Building Inspection and Building Code Claims – A Brief Overview

Greg Van Berkel & Jonathan de Vries
Shillingtons LLP

INTRODUCTION

The starting point for any discussion of the liability of building authorities in Ontario is, not surprisingly, the *Building Code Act, 1992*[1] and its various regulations, including the *Building Code*.[2] The purpose of the *Building Code* and other construction regulations is to ensure the health and safety of the public by enforcing uniform standards of construction safety, and by providing for an independent mechanism to ensure the sufficiency and safety of construction projects undertaken by builders who may, either intentionally or inadvertently, build sub-standard or dangerous structures. Given this purpose, individual members of the public at large are entitled to rely upon building authorities to inspect buildings and ensure compliance with the *Building Code*. When building authorities fail in this duty they are liable for any resulting damages.[3]

The imposition of liability on building authorities for negligently built structures has always had its detractors. Almost immediately after courts started recognizing claims against building authorities, critics began pointing out that the "the attraction of making the [building] authority liable appears to spring from its assured solvency and general responsibility to the public at large, and not because any reliance is placed on the [building authority's] inspection in any particular case by any particular plaintiff."[4]

---

[1] *Building Code Act, 1992*, S.O. 1992, c. 23 [*Building Code Act*].
[2] O. Reg. 350/06.
[3] *Rothfield v. Manolakos*, [1989] S.C.J. No. 120 at paras. 7, 15 (QL) [*Rothfield*]; *Ingles v. Tutkaluk Construction Ltd.*, [2000] S.C.J. No. 13 at para. 23 (QL) [*Ingles*].
[4] Richard Buxton, "Built upon Sand" (1978) 41 Mod. L. Rev. 85 at 87 (citations omitted).

Others have pointed out that imposing liability on building authorities tends to reward irresponsible builders or owners at the expense of taxpayers, and further that nothing is wrong with making people bear the burden of their own irresponsibility.[5]

Despite endless protestations by courts that building authorities are not to be treated as "insurers" of the structural soundness and safety of buildings (although many see this as exactly what has happened)[6] it has become almost axiomatic that in any case involving a defective building, the building authority is going to be sued. Furthermore, a building authority will often find itself standing alone defending a claim, the other parties having gone bankrupt, having dissolved or lacking sufficient assets to be a viable defendant.

The purpose of this paper is to provide a brief overview of building authority liability as it currently exists in the province of Ontario. It surveys the parties who are often involved, what the legal tests are that a court will employ to determine whether a building authority was negligent and finally offer some comments regarding risk management for building authorities.

[5] M. Kevin Woodhall, "Private Law Liablity of Public Authorities for Negligent Inspection and Regulation" (1991-1992) 37 McGill L.J. 83 at 131-132. See also Buxton, *ibid.* at 87-88: "...it is (at least), not self-evident that the ratepayers should act as insurers to house purchasers who make bad bargins."

[6] See e.g. David G. Boghosian & J. Murray Davison, *The Law of Municipal Liablity in Canada*, looseleaf (Markham: Lexisnexus Canada Inc., 1999) at §5.90.

> The reality in this area of law is that Canadian courts have effectively rendered municipalities virtual insurers of property owners and occupiers who have suffered damage from building defects, while paying lip service to a fault based standard [i.e. a tort standard].

THE PARTIES

Who Can Sue?

For eleven years now, the leading authority on the liability of building authorities has been the 2000 decision of the Supreme Court of Canada in *Ingles v. Tutkaluk Construction*. In that case, the Court held that: "municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers."[7] The list of persons who "might be injured" is extensive, and includes not only the initial owners and occupiers of buildings, but also any subsequent owners or occupiers. It further includes any person present at the building, or persons owning, occupying or present on adjoining property. It can even extend to non-owners/occupiers who have a financial interest in the building, such as mortgagors and investors. The end result is that the potential pool of plaintiffs is vast, with one writer suggesting that "[building authorities] are exposed to virtually limitless liability in regard to both the persons to whom they will be found to owe a duty of care and the length of time passing between the building construction and the onset of harm resulting from a building defect".[8]

What Can They Sue For?

The types of damages that can be claimed from building authorities are as varied as the types of plaintiffs who can sue them. In many case, the damages being sought reflect the costs of repairing the building defects.[9] However, it is a mistake to assume that a building authority's liability is always limited to the cost of repairs. Indeed, the larger

[7] *Ingles*, *supra* note 3 at para. 23.
[8] Boghosian & Davison, *supra* note 6 at §5.32.2
[9] See e.g. *Ingles*, *supra* note 3, where the trial judge assessed the damages as being the equivalent of the cost of repairing the defective foundations of the plaintiffs' home: $52,520.00.

