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ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

Strategies for Defending Liability Claims in the Construction Context

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MCHUMOR.com by T. McCracken



“Build it, and they will sue.”

Construction claims

- are complicated
- multi party, multi issue
 - relationships primarily contractual
 - usually involves some allegation of professional negligence
 - overlap of tort and contract

Every major construction claim

- involves a professional eg. architect and/ or engineer (and specialty sub-consultants)
- building inspector and plans examiner
- contractor, specialty contractor, manufacturer

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"I haven't found anything wrong yet, but it's OK for you to go ahead and worry a bit longer."

Construction Context

- I am not dealing with coverage
- do note that many claims are being defended which years ago may not have triggered coverage

- is there a contractual indemnity (to the owner)
- is there a contractual indemnity (from the subcontractor)
- sometimes can get subcontractor to assume the defence

- always check the contract language
 - sets the standard of performance and hence breach (tort or otherwise)

Under the Ontario Rules, three main pre-trial attacks on a proceeding

- motion to strike (Rule 21)
- dismissal for delay (Rule 24)
- summary judgment (Rule 20)

motion to dismiss for delay brought by
defendant

motion to strike or for summary judgment
can be brought by any party

most of my comments from a defendant's
perspective

motion to strike (Rule 21)

is it plain and obvious the plaintiff's case cannot succeed?

is the plaintiff without legal capacity to sue?

a legal issue with a novel aspect is not suitable for determination under Rule 21 where “factual considerations arise”

damages evidence still had to be led at a trial, no real cost savings, and factual *inferences* were being made from the pleadings

PDC 3 Partnership v. Bregman + Hamman [2001] O.J. No. 422 (CA)

you can't use Rule 21 to decide an admissibility question or whether to move for summary judgment

BDO Dunwoody v. Buckingham Securities (2008) O.R. (3d) 207 (SCJ)

motion to dismiss for delay (Rule 24)

has a witness died?

how long has it been since the events in question?

has the plaintiff demonstrated necessary witnesses have a sufficient recollection of events

- Baranick .v Counsel Trust 2007 CarswellOnt 3287, affirmed 2008 ONCA 142 (CA)

three tips for motions to dismiss for delay

- always prepare and serve your *sworn* affidavit of documents
- are you really asking for case management or a timetable?
- what is the real prejudice?

motion for summary judgment (Rule 20)

must show there is no genuine issue
requiring a trial

- no genuine issue requiring the forensic machinery of a trial
- can now weigh evidence and make inferences

Where a court is satisfied there is no genuine issue for trial with respect to a claim or defence, must grant summary judgment

- Irving Ungerman v. Galanis (1991) 4 O.R. (3d) 545 (CA)

to oppose, must show “real chance of success” at trial

- Guarantee Company v. Gordon Capital [1999] S.C.J. No.60

summary judgment remains the exception not the rule, but...

“A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter was allowed to proceed.”

- Canada (Attorney General) v. Lameman 2008 SCC 14

Questions?