

SJC Clarifies Distinction Between Contract and Tort Claims in Construction Defect Cases

By Ryan Clemens on October 10, 2025



Developers and contractors should be aware of indemnity provisions within their construction contracts that may unintentionally expand their liability beyond the regular six-year tort statute of repose. Massachusetts law sets time limits, known as statutes of limitation and repose, for when one party may sue another over construction defect claims. These time limits depend on whether the claim is in contract or tort, and the Massachusetts Supreme Judicial Court (SJC) recently reaffirmed a distinction between the two where contracts incorporate tort elements.

In general, understanding the difference between contract claims and tort claims is important. Contract claims in this context arise when a contractor allegedly breaches its promise to provide a specific result beyond ordinary workmanship. Contract claims must be brought within six years following the date of accrual. G.L. c. 260, § 2. Tort claims are based on a contractor's failure to perform according to the ordinary workmanship standard of care or, in Massachusetts, the failure to build according to specifications that a contract sets. Tort claims must be brought within three years following the date of accrual, but in no event may be brought more than six years following "the earlier of the dates of (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner." Importantly, this means that the six-year statute of repose applies to tort claims regardless of when the condition was discovered, even if the discovery occurred after the six-year period has lapsed. The six-year limit for contract claims and the three-year limit for tort claims in the preceding are *statutes of limitations*. The six-year limit for tort claims is a *statute of repose*.

Further, a construction claim accrues when the plaintiff either knows or should know of a deficiency. See *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.*, 396 Mass. 818, 824 (1986) ("a cause of action accrues on the happening of an event likely to put the plaintiff on notice"). Construction defect claims may possibly be tolled, then, if a plaintiff was unaware of the defect. *Dicorato v. Procopio Constr. Co.*, 2002 Mass. Super. LEXIS 440, *7-8 (Oct. 31, 2002). And where projects have multiple phases, the date that a particular improvement was completed or a particular portion of a project was open for use controls for defects related to that particular improvement, even if the rest of the project is incomplete. See *Oates v. Larkin*, 2007 Mass. Super. LEXIS 580, *18-19 (Dec. 5, 2007) ("The Court concludes, therefore, that issuance of [a temporary certificate of occupancy] triggered the running of the six-year repose period for any claims in defect *in those portions of the complex to which that certificate applied.*") (emphasis added).

So, for example, a property owner who discovers a construction defect that falls below the ordinary workmanship standard of care in their new house would ordinarily have three years from that discovery to file a tort action. Because of the statute of repose, however,

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that owner must file the tort claim within six years of occupying the home, regardless of when the defect was discovered. Otherwise, the statute of repose blocks the tort claim. Conversely, if the defect can be characterized as a contract claim (such as if the contractor made a specific promise regarding the work that was being done), that owner can file the contract claim within six years of that discovery regardless of when the owner occupied the new house.

A recent SJC decision clarifies the difference between tort and contract claims where certain contract terms incorporate tort-based language. In *Trustees of Boston Univ. v. Clough, Harbour & Assocs., LLP*, the Supreme Judicial Court reviewed a challenge to an alleged defect in athletic field. 495 Mass. 682, 682 (2025). The contract to build the field included an indemnification clause, which required the defendant contractor to indemnify the plaintiff university for the defendant's negligence, a tort. *Id.* at 683 The plaintiff discovered the defects in the field and sued the defendant for breach of contract within three years of the discovery, but more than six years after the field's completion. *Id.* at 683-84. The defendant contractor argued that because the indemnification clause is based in negligence, plaintiff's claim is actually in tort, and so the six-year tort statute of repose applies and bars the claim. *Id.* at 684.

The Court first distinguished between contract and tort claims: a contract claim is where the standard of performance is set by defendant's promises, while a tort's standard of performance is set by law. *Id.* at 685. Extrapolating, the Court noted that tort claims are breaches of implied warranty where the duty is imposed by law, whereas contract claims are breaches of express warranty where a duty arises from an express agreement to guarantee particular result. *Id.* The Court then cited its decision in *Gomes v. Pan Am. Assoc.*, where an indemnification provision was tied, in part, to a negligence standard. *Id.* at 686 (citing 406 Mass. 647, 648 (1990)). There, the Court reasoned that the construction defect claim was grounded in the contractual indemnification provision, even though the underlying claim was for negligence, and so the tort statute of repose did not apply. *Id.*

The Court in *Boston University* then identified that the gist of plaintiff's claim was "essentially contractual – the enforcement of a contract of indemnification," because the defendant promised to indemnify the plaintiff for expenses due to defendant's negligence. *Id.* The promise was not imposed by law but rather was a promise to which defendant freely and willingly chose to be bound by contract. *Id.* (citing *Bridgwood v. A.J. Wood Construction, Inc.*, 480 Mass. 349, 355 (2018)). Further, "while the parties chose to incorporate the negligence standard of care into the indemnification provision, the elements of the university's contractual indemnification claim differ from a claim for negligence." *Id.* at 687. Since the plaintiff would have to show contractual elements beyond just tort elements, its claim was contractual and thus the tort statute of repose did not apply to bar that claim.

Boston University provides a warning for developers and contractors to closely review their construction contracts. Under this analysis, contract terms that incorporate tort elements such as negligence can avoid the statute of repose, essentially permitting tort litigation beyond six years from a project's completion.

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