and more complex a construction project becomes, the number of parties that can be negatively affected increases, as do the potential damages. One of the best illustrations of this is the case of *Riverside Developments Bobcaygeon Ltd. v. Bobcaygeon (Village).*[10] In that case, a developer undertook to build four rental buildings, with the project being financed by a mortgage that was guaranteed by several other corporations and individuals. When numerous deficiencies began to be discovered, three of the four buildings were already completed and were occupied by tenants. As problems with the buildings became more widely known, tenants began to flee and the developer's financial situation became precarious, leaving it in a position where it was unable to carry out any of the necessary repairs. Eventually, the bank took possession of the buildings, completed the remedial work through a receiver and sold the buildings. It also obtained judgments against the developer on the mortgage and against the guarantors. The building authority was found to have negligently approved the plans for the buildings and for having negligently failed to conduct proper building inspections. It was determined that the actual cost to repair the buildings was $1,600,000. However, when all of the other losses sustained by the developer and its guarantors as a result of the collapse of the project were added up, the building authority was faced with a judgment totaling more than $14,000,000.[11]

Personal injury claims also present significant risks to building authorities. A recent case that illustrates this is *Musselman v. 8755667 Ontario Inc. (c.o.b. Cities Bistro).*[12] The case involved a 71 year old plaintiff who was rendered a quadriplegic after falling down a

[10] [2004] O.J. No. 151 (S.C.J.), aff'd [2005] O.J. No. 3326 (C.A.) (QL) [*Riverside*].
[11] The judgment included amounts for lost income from the buildings, lost equity in the buildings, excess costs incurred by the developer while it was still in possession of the buildings, the balance of the mortgage indebtedness and the guarantors' indebtedness under their guarantees.
[12] [2010] O.J. No. 2325 (S.C.J.) (QL); aff'd 2012 ONCA 41 [*Musselman*].

substandard staircase in the basement of a restaurant. The building authority had inspected and approved the design and construction of the staircase 14 years prior to the incident. The plaintiff's monetary damages, for which the building authority was found 30% liable, totaled $3,243,349.48.[13]

When Can They Sue?

The previous comment regarding the passage of time bears further comment. Normally, civil claims are subject to limitation periods, which prevent a lawsuit from being commenced after a prescribed period of time has elapsed from the time that the act or omission the claim is based upon occurred. Such a rule presents the obvious problem of what happens when a plaintiff is unaware that they have a claim. This may occur when the negligence of the defendant is unknown to the plaintiff, or where the plaintiff does not actually realize they have suffered a loss. To prevent claims from becoming unjustly barred before a plaintiff even realizes that it is exists, courts adopted what is called discoverability principle, which prevents a limitation period from commencing until "the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence."[14] The practical impact of the discoverability rule is that claims can often be brought years, sometimes decades, after the conduct they are based upon occurred.

In Ontario, the current limitation period applicable to building code cases is two years from the date the claim was discovered. The current limitations legislation in Ontario also provides for a 15 year ultimate limitation period, which runs from the date that the

[13] These damages included both the plaintiff's personal damages as well as the derivative claims advanced by her family members pursuant to the *Family Law Act*, R.S.O. 1990, c. F. 3.
[14] *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224.

act or omission the claim is based upon occurred, and runs regardless of whether or not the claim has been discovered.[15]

Discoverability arguments often arise in building code cases, particularly those involving claims by property owners for building defects or property damage.[16] Even the most shoddily built structure will not necessary show any signs of defects immediately upon completion. It can sometimes take years for defects to fully manifest themselves, while other defects only manifest themselves when they are combined with certain circumstances, such as a heavily rainfall which causes basement flooding. Furthermore, since the duty of care is owned to individual property owners (current and successive), a claim might not even be discovered until a future owner takes possession of the property.[17] Also, in cases involving multiple building defects, the individual defects will have separate limitation periods, meaning that each defect will have to be separately discovered before the limitation clock begins to run.[18]

The requirement of reasonable diligence is intended to force a plaintiff to actively investigate and pursue their legal remedies. However, the circumstances posed by building code cases often result in a less onerous requirement of diligence. In the

[15] But see *infra* note 18 and accompanying text regarding acts or omissions that took place on or before January 1, 2004.
[16] Discoverability arguments are less common in cases involving losses suffered by entrants or other non-owners. Such cases do not involve a loss caused by the ownership of a defective building, but rather involve personal injury or property damage resulting from a transitory presence at, or a particular interaction with, the building in question. In such cases, the claim itself does not exist until the actual injury itself is sustained. As such, discoverability is not generally an issue.
[17] A good illustration of such a situation is found in the case of *Kamloops v. Nielsen*, [1984] S.C.J. No. 29 (QL) [*Kamloops*]. In *Kamloops*, the son of a municipal official had built a house for his parents. The construction had subject to several orders related to structural concerns, all of which the builder had ignored. After completion, ownership of the house was transferred to the muncipal offical and his spouse. The house was subsequent sold to a third party, who had no knowledge of the structural issue or the building authority's prior involvement.
[18] *Grey Condominium Corp. No. 27 v. Blue Mountain Resorts Ltd.*, [2008] O.J. No. 1893 (C.A.) (QL).

absence of any manifest problems, there is little reason to require a plaintiff to comprehensively investigate the *Building Code* compliance of his or her home.[19] Furthermore, even when problems are manifesting themselves, the average plaintiff likely lacks the technical knowledge required to understand the cause or extent of those problems.

