breach of the terms of his engagement and that there was no liability in tort.

On the other side of the issue, **J. Nunes Diamonds,** as La Forest, J.A. pointed out, has been distinguished and limited to its facts or even simply ignored by the courts which have held that concurrent liability can exist so that in the case of a professional man, a client can claim either in tort or in contract, selecting whichever basis of liability gives him the more favourable result (see **Jacobson Ford-Mercury Sales Ltd.** v. **Sivertz** (1979-80) 10 CCLT 274, **T-D Bank v. Guest** (1979) 10 CCLT 256, **Surrey v. Carrol-Hatch and Associates** (1979-80) 10 CCLT 226, **Power v. Halley** (1979) 88 DLR (3d) 381, **Dominion Chain Co.** v. **Eastern Construction Co.** (1976) 68 DLR (3d) 385 and **Dabous v. Zaliani** (1976) 68 DLR (3d) 414.

In England, it is clear that the debate has been resolved in favour of concurrent liability. From the early days, concurrent actions were allowed against persons exercising professions and callings **(Courtenay v. Eerie** (1850) 10 C.B. 73), but **Bagot v. Stevens Scanian & Co.** (1966) 1 CJB 197 sought to restrict this "common callings" principle to professional relationships where no contract had been made. **Bagot,** however, was expressly disapproved of by Lord Denning in **Esso Petroleum v. Mardon** (1976) 2 A11 ER 5 who extended the - common callings - and concurrent liability principles to cover persons who were not in the business or profession of giving advice, information or opinion. **Bagot** was finally effectively overruled by the Court of Appeal in **Batty v. Metropolitan Property** (1978) 2 A11 ER 445 which held that a development company's duty to examine a site with reasonable care was owed not only the party which had a contract to have a house built on the site but also to subsequent purchasers who were not in privity of contract with the company. Thus, the **Donoghue v. Stevenson** principle was brought into this area of the law. Finally, Lord Denning again made clear in **Photo Production v. Securicor Transport Ltd.** (1978) 3 All ER that a plaintiff can sue in tort or contract unless he has contracted out of his rights.

La Forest, J.A. in reviewing these and other cases, stressed that the cases favouring the exclusion of tortious liability where a contract exists, including **J. Nunes Diamonds,** relied on older English cases which have since been overturned. He pointed out that the Supreme Court of Canada has subsequently declined to pronounce on the issue again since **J. Nunes Diamonds,** although it has had several opportunities to do so, preferring in each case to dispose of the case on other or narrower grounds, although there was some hint in **Fraser Raid v. Drourntsekas** (1979) 29 NR 424 that the court might have considered allowing a negligence action against a builder despite the existence of a contract, had negligence been argued.

Finally, La Forest argued that since parties were free to contract out of liability, a person should not be deprived of his action in tort if there is no contractual term to the contrary and a person who does work gratuitously, without a contract, should not be in a worse position than one who does it for hire pursuant to contract either by being subjected to a different period of limitation or to the payment of interest, etc.

The implications of allowing concurrent liability are several. The plaintiff can choose whether to sue in contract or tort. An action in contract may be barred by the limitation period but an action in tort may not be. A cause of action in contract arises when the breach of contract takes place and cannot be later than the time the contract is completed. A cause of action in tort, however, arises when damage results or when it is or ought to have been discovered. Only then does the limitation clock start ticking. In many contracts for work, defects may not become apparent for years, and the limitation period may have run out if the plaintiff is restricted to suing under the contract. If there had been no contract and/or the person doing the work had done it gratuitously, the same plaintiff would be able to sue in tort, creating the anomaly that a plaintiff without a contract is better off than one with a contract and that the person performing work gratuitously is worse off than the person performing it for hire under a contract.

The ability to recover interest and the amount of interest recoverable are also affected by the form of action. Since the mid-1970s, most courts

have had the jurisdiction to award interest to a successful party from the date the cause of action arises. If a breach of contract occurred before that time, the plaintiff was out of luck as far as the recovery of interest was concerned, but if actionable damage occurred or was discovered in respect of the same work after that time, the plaintiff could recover interest.

