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Insights

LIMITATION PERIOD FOR A TORTIOUS CLAIM: WHEN DOES IT END?

Apr 14, 2021

SUMMARY

Some breaches of contract do not become apparent until many years have passed. This is especially true where the result is a defect. Recently, our colleague Charlotte Mears blogged on limitation periods under contract. But what happens after the limitation period under a contract has expired?

This blog explores the extent to which an answer lies in tort focusing on the tort of negligence.

What is the statutory limitation period in tort?

Time starts running, in both breach of contract and tort claims, at the point when the cause of action accrues, but that point is not the same.

The six year limitation period (or 12 if the parties entered into a deed) for breach of contract claims begins to run when the breach occurs. In construction claims, this tends to be at the time of practical completion irrespective of when a defect manifests itself.

However, tort is different. Time does not start running when the negligent act or omission occurred but instead when the loss (damage) was suffered. So in negligence, the claimant's right to sue only accrues when the alleged negligent act or omission causes loss. In continuing or recurring torts (as sometimes is the case in nuisance cases) the right of action accrues afresh every day, but damages can only be recovered for that part of the loss which arose within the relevant period before the commencement of proceedings. For latent damage claims, claims may be postponed until the claimant is aware of the loss (as discussed further below).

Tortious limitation periods also differ from contractual limitation periods, for example:

- For actions in tort (excluding personal injury and latent damage) the limitation is six years running from the date the damage is suffered.

- For negligence claims in respect of latent damage the limitation period is the later of:
  - six years from the date the damage occurred; or
  - three years from the date on which the claimant had the requisite knowledge and the right to bring such an action.

These periods are subject to a maximum period of 15 years from the negligent act or omission.

While this sounds simple enough, applying these rules to specific situations and calculating the limitation period may give rise to uncertainties.

When does the damage occur?

Generally, the damage occurs when there is physical damage to the building or, in the specific category of cases where economic loss is recoverable without physical damage, when that loss is suffered. It is at that point that the cause of action accrues.

So, for example, in Pirelli General Cable Works Ltd v Oscar Faber & Partners, Lord Fraser stated:

> "It seems to me, that except perhaps where the advice of an Architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building."

Abbott v Will Gannon & Smith Ltd is another good example of this rationale. This case concerned repair work to a window designed by engineers. The claim accrued not when the design was completed but instead when cracks appeared in the windows.

Alternatively, if the building is already clearly defective or damaged when handed over at practical completion then the cause of action arises at this point (Tozer Kemsley and Millbourn (Holdings) Ltd v J Jarvis & Sons Ltd) but rarely, if ever, before.

Although these scenarios are at the simpler end of this spectrum, issues can still arise, as pointed out by the late David Sears QC in his blog on limitation in economic loss cases.

What about latent damage?

While defects may escape detection so may the damage caused by the defects. This is a tricky area and unsurprisingly, when such "knowledge" of the damage can be said to have arisen and so start the clock ticking has been frequently discussed and litigated.

The cases emphasise that, to start time running, a claimant need not know for certain that it has a claim for damages – it can be enough that they have sufficient suspicion to begin to investigate. In Haward and others v Fawcetts (a firm), the House of Lords referred to the degree of knowledge required as knowing enough and having sufficient confidence to justify embarking on preliminary

steps to making a claim, such as submitting a claim to the proposed defendant, taking advice and collecting evidence.

How do you establish a claim in negligence?

Everyone will be broadly familiar with the key hurdles that a claimant needs to jump to establish a claim in tort. These are covered in detail in Practical Law's note on claims in negligence, but in a nutshell they are as follows:

- The defendant owed a duty to the claimant.
- The defendant breached that duty.
- The defendant's breach of duty caused the claimant to suffer loss.
- The loss caused by the defendant's breach of duty is recoverable.