While it is not a hard and fast legal rule, courts have generally proceeded on the assumption that where the discovery of a building defect requires some level of technical expertise, a plaintiff will not discover the defect for the purposes of the commencement of a limitation period until an expert investigation is conducted and an opinion provided to the plaintiff.[20] However, a plaintiff does not need to have a comprehensive explanation from an expert before the limitation period begins to run. It is normally sufficient that an expert puts the plaintiff on notice that something is amiss with their building. This is illustrated by the case of *Jagosky v. Huntsville (Town)*.[21] In that case, the plaintiff homeowners had received a soil testing report which indicated that the soil their rental building was constructed on was not suitable to support the building's foundation. The plaintiffs argued that they did not discover their claim until 5½ years later, when they had an engineering investigation conducted which confirmed that footings of the building had been improperly built. This argument was rejected by Justice Quinlan, whose decision was later affirmed by the Court of Appeal for Ontario. The soils report had sufficient information to put the plaintiffs on notice that something

[19] an exception arises in situations where there is some patent problem with a building that would suggest to a reasonable person that further investigations should be undertaken. See generally *Theriault*, *infra* note 51.
[20] See generally Boghosian & Davison, *supra* note 6 at §10.109. Boghosian & Davison provide an extensive list of cases involving the interaction between expert investigations and the discovery of claims.
[21] [2010] O.J. No. 3562 (S.C.J.), aff'd [2011] O.J. No. 1841 (C.A.) (QL) [*Jagosky*].

was wrong with the way their building had been constructed and therefore the limitation period ran from the receipt of that report.[22]

THE TESTS

In order to avoid liability, a building authority must prove that it acted in accordance with the standard of care of an "ordinary, reasonable and prudent inspector in the same circumstances".[23] The duty extends to both acts and omission by a building authority and its employees and agents. The standard is relative to various factors involved in any given case, such as the size of the building project in issue, the likelihood of harm occurring, the gravity or severity of any potential harm and the cost of remedying or preventing the harm.[24] The result is a subjective standard that is both a blessing and a curse: it is flexible and somewhat accommodating, but it is also difficult to articulate in any given set of circumstances. It will usually be entirely fact specific.

Building authority liability generally arises at two stages of any given construction project: the permit approval stage and the building inspection stage. These two stages will be considered in turn. However, some comments must first be made about what is known as the policy/operational distinction.

[22] *Ibid.* at paras. 25-38. It is curious to note that approximately nine years prior to obtaining the soils report, the plaintiffs had written to the Municipal Property Assessment Corporation and had attempted to have the value of their building reduced for property tax purposes due to "wall and footing destrution" that had hindered the ability to refinance the property. Nevertheless, it was held that the plaintiff had not discovered their claim at that time.
[23] *Ingles*, *supra* note 3 at para. 40.
[24] *Ibid.*

The Policy/Operational Distinction

Canadian tort law recognizes a distinction between "policy" decisions by public authorities, and the "operational" implementation of these decisions. The latter are actionable at law while the former are not. The Supreme Court of Canada in *Brown v. British Columbia* defined the distinction between these two concepts as follows:

> True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.
>
> The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[25]

The distinction is usually articulate in the abstract – trying to apply it to a given set of facts can sometimes be exceedingly difficult. Nevertheless, the policy decision immunity, as it is sometimes called, can be invoked by building authorities. For example,

[25] *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] S.C.J. No. 20 at para. 38 (QL).

in *Iacolucci v. Fernbrook Homes (Brooklin) Ltd.*,[26] it was held that the building authority had a valid policy in place pursuant to which it would only conduct inspections when contacted to do so by the builder, and would only provide the results of those inspections to persons present at the inspection or who subsequently requested a report on the inspection. In that case the building authority had conducted an inspection and had noted the absence of a required railing on the front porch of a house under construction. Since no one else was present at the inspection, a report was never provided to anyone indicating the deficiency. The plaintiff, who purchased the home and took possession without obtaining an occupancy permit, was injured after falling from the front porch. Her claim against the building authority, based on an allegedly negligent failure to advise the builder of the absence of the railing, was dismissed on the basis that the authority had a valid policy in place regarding inspections and notification of defects.

Aside from its nebulous nature, the use of the policy decision immunity is limited in several other respects. While the *Building Code Act* confers some discretion on a building authority, the exercise of this discretion will only give rise to a valid policy decision when it is done "in a reasonable manner which constitutes a *bona fide* exercise of discretion."[27] This is often taken to mean that a policy decision must have some connection with the health and safety mandate of the *Building Code Act*. Put another way, the building authority cannot simply make a general policy decision to do nothing to enforce the *Building Code* or the *Building Code Act*.[28]

[26] [2006] O.J. No. 5669 (S.C.J.), aff'd [2007] O.J. No. 3863 (C.A.) (QL) [*Iacolucci*].
[27] *Ingles*, *supra* note 3 at para. 19.
[28] *Ibid*.