The measure and remoteness of damages in tort and contract is also different. The basic principle in contract is that damages are awarded to restore the plaintiff to the position he would have been in if the contract had been performed. These are limited to what may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it **(Hadley v. Baxendale** 9 Exch. 341). Liability in tort, however, extends to any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it. A party to a contract can protect himself against particular risks by means of an exclusionary clause, but in tort there is no such opportunity and a tort-feasor cannot complain if he has to pay for unusual but foreseeable damage resulting from his acts or omissions. Thus, liability in tort is wider than liability in contract, although in most cases there will be little difference. (Note - this is wrong and La Forest points out that an exclusionary clause cannot be gotten around by suing in tort. This was attempted in **J. Nunes Diamonds.)**

As well, if a plaintiff has been contributorily negligent, his damages would be reduced by his degree of fault if he sues in tort, but this may not be so if he sues in contract.

There may also be a difference in apportionment of liability among two or more defendants. If damage is caused or contributed to by the fault or neglect of two or more persons, they are jointly and severally liable to the plaintiff and can also claim contribution from each other (Ontario Negligence Act, RSO 1980, c.315). It is unclear whether there can be contribution in a contractual setting. The cases have been inconsistent on this point, although the trend is to allow contribution or to avoid the Negligence Act requirement of common liability by holding that a negligent breach of contract is itself a tort **(Dominion Chain Co.** Ltd. v. **Eastern Construction Co.** Ltd.). If the plaintiff sues one party in tort and the other in contract, there would be no apportionment of liability.

Allowing tort action where a relationship was created by contract will no doubt widen the liability of architects, engineers and builders. Not only will there be more potential actions because of extended limitation periods, but also, the measure of damages may be larger. The decision in the Maryon v. NB Tel case may well have a considerable effect on the legal liability and responsibility of all those connected with the construction industry.

Increased Construction Research Activity in Canada needed - RAL National Study

The volume of Construction RD&D (Research, Development and Demonstration) activity in Canada is far less than is appropriate for an industrial sector of such economic and technical importance. (it is less than 0.2% of the value of annual construction spending).

"Market Pull" provides the main incentive for RD&D. This is best exemplified by actions of manufacturers and owners.

Whereas the industry prides itself on being innovative, the construction 11 system" inhibits deliberate R&D activities. In general, contractors lack the resources to execute research work and in most cases are "building to specification". Similarly, architects and engineers typically are not afforded sufficient time or budgets by their clients to engage in research activities.

The Federal Government, as the largest Owner of a diversified inventory of construction projects throughout Canada, has a major incentive to play a leadership role; greater recognition for the Construction Sector in overall Federal RD&D policies and programs is needed.

A multifaceted program of technology transfer is necessary to make use of existing construction technology.

Great emphasis on building science and building systems is needed in educational and training programs for design, construction and maintenance personnel.

The above are among the conclusions of a report commissioned by the Interdepartmental Committee on National Construction RD&D and prepared by Revay and Associates Limited. The sponsors had sent a detailed questionnaire to 40 Federal Departments and Agencies on their involvement, interests and recommendations concerning Construction RD&D. RAL won a competition for the analysis of the survey responses and the conduct of a similar survey directed at the other levels of government, the private sector and educational institutions.

The primary objectives of the study were to provide a broad overview of the present state of Construction RD&D in Canada which identified the main areas of interest and influence, the expressed needs and priorities, the principal gaps and constraints and the main interactive mechanisms". In addition, RAL was directed to report on suggested improvements and to present its conclusions.

Some 400 detailed questionnaires were analysed and 128 organisations were interviewed in 14 cities across Canada. The report was prepared in RAL's Ottawa Bureau and all four RAL offices were involved in the national survey. The report's Main Conclusions have been endorsed by the Canadian Committee on Building Research and by the Construction

Technology Committee of the Construction Industry Development Council. The report is currently being reviewed by the Task Force on Federal Policies and Programs for Technological Development.

Copies of the 150 page report on "Construction RD&D in Canada - Present and Potential" will be sent on request.

QUEBEC NOTE

by Peter M. Blaikie of Heenan, Blaikie, Jolin, Powin, Tr6joanier, Cobbett, Montreal

In the Province of Quebec, whose civil law is derived from the law of France, the issue of concurrent liability has sparked considerable interest among academics over the years. The concept of concurrent liability is known in Quebec as the "cumul" of contractual and delictual responsibility. Although most practitioners have regarded the issue as having been settled for some time in favour of concurrent liability, some academic skepticism has been expressed as to the validity of this view.

