SEALS, SIGNATURES AND CIVIL LIABILITY

ED. NOTE: The following article is reprinted from the "Ontario Digest and Engineering Digest", by kind permission of the authors, Donald E. Smith, P.Eng. and McCarthy and McCarthy, Barristers, of the Association of Professional Engineers of Ontario. It has considerable relevance for our association members.

The Use of a Seal and Civil Liability

The question of a potential civil liability of an engineer for the use or non-use of a seal will be looked at principally from the standpoint of an engineer employed either by a sole practitioner, a partnership or by a corporation. The law does not differentiate between the legal character of the employer insofar as liability of the employer is concerned. Where appropriate the liability of the employer will also be indicated. Only the two major areas of civil liability, viz., contractual liability and tort liability (principally negligence) will be considered. Other heads of civil liability such as patent infringement, or trade-mark or copyright infringement are probably not really relevant in a consideration of the question at hand.

Contractual Liability

The law of contract is such that in order for a person to be held liable for breach of contract such person must be a party to the contract. Accordingly, an employee-engineer would never be liable for breach of a contract between his employer and some third party. Insofar as the employer's contractual liability resulting from the use or non-use of a seal, this could only rise if it was a term of the contract either that all drawings, plans etc., would on delivery be duly sealed by the engineer preparing same or by the supervising engineer or both and this was not done, or if it was a term of the contract that all drawings, etc., would be prepared in accordance with all applicable legislation. In the latter case, and if the view is taken that The Professional Engineers Act does require all drawings etc., to be signed or sealed, failure to have such drawings signed or sealed would constitute a breach of contract for which the employer would be liable if such omission caused the other contracting party to suffer damages.

In either of the above cases, the only contractual liability that an employee-engineer might be subject to, is breach of his contract of employment either express or implied. It is an implied term of all employment that the employee will use his best efforts in the performance of his duties. There is usually a similar term in all express employment contracts. If an employee-engineer in the performance of his duties fails to sign or seal work that he has prepared (again assuming this to be a requirement of the Ontario Act) and such failure results in his employer being held liable for breach of contract, such failure might possibly be regarded as a breach by the employee of his employment contract, and would give the employer a right to sue the employee for the amount of the damages he has suffered.

Liability for Negligence.

Several general propositions should be stated at the outset.

1. An employer is vicariously liable for the negligence of an employee if such negligence was committed by the employee in the course of his employment. The employee is, of course, also liable. The damages awarded may be recovered from either or both. An example of this situation would be a delivery truck driver injuring a person in the course of making his deliveries. Both the employer and the driver would be potentially liable.
2. If an employer incurs liability as a result of the negligence of an employee, the employer has a right to sue the employee for the recovery of any damages he has been required to pay. This situation would probably most likely occur where the employer's insurance carrier has had to pay out on a claim and is subrogated to all rights of the insured. It is for this reason that negligence insurance carried by an employer should not only cover the partnership or company but also all individual engineers.
3. Assuming the Ontario Professional Engineers Act does require all drawings, etc., to be either signed or sealed, the failure of an engineer to do so will not effect the question of civil liability for negligence even though such failure might expose the engineer to certain statutory penalties.
4. An engineer who knowingly signs or seals documents, etc., that have not been prepared by him or under his supervision is not only in breach of the professional Code of Ethics for which he may be punished but is also open to be sued for fraud and for negligence if such misrepresentation results in some party suffering damages.
5. Liability for negligence is in each case a question of fact. Signing or sealing of documents by engineers only makes it easier to identify the parties responsible for work, and has absolutely nothing to do with the question of liability for negligence except in the case referred to in the foregoing clause 4. In other words an engineer is liable because he prepared the drawings or because he supervised or approved them and not because he signed or sealed them.

The foregoing general principles can probably best be illustrated by an example, Assume ABC Company Limited, an incorporated engineering practice, has a contract to design and supervise the construction of a bridge for a municipality. The design work is done by engineer X under the supervision and direction of Y who is the chief design engineer of the company. Supervision of construction is looked after by Z. The bridge when partially completed collapses and M, a third party is injured. It is affirmatively established that the cause of the collapse was faulty design.