Permit Approval

The standard of care at this stage is focused on the steps leading up to the issuance of a building permit, including the plans and specifications submitted with the permit application and the review of this information before a decision is made as to whether or not to issue a permit. The test was explained in detail in the Supreme Court of Canada decision of *Rothfield v. Manolakos*:

> [I]t is incumbent on the city to at least examine the specifications and sketches. If an examination of these reveals that they may reasonably serve in the construction of a project, it would appear sensible to issue a permit. The inspector is functioning within the parameters of a legislative scheme in which it is normal to ensure that a project fully meets the standards of the by-law at the on-site inspection stage. It would tend to defeat the discretion not to require professional plans if a more exacting standard were imposed on the city inspector. The city's duty, after all, is only to exercise reasonable care.[29]

In further explaining this standard, Justice LaForest articulated a distinction between accepting plans that are merely insufficient (which will not necessarily attract liability) and accepting plans that are clearly inadequate (which will likely attract liability). With respect to plans that are insufficient, Justice LaForest noted that it was not unreasonable for a building authority to accept plans that are less than comprehensive:

[29] *Rothfield*, *supra* note 3 at para. 11.

> The many small projects that come to the city must be processed with a reasonable measure of flexibility and efficiency, and undoubtedly many of the rudimentary specifications and sketches that are submitted to the inspector do not contain all the information necessary to enable the city to fully assess whether a project is up to standard. It would be unrealistic for the city to insist that owners submit fully adequate plans for such projects. By the same token, however, it would be unreasonable to impose on the city the burden of perfecting all such plans.[30]

Problems arise when the plans submitted, regardless of their level of detail, contain obvious departures from the building code. Such plans are inadequate and should not be accepted. This is what occurred in *Rothfield*. In that case, a permit for a retaining wall was applied for, with the application being accompanied by a rudimentary sketch. While lacking in detail, the sketch did provide specifications regarding proposed steel reinforcements for the retaining wall that were wholly inadequate. Despite this, a building permit was still issued. The building authority was held liable for the damage that resulted when the wall that was eventually built collapsing several months after its completion.

The duty with respect to the issuance of a building permit is not limited to the review of the contents of the permit application materials. If a building authority has knowledge of additional issues with a proposed construction, there can be a positive duty to notify the applicant. This is illustrated in the recent case of *Biskey v. Chatham-Kent*

[30] *Ibid.* at para. 10.

(Municipality).[31] That case involved a vacant lot that had been owned by the building authority and had previously been used as a dumping site. The building authority had eventually sold the property to a third party, who sold it in turn to the plaintiffs. The plaintiffs proceeded to apply for a building permit for a residence on the property. The permit was approved without any conditions being attached, and without the building authority providing information regarding the contamination on the site. When the plaintiffs' construction costs was increased by having to deal with the contamination at the property, the building authority was ultimately held liable for the increased costs.

A point worth noting about *Biskey* is that the building authority was not held liable because it approved a permit for a residence where one could not be legally built. There was no debate that a residence could be built on the property – the question was the costs involved in doing so. Nevertheless, the building authority was still held liable for failing to disclose something it knew would significantly impact the construction project.[32]

Engineers

One issue that often arises is how much a building authority can rely on plans that have been prepared by professional third parties, particularly professional engineers. In the 1998 decision of *Hilton Canada Inc. v. Magil Construction Ltd.*,[33] the building authority had an established policy of only conducting a cursory review of submitted plans that bore the seal of professional engineer. The seal was deemed to be proof that the plans complied with the *Building Code*. At trial, it was accepted that this was a valid policy decision by the building authority. The result was the building authority bore no liability

[31] [2011] O.J. No. 557 (S.C.J.) (QL) [*Biskey*].
[32] *Ibid*. at paras. 34 and 44.
[33] [1998] O.J. No. 3069 (Gen. Div.) (QL) [*Hilton*].

for over $5,000,000 worth of losses that resulted from the construction of a hotel that was done pursuant to substandard designs prepared by an engineer.