In 1981, as regards the Province of Quebec, the matter was definitively settled by the Supreme Court of Canada in **Wabasso Limited v. The National Drying Machinery Co.** (1981) 1 S.C.R. 578. The issue came before the Supreme Court by way of an exception to jurisdiction presented by defendant. It was clear that if the plaintiff's only recourse was based on the contract between the parties, the Superior Court of Quebec had no jurisdiction, since the defendant had neither domicile nor place of business in the Province of Quebec, had no assets in the Province and the contract was signed in the United States. If, on the other hand, the plaintiff could exercise an action in delict (tort), notwithstanding the existence of a contract, it could sue before the courts of Quebec.

The head-note in the report accurately summarises the decision of the Supreme Court of Canada.

"The same fact can constitute both contractual fault and delictual fault, and the existence of contractual relations between the parties does not deprive the victim of the right to base his remedy on delictual fault. For him to do so, the fault committed within the framework of the contract must in itself be a fault sanctioned by Article 1053 CC in the absence of a contract. (it should be noted that Article 1053 CC is the basis of delictual (tortious) liability in the Province of Quebec.)

In the case at bar, the liability of respondent would exist even if there had been no contract between it and appellant. There is no reason why the negligent act should suddenly lose its delictual nature because the victim is a party to the contract during the course of which it is committed.

Accordingly, as the whole cause of action, as worded, arose in TroisRivi6res the Superior Court of that District has jurisdiction."

Based on the foregoing commentary by Robert Wright, it would appear that the positions in Quebec and the common law provinces, with respect to the question of concurrent liability, are now quite similar.

Messrs. Wright and Blaikie have frequently acted as Discussion Leaders in RAL Seminars across Canada on "The Causes and Settlement of Construction Contract Disputes" and "Construction Claims".

The Evaluation of New Construction Materials or Usages National Survey

New products, systems and usages are ever - present in the dynamic construction industry. Can specifiers use them with assurance? Can building officials accept them? Can manufacturers demonstrate their suitability economically?

These problems have led a number of national associations to propose that a broad national service to evaluate building materials be established in Canada. Similar services operate in the United States, many European countries, Japan etc. A representative Task Force on a National Building Materials Evaluation Service for Canada has developed specific proposals and has sponsored a national survey to be conducted by an independent consultant to obtain the reaction of manufacturers, distributors, regulators, specifiers and other interested parties.

Revay and Associates Limited was chosen to carry out the survey assignment. Details concerning the proposal and a brief questionnaire have been distributed to a sizeable representative sample across Canada. **Additional copies** will be gladly mailed upon request to RAL's Ottawa Bureau.

RAL Management Services on Hamilton Airport Expansion Project

In October, 1982 RAL was retained by Transport Canada to provide Scheduling Control and Cost Control Reporting Services on the $49 million Hamilton Civic Airport expansion. Precise scheduling is essential because of the multi-contract nature of the work and the need to keep the airport fully operational throughout the

expansion program. The project involves a new runway 2400 metres long, a major overlay to the existing runway, a two-phase expansion of the air terminal involving new construction, major demolition and restructuring, an emergency road system, improved aprons and a new firehall.

Schedule control is being provided to Transport Canada in the form of arrow diagram CPM networks, summary bar charts and monthly narrative reports. Cash flow projections are compiled and updated as contract packages are awarded. The work is proceeding on schedule and under budget.

Detailed estimates and schedules prepared for St. John's Project

An RAL quantity surveying and scheduling team headed by Vice-President Regula Brunies is providing specialised project management services for the $42 million Institute of Fisheries and Marine Technology in St. John's, Nfld. The Government of Newfoundland & Labrador, under a Canada Newfoundland Subsidiary Agreement, is constructing the new 20,000m2 facility for 1,000 students on a project management basis.

Revay and Associates Limited, in subcontract with the Government's auditing consultants, Clarkson Gordon, prepared a detailed contractor-type construction estimate and the project's master schedule.

In addition, RAL designed the monitoring system for project costs and schedule and is responsible for control and reporting on developing trends affecting the project's progress.

Author, Author!

Edgar Lion, an RAL Associate in the Montreal Office since 1976, has had his third book published - "Building Renovation and Recycling", John Wiley & Sons Inc., New York. It focuses mainly on commercial and industrial applications but also deals with some in the institutional and residential fields.

Previous books to his credit are, "A Practical Guide to Building Construction" (Prentice-Hall, New York, 1980) and "Shopping Centers-Planning, Development and Administration" (Wiley, N.Y., 1976). Some of his RAIL assignments also constitute "books" e.g. the course material on "Fundamentals of Quality Concrete", prepared for the Ontario General Contractors Association accreditation program for construction superintendents, ran to some 250 pages.

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