Under the foregoing circumstances, X would be liable to M if the faulty design could be shown to have been as the result of negligence, and it would not matter if he had signed or sealed the drawings and specifications or not. To establish X's liability it would be necessary for M to prove that X did not possess or did not exercise that reasonable standard of professional competence that can be expected of an engineer having regard to his existence. If X is held to be liable the ABC Company Limited is also liable under the vicarious liability rule referred to in clause 1 (Liability For Negligence). In addition, Y, the supervising engineer, might also be liable and again this would be quite apart from the question of whether he had signed or sealed the work. The basis for Y's responsibility would either be that he had approved the work, and this would be a question of fact and hence should have caught the faulty design, or that he was negligent in delegating the work to X without exercising due supervision over its performance. Again this latter matter would be a question of fact. It should also be pointed out that the situation could arise where X could be found free of blame for faulty work prepared by him on the basis that he was not in breach of the standard of care expected of him and Y, his supervisor, could be held wholly responsible for the faulty work on the basis of his greater knowledge and experience.

There is also the possibility that Z, the engineer supervising construction, might also be liable. As in all cases this would be a question of fact and would depend upon the nature of the design fault and Z's experience. As in the case of X, if either Y or Z are found to be liable, the employer company is also liable.

The principle from the foregoing example is once again that liability for negligence is always a question of fact. Any requirement of signing or sealing of engineering work is quite apart from any question of liability although such a requirement may, for the purposes of an action for negligence, clearly identify the parties responsible and hence make the evidentiary problem of the case less onerous.

In clause 4 (Liability For Negligence), the situation has been adverted to where an engineer signs or seals work that he has neither prepared nor supervised. If the work so signed or sealed has been,

negligently performed and some third party has suffered damages as a result of it and can establish that he relied on the signature or seal, the engineer who has done so will probably be liable for such damages or a part thereof. The basis for the action against such engineer would either be that he has fraudulently misrepresented that he has approved or prepared the work or that he was grossly negligent in signing or sealing the work without having actually considered it, thereby leading others to believe that it had been approved or prepared by him.

Our opinion has also been asked on the following specific questions:

1. Assuming an engineering practice incorporated under the 'Companies Act', is there a way in which drawings and documents may be signed to ensure protection of the individual?
   From the foregoing, the brief answer to the foregoing is "no". As pointed out, the individual engineer employed by an engineering corporation is really not subject to contractual liability and, as far as liability for negligence is concerned, the general rule is that you cannot contract our of liability for negligence. In any event, any elaborate exculpatory provision put on work performed by an engineer would only be effective, if at all, with respect to persons who had notice of it. From a practical standpoint, such a provision is unthinkable.
2. What protection is available to an engineer against an action for damages? Does this protection stem from the 'Professional Engineers Act' or the 'Companies Act'?
   An individual engineer can protect his personal assets against an action for damages for breach of contract by incorporating his practice. After incorporation, it is the company that is the contracting party and not the individual, and as pointed out above only a contracting party can be held liable for breach of contract. As far as protecting himself from liability for negligence there is nothing available to an engineer except insurance. If an engineer produces negligent work he is liable for it whether he is a sole practitioner, a partner of a firm, an officer or director of an engineering corporation or an employee of any of them. An engineer who employs other engineers can however protect his personal assets from an action for damages for the negligence of one of his employees (for which he would be vicariously liable) by incorporating the practice. After incorporation the company is the employer and would be vicariously liable for the negligence of its employees.
3. Are the liabilities incurred by an engineer under the 'Professional Engineers Act' changed in any way by incorporation as a company?
   It is really not correct to say that an engineer incurs liabilities under the Professional Engineers Act. Under that Act the engineer is only required to conform with certain standards of conduct and is subject to censure or expulsion for failure to do so. Incorporation in no way effects this since after incorporation it is still the individual engineer who is a member of the Association and not the corporation. As far as civil liability is concerned this is certainly effected by incorporation but such liability is in no way dependent upon that Act.
4. The Ontario Corporations Act in S.72 provides that directors of a company may be indemnified by the company against loss arising from an action against him in respect of any matter made done or permitted to be done by him in the execution of his duties as a director save and except any loss occasioned by his own neglect or default. The question has been asked whether there is a similar provision in that Act which "would protect an individual against professional liabilities which he incurs under the 'Professional Engineers Act' ". The simple answer to this is that there is not for the reason than an individual who is a member of the Association is not subject to financial penalties under the Professional Engineers Act but only to censure or expulsion for breach of the Act. This type of "loss" cannot be indemnified against.