The ability of a building authority to rely on engineer prepared drawings came under attack again in the case of *Essex Condominium Corp. 43. v. LaSalle (Town)*.[34] In that case, it was argued that the reliance upon engineer prepared drawings was an improper delegation of the building authority's power under the *Building Code Act*. Reference was made to the recent amendments to the *Building Code Act* regarding registered code agents, and the requirements surrounding their use by building authorities. Justice Pomerance rejected this argument and held that *Hilton* was still good law. While this issue has never been specifically considered by the Court of Appeal, it appears to remain the law in Ontario that it is permissible for building authorities to rely upon an engineer's seal as proof that the design in question complies with the *Building Code*.[35]

Building Inspections

As previously noted, the duty of a building authority at the building inspection stage is very fact specific. Nevertheless, decided cases provide some guidance as to what a building inspector is and is not expected to do. As an initial point, it is recognized that building inspectors do not have to continuously monitor the construction of buildings. Intermittent inspections are reasonable, as is having the builder or owner contact the building authority when these inspections should take place.[36]

[34] [2009] O.J. No. 5745 (S.C.J.) (QL).
[35] Reference can also be made to decision in *Craft-Bilt Materials, Ltd. v. Toronto (City)*, [2006] O.J. No. 4710 (S.C.J.), aff'd [2008] O.J. No. 59 (Div. Ct.) (QL), where it was held that a building authority could not ignore engineer certified load testing data that was part of an application pursuant to section 4.1.1.4(1) of the *Building Code*.
[36] See e.g. *Iacolucci*, *supra* note 26. See also Boghosian & Davison, *supra* note 6 at §5.73 for a survey of cases outside Ontario on this issue.

With respect to the actual inspections themselves, the duty of building inspectors is directed towards those elements of the building that affect health and safety. One of the more obvious examples of such an element is a building's foundations and general structural integrity.[37] Other elements include such things as the soundness of exterior walls,[38] the proper construction of stairways[39] and fire protection elements.[40] A building inspector does not have to detect every deviation from the building code.[41]

The standard of care recognizes that a building inspector will normally only conduct a visual inspection. However, this is subject to the caveat that a building inspector will be required to conduct additional investigations when the circumstances warrant it. The case of *Ingles* illustrates the sort of situation where such circumstances exist. That case involved a homeowner who hired a contractor to renovate his basement. The contractor convinced the homeowner to allow construct to commence without first obtaining a building permit. By the time a permit was eventually obtained the underpinnings of the house had already been completed and had been concealed from visual inspection by subsequent construction. The building inspector who attended simply accepted the assurances of the contractor that the underpinnings had been properly built which, it subsequently turned, they had not. In affirming a finding of liability against the building authority, the Supreme Court noted that the underpinnings had to bear the entire weight of the house, and that a defect in them posed a risk of a catastrophic event: the collapse of

[37] *Ingles*, *supra* note 3 at para. 40.
[38] *Mortimer*, *infra* note 43.
[39] *Musselman*, *supra* note 12.
[40] *Riverside*, *supra* note 10.
[41] *Ingles*, *supra* note 3 at para. 40; *Rothfield*, *supra* note 3 at para. 8.

the house. Given this, a more thorough inspection was needed to ensure that the underpinnings were sufficient.

The result in *Ingles* can be contrasted with that in the case of *Shulist v. Waterloo (City)*.[42] In that case, after purchasing a new home the Plaintiff discovered that the lintel and wood beam spanning the top of the garage door were grossly undersized and did not comply with the *Building Code*. At the trial, the evidence heard was that a garage door lintel would likely have been concealed from visual observation at the time of the relevant inspections. Nevertheless, the claim against the building authority was dismissed as detecting the defect in the lintel did not fall within the scope of issues related to health and safety.

While a building inspector may not be under an obligation to verify compliance with every empirical standard in the *Building Code*, it is important to note that the building inspector's duty is not limited to the enforcement of empirical standards. It can also extend to ensuring compliance with non-empirical, functional standards, and it can even extend to ensuring compliance with "good building practices" and general fitness for purpose in circumstances where there is no directly applicable empirical standard. This is illustrated by the case of *Mortimer v. Cameron*.[43] The plaintiff in that case had been catastrophically injured when he fell through the exterior wall of an enclosed exterior staircase. At trial, the building authority's position was that the staircase was an exterior one and, pursuant to the building authority's own by-laws and the *Building Code* that existed at the time, all that was required was that the staircase be enclosed with a

[42] [2007] O.J. No. 4093 (S.C.J. (Sm. Cl. Ct.)) (QL).
[43] [1994] O.J. No. 277 (C.A.) (QL) [*Mortimer*].

"balustrade". "Balustrade" was a term that had no empirical definition, only a functional one: "a protective barrier that acts as a guard around openings in floors or the open sides of stairs … to prevent accidental falls from one level to another."[44] Despite the lack of an empirical definition (height, materials, spacing, etc.), both the trial court and the Court of Appeal held that the building authority was obligated to confirm that the structure in question satisfied the functional requirement imposed by the *Building Code*.[45]

A sometimes overlooked issue is what a building authority is required to do once it becomes aware of a *Building Code* violation at a property under construction. At the very least, the building authority must note the violation and order it remedied. The obligation does not stop there though. Normally a building authority must follow up and actively monitor the situation to ensure that the violation had been remedied. Also, a building authority should normally ensure that all violations are remedied before an occupancy permit is issued.[46]