While hurdles can be neatly summarised, in both theory and practice they are not the full story. For example, even if a duty of care is owed, the equally burning question concerns the nature and scope of that duty. This directly impacts the type of loss the claimant can recover.

Can a claimant recover pure economic loss?

There is a general rule that a negligent tortfeasor is not liable for pure economic loss.

The seminal case of Murphy v Brentwood is generally used to support the proposition that in the absence of property damage, the costs of rectifying building defects are economic losses and thus irrecoverable in negligence actions. Although the fine print of Murphy and the various cases following it have provided glimpses of concepts that might circumvent this general rule ("complex structure" theory being the most alluring), the overall general rule has survived.

An interesting exception that survives notwithstanding Murphy was established in the case of Hedley Byrne v Heller. This case provides that where there is a sufficiently proximate relationship between the parties, such that the party providing the advice should have known that the information it was providing would likely be relied upon, the advisor may be liable for pure economic loss caused by a negligent misstatement. The court commented:

> "… if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise."

Since the Hedley Byrne decision, the courts have extended the principle of tortious liability beyond the provision of information and advice to include the performance of other services (Henderson v Merrett Syndicates Ltd, Robinson v PE Jones, confirmed on appeal, Tesco Stores Ltd v Costain & Others and Lejonvarn v Burgess). These cases provide a further indication that the provision of

services, including the production of negligent design, provided there is a sufficiently proximate relationship between the professional and the person who relies on their expertise, will fall within the ambit of the Hedley Byrne principle.

This gets intriguing where there is a concurrent contractual relationship between the parties giving rise to a similar, but not necessarily identical, network of rights, obligations and liabilities. It is yet more intriguing where there is no concurrent liability in the true sense (there being no contract between the specific parties) but perhaps a contract between the person producing the design (or delivering the advice) and a third party, but which frames part of the courts' inquiry into the nature and scope of the duty they assumed, which Emma Hynes discussed in her recent blog post. The courts seem reluctant to expand the scope of a tortious duty too far beyond its contractual correlative (whether concurrent or quasi-concurrent).

Happily, the nuances of those situations are outside the scope of this blog but when it comes to limitation periods it seems (perhaps uncomfortably) settled that the existence of a contract (and a potentially earlier-expiring limitation period for claims made under it) does not in and of itself prevent a claimant from taking advantage of the longer limitation available for its claim in negligence.

How to stop time running?

If you are approaching the end of the limitation period, you will need to act quickly to stop time running.

One way to stop time running for limitation purposes is simply to start the claim. But remember, if the claim is to be made in court, a claim is brought for limitation purposes when the court receives the claim form, not the date the claim form is issued (St Helens Metropolitan BC v Barnes).

If the parties are to arbitrate, section 14 of the Arbitration Act 1996 provides that the claim is commenced either:

- Where the arbitrator is named or designated, when one of the parties serves a notice requiring them to submit the matter to the person named or designated.
- Where the arbitrator or arbitrators are to be appointed by the parties, when one party serves on the other a notice requiring it to appoint an arbitrator or agree to the appointment of an arbitrator.

However, a court will also give effect to the applicable institutional rules when determining if the proceedings have been commenced.

If the parties are to adjudicate, the statutory limitation periods may not even apply. See James Frampton's recent blog post discussing this issue.

Alternatively, if the parties are keen to pursue settlement or are not in a position to start a claim just yet, the parties may also enter into a standstill agreement to stop time running on their claim. Parties planning to enter into such an agreement should pay attention to the governing law of the contract. Standstill agreements are common and effective under English law but are less reliable in certain legal systems.

Final thoughts

While tort may offer a lifeline to parties keen to bring a claim in instances where the limitation period for a contractual claim has expired, this blog shows that tort is not the easy option. While the lengthier limitation periods may offer the claimant scope for success, it's important to understand that tort is not contract and the evidential hurdles are different as are the damages that may be sought.

This article first appeared on the Practical Law Construction blog dated 7 April 2021.

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