Apportioning Fault

Since building authorities do not construct buildings, they are normally not the only parties legally responsible for damages caused by building defects. Other parties who can bear liability include builders, owners, occupiers and purchasers. The availability of other parties does not always negate the dilemma that a building authority is faced with as a result of Ontario's joint and several liability regime. Often the other defendants in a building code case will either lack insurance coverage or assets to satisfy a judgment, or will, in some cases, not even actively participate in litigation. This leaves the building

[44] *Ibid.* at paras. 20-21. For the full reference, see Boghosian & Davison, *supra* note 6 at §5.67.
[45] *Ibid.* at para. 22.
[46] Boghosian & Davison, *supra* note 6 at §5.76.

authority, with its large limit liability policies, its extensive assets and its taxation powers as the only remaining defendant who, if found at least 1% liable, could have to satisfy most if not all of the plaintiffs losses by itself.

Builders

Courts have generally recognized that in cases involving defective buildings, the sensible result is that the party responsible for creating the defect should bear the brunt of the responsibility for it. This is illustrated by *Ingles*, where the builder was held to be 80% liable for the damage caused by the defective underpinnings, as contrasted to the 14% finding of liability against the building authority. Of course, *Ingles* also illustrates the problem created by joint and several liability. The builder in that case never actively participated in the action, leaving the building authority to cover both the builder's and its own share of the damages.

Owner/Builders

The law with respect to the liability of owner/builders in building code cases is best summarized by Justice Rogin in the *Biskey* case: "The [building authority] it may be said, has a duty to protect people from themselves."[47] Owner/builders can go to great lengths, whether inadvertently or intentionally, to cause their own losses without depriving themselves of the right to sue the building authority for those losses.

Ingles again provides an excellent illustration of this point. In that case, the plaintiff owner/builder (who held a Ph.D.) had fully researched the building permit process prior to retaining a contractor to renovate the basement. His wife (who also held a Ph.D.) had

[47] *Biskey*, *supra* note 31 at para. 15.

prepared all of the designs and drawings. The plaintiff had initially required the contractor to obtain a building permit prior to construction commencing. After being advised by the contractor that obtaining a permit would delay the start of construction, the plaintiff instructed the contractor to commence the work and obtain the permit later. The delay in obtaining the permit allowed the underpinnings to be completed and covered prior to the arrival of the building inspector. At the Supreme Court, it was held that while the plaintiff had been negligent (to the extent of 6%, compared to the building authority's 14%) in allowing construction to begin without a permit, he had not acted in a sufficient egregious matter to waive any duty the building authority might owe to him. According to the Court, the only time this would occur is when the owner's action made it absolutely impossible for the building authority to do anything to discover and order remedied a building defect.[48]

Occupiers

In cases involving personal injury claims against both a building authority and an occupier, the latter will normally bear the brunt of the liability. The building authority's role is limited to the period of time that the building is being constructed. After

[48] *Ingles*, *supra* note 3 at para. 39.

> To summarize, despite some ambiguity in the language used in his decision, it is clear that La Forest J. created a complete defence for municipalities that could be used to militate against a finding of negligence only in the rarest of circumstances, namely, when the owner-builder's conduct was such that a court could only conclude that he or she was the sole source of his or her own loss. This complete defence may encompass those situations where an owner-builder never applies for a building permit, or never notifies the inspector of the need for an inspection, or those situations where the inspector receives notification so late that it would be impossible, upon full exercise of the powers granted under the governing legislation, to discover any hidden defects. In other cases, such as *Rothfield v. Manolakos*, … itself, it will still be open to municipalities to show that a plaintiff was contributorily negligent, and to seek an apportionment of the damages accordingly. It is also clear that once a municipality chooses to implement a policy decision to inspect, it owes a duty to all who might be injured by the negligent exercise of those powers, including builder-owners, to take reasonable care in conducting that inspection. As a result, I must disagree with the findings of the Ontario Court of Appeal in this case. The city owed a duty to the appellant to conduct a reasonable inspection of the renovations to his home.

construction is completed, it is the occupier of the property who has the legal responsibility for the repair and maintenance of the building, and also bears responsibility for the activities it allows to occur on in or around the building. This distinction is shown in the *Mortimer* decision, where the occupier was held to be 60% responsible for the plaintiff's losses, with the building authority bearing the remaining 40%. While the building authority in that case had been negligent in certifying the construction of the exterior wall and staircase, after the construction was completed it was the occupier who bore the continuing responsibility for the safety of persons in the building.[49]

Also, the occupier of property is often more likely to be a solvent defendant, thus eliminating or at least reducing the risk posed by joint and several liability. This is not always the case though: sometimes the occupier will have insufficient assets or insurance limits to cover its entire share of damages assessed against it.[50]

Purchasers

There is some authority for the proposition that a person who purchases a home with a patent building defect, or a building defect that should have been reasonably detected before purchase, will not be able to subsequently sue the building authority for the damages associated with that defect. One example of this is in the recent case of *Theriault v. Lanthier*.[51] In that case, the plaintiff purchased a home whose foundations had been built below the water table. Before the transaction closed, the plaintiff hired a home inspector whose inspection revealed signs of potential water infiltration. The

[49] *Mortimer*, *supra* note 43. The occupier in *Mortimer* had not actually owned the building at the time the exterior staircase was built. It had acquired the building several years later.
[50] See e.g. *ibid.* In *Mortimer*, despite the allocation of liability at 40% on the building authority and 60% to the owner of the building, the insurance limits available to the owner resulted in the building authority paying over 80% of the assessed damages. See generally Boghosian & Davison, *supra* note 6 at §5.22.
[51] [2010] O.J. No. 1545 (S.C.J.) (QL) [*Theriault*]

plaintiff ignored the inspection report, did not conduct any further investigations into the water infiltration issue and proceeded to buy the house. After taking possession, the plaintiff began experiencing significant water infiltration problems. His subsequent claim against the building authority was dismissed, with Justice Charbonneau noting that if the defect could be detected by a "reasonably diligent purchaser inspecting the home he was considering buying" then no action could be brought against the building authority for failing to detect the defect or order it remedied.[52]

STRATEGIES FOR CLAIMS

As noted previously, the building authority will normally be added as a defendant by default in any claim involving a defective building. However, there are several things a building authority can do to successfully defend those that are brought.

Documentation

The important of having a proper and complete documentary record cannot be overstated. A complete record of permit applications, building plans and building inspection logs helps to prove that particular steps and actions were taken during the permit approval and inspection process. However, what must always be remembered is that documents do not testify at trial – witnesses do. This makes witnesses' ability to recollect events crucial, and this is where a proper and complete documentary record also plays a significant role.

A significant problem that many building authorities face when they are sued is that the relevant events happened years prior to the litigation commencing. Even if the staff members originally involved are still employed, they will often have difficulty

[52] *Ibid.* at para. 148.

remembering details about one particular permit application or inspection they dealt with years prior. Having copies of a standardized forms such as a permit application can help with recollection, but what is often most useful is personalized notes prepared by the building inspectors themselves.

The role of a documentary record, or the lack thereof, can be seen in the case of *Wood v. Hungerford*.[53] The case involved a house built in 1979, purchased by the plaintiff in 1996 and subsequently discovered to have significant foundation problems. The building authority was unable to locate any documents regarding the construction, save for the original building permit. The testimony of the building inspector was vague and minimal. With respect to the footing inspection he conducted, the only direct detail he apparently recalled was observing "a hole in the ground, like, and wetter than old hell."[54] With respect to the contractor who was building the house, the recollection was somewhat more detailed: "he was drunk the odd time, but other than that I think he knew how much cement to throw in the wheelbarrow."[55] The building authority was eventually found to be 50% liable for the plaintiff's losses.

Documentation is also crucial when issues are raised as to what a building authority's past policies and procedures were. This is an issue that often comes up whenever the policy immunity defence is raised. Also, when witnesses are not available or cannot recollect what happened, evidence as to an established policy or procedure can sometimes help a court infer what most likely happened.

[53] [2004] O.J. No. 4472 (S.C.J.) [*Wood*].
[54] *Ibid.* at para. 47.
[55] *Ibid.*

A question that often arises is how long file material should be retained. Currently, Ontario's *Limitations Act, 2002* provides for an ultimate limitation period of 15 years running from the date that the act or omission that the claim is based upon occurs. However, in the 2007 decision of *York Condominium Corporation No. 382 v. Jay-M Holdings Limited*, the Court of Appeal held that if a claim that pre-existed January 1, 2004 (the date the *Limitations Act, 2002* came into force) had not been discovered by that date, it would be deemed to have come into existence on January 1, 2004.[56]

In the current context, the 15 year ultimate limitation period would normally run from date of the issuance of the original building permit or the allegedly negligent building inspection(s), so this provides an excellent guideline for a document retention policy. However, given the Court of Appeal's ruling in *York Condominium*, if the building authority's involvement occurred prior to January 1, 2004 without a claim being discovered before that date, the ultimate limitation period will not expire until January 1, 2019. As such, it will be some time before building authorities can rely upon the ultimate limitation period as creating a strict temporal limitation on claims.

Cost versus Liability Exposure

It is simply wrong to think of the monetary risk flowing from a negligent building inspection as being equivalent to the cost of repairing or rebuilding the defective element in issue. Instead, what must be remembered is that legal liability arises not only from the possibility that there will be construction defects that have to be repaired or remedied, but also from the threat that such construction defects pose to persons or property. The latter can often be more consequential than the former: things that are minor from a

[56](2007), 84 OR (3d) 414 (C.A.) [*York Condominium*].

construction cost perspective can be major from a personal injury perspective. In *Musselman*, the defective staircase that ended up causing over $3,000,000.00 worth of damages could likely have been brought up to standard through the expenditure of only a few thousand dollars. Cases like *Riverside* show that even in non-personal injury cases, the potential monetary consequences of building defects can extend well beyond the simple cost of the repairing them.

Problematic Conduct by Builders

One of the more difficult aspects of the duty imposed on building authorities by courts is that the duty appears to become more onerous as soon as the building authority is "put on notice that a construction project *may* be defective"[57] or where the behavior of a builder should make a building inspector "wary"[58] of the quality of construction. The concern is no so much with cases where there are obvious *Building Code* violations at a particular building. Indeed, such situations are easy to deal with: all the building authority need do is note the violation and ensure that it is remedied. The situation is more complicated when there is no clear evidence of a defect in a building, but where there is some suggestion the non-compliance may have occurred.

In *Ingles*, it was held that the building authority was not entitled to rely upon the contractor's assurances that the defective underpinnings were properly built. This can be contrasted to *Hilton*, where the building authority was entitled to accept the assurances of an engineer that the design of the building met the *Building Code*. In both cases the building authority relied on outside assurances of the soundness of the construction.

[57] *Ingles*, *supra* note 3 at para. 40.
[58] *Ibid.* at para. 43

Also, the defects in both cases were hidden from inspection (in *Ingles* it was hidden beneath additional construction; in *Hilton* it was hidden in the design of the building itself). The difference in *Ingles* was, among other things, the fact that the contractor had engaged in suspicious behavior, such as ignoring instructions on the building permit, failing to acquire a permit before building the underpinnings and failing to post the permit at the construction site.[59]

However, the duty on the part of the building authority to be "wary" may not even require that there be actual proof that the parties involved are actively violating the *Building Code* or instructions provided by the building authority. In *Musselman*, the court seemed to suggest that when the initial building permit for the restaurant was applied for, the building authority should have had its suspicions aroused when the original permit application, which called for a 32 seat restaurant, was altered so as to only call for a 30 seat restaurant. A 32 seat restaurant would have required a plan approved by an architect, while a 30 seat restaurant did not.[60]

Once the suspicions of a building authority are reasonably raised, the standard of care appears to increase to the point of requiring the building authority to exhaust all possible avenues of inspection. The comments of the court in *Ingles* provide an illustration of this:

> The city argued that the inspector lacked the power to do anything further than the inspection that he conducted. The underpinning had been laid

[59] *Ibid.*
[60] *Musselman*, *supra* note 12 at para. 166.

> before his arrival and it was impossible to determine visually whether it continued for the full width of the footing. The basement was dug up for the laying of the drains, and only a few inches of the depth of the underpinning were visible because of the piles of dirt from the excavation. The city argued that the powers of the building inspector to uncover work were limited. Section 9(2) restricted those powers to situations where there was a reason to believe that a part of the building had not been constructed in compliance with the Act and there was a pre-existing order not to cover. At trial, Conant J. accepted that the preconditions to satisfy granting an order pursuant to s. 9(2) of the Act were absent in this case. However, he rejected the argument that this was the only power available to the municipality to remedy the defect.
>
> The trial judge found that, pursuant to s. 11(1)(d) of the 1990 Act, the inspector had the power to order the appellant to call in an engineer to saw through the underpinning to determine its width. Furthermore, pursuant to s. 9(1) of the Act, the inspector could have ordered that the basement floor not be laid. He could then have returned after the drains had been installed, when it was not raining, and dug down to determine the depth of the underpinning.[61]

Of course, it is easy to impose an onerous standard in a particular case (and in hindsight). Practical considerations of time, budgetary and other resource restrictions may make general adherence to such a standard difficult. It also bears noting that the over-vigilant

[61] *Ingles*, *supra* note 3 at paras. 45-46.

exercise of its powers under the *Building Code Act* can just as easily get a building authority sued as a failure to properly exercise them.

Conclusion

One of the more frustrating aspects of building code cases is that building authorities routinely find themselves liable for losses caused by the incompetence, short-sightedness or delinquent behaviour of those who often end up suing the building authority. Judicial reactions to non-compliance with the *Building Code* and building inspection regimes, as explained above, can be easily characterized as apathetic. Builders will cut corners and not follow the *Building Code* – that's why we have building inspections.[62] Of course, this same *Building Code* requires building authorities to police those who may violate it, and the tortious liability regime established by the judiciary effectively makes the police liable for the conduct of the offenders.[63]

Judicial reform of this area of the law is unlikely in the near future. Indeed, the trend of the jurisprudence on this issue is to increase the scope of a building authority liability, not restrict it. Any substantive change, if it is to occur, will likely be legislative in nature, and will likely focus on the issue of joint and several liability. Such reforms remain nothing more than notions at this point in time though, leaving building authorities and their insurers to make do as best they can in the current legal climate.

[62] *Rothfield*, *supra* note 3 at para. 15: "It is to be expected that contractors, in the normal course of events, will fail to observe certain aspects of the building by-laws. That is why municipalities employ building inspectors."
[63] Woodall, *supra* note 5 at 131.