PROFESSIONAL LIABILITY AND MANDATORY INSURANCE

The following are excerpts from a presentation to the Annual Meeting 1979 by W. Donald Lilly Q.C. of Thomson, Rogers, Toronto.

"Almost every day of the week, cases come across my desk that demonstrate the alarming increase in the legal responsibilities imposed on professionals. Whether it is because of the greater sophistication in developing claims against them, or a change in the attitude of the public towards professionals, or indeed because of the tightening up of the economy, the results are all the same. It is a trend which I believe we must be aware of if we are to adequately protect and defend the role that the professional plays in the community.

The trend is best reflected in the history of engineers over the last ten years. They should be of some interest to you because they are a profession with which you are in constant communication. Statistics from one of the leading insurers of engineers indicate that the number of policies in the last ten years has increased three times. During that same period, the number of claims has increased eighteen times. This means that at the end of the period, there are six times as many claims per policy as at the beginning. Translating that into dollars, the amounts paid and reserved for claims for the period 1967 to 1973 alone increased thirty times. This gives some idea of the alarming increase in jeopardy for engineers during that period."

"In looking back to events since 1967, it becomes clear what has happened. In 1967, the Courts simply looked at the contract wording between the engineer and the owner. The engineer could limit his responsibilities by expressed provisions in the contract and that simply put an end to the matter. The results were:

a. That he could limit his responsibility by the express wording of the contract;
b. He owed that responsibility only to his client with whom he has a contract. He owed no duty to a third party;
c. Lawsuits were statute barred six years from the date that he actually did his work.

And then the Courts gradually introduced the idea that the engineer could be liable not only under his contract to the owner, but also in negligence generally as a member of the community. In addition to his contract responsibilities, he must perform his work efficiently and safely for the benefit of all members of the community that might be affected by his work. The Courts call it a duty in negligence and they wrap it all up in a neat little package that now means:

a. That the engineer must do his work as efficiently and safely as other average members of his profession, and his work is therefore measured by calling another member of the profession as a witness to testify as to whether the work done by the engineer was reasonably efficient and safe.
b. He owes a duty not only to the owner with whom he is in contract, but also to all members of the community who may be affected by his work.
c. He may be sued any time within six years from the date that the owner first becomes aware of the damages resulting from his work. Thus work performed in 1978 which results in damage to walls in 1985 gives rise to a lawsuit that can be brought any time within six years of 1985. Theoretically, there is no protection in the Statute of Limitations against damages occurring twenty-five, or fifty, or even one hundred years from now.

This position was formally recognized in 1972 by the now famous case of Dominion Chain v Eastern Construction, a case in which I personally was involved. That case went to the Court of Appeal of Ontario and to the Supreme Court of Canada. It is an authority which is now enshrined in our jurisprudence.

As a result, the Courts will now look at the performance of the engineer having regard to:

a. All duties that are set out in the contract between the owner and the engineer;
b. All extra duties which the engineer owes generally to the community to perform his work safely and efficiently;
c. Performance of these duties will be compared with what an expert witness will testify and what an average prudent engineer would have done in the performance of these duties.

Unfortunately, the engineer witnesses called as experts as to the standard of care are not particularly kindly to their fellow practitioners. Perhaps it is because they are competitors; or that they have the benefit of hindsight; or that it is usually the big name members of the profession who are called as experts, and they tend to be more conservative; or perhaps that they are testifying in theory without the pressures of budget limits by the owner or limitations on the fee they receive for their work.

Whatever is the reason, the results are clear. The high standard of care imposed by the experts over the years has dramatically raised the expectations of the Courts and the public with respect to the performance by the engineer.

I am afraid that what has happened to engineers appears to be happening with surveyors as well. If we trace the historical responsibility of surveyors we find that they started off in much the same position as engineers. In 1881, in the case of Stafford v Bell, the Court set down the simple duty of a surveyor as being:

a. Only those responsibilities which were set out in the expressed contract between the owner and the surveyor;
b. The contract was read together with the old Land Surveyors Act which clearly set out exactly what the surveyor was to do;
c. The duty was only owed to the party with whom the surveyor contracted;
d. And he could only be sued within six years from the date that he did the work.

And then gradually the concept developed that he also owed a duty as a member of the community to do all the things that an average prudent surveyor would have done under the circumstances. That became enshrined in the infamous year of 1972 as in the case of engineers, in the case of MacLaren Elgin v Gooch, which confirmed that the client may sue the surveyor not only in contract but as well in negligence. That means that:

a. The surveyors' performance is measured against what an average prudent surveyor would have done in the circumstances. An expert surveyor will be called to testify as to what an average surveyor would have done;

b. That duty is owed to anybody in the community who may be affected by his work. It is not limited simply to the party with whom the surveyor has contracted;

c. The limitations period for bringing a lawsuit against a surveyor runs for six years from the date that the claimant became aware of the damages he has suffered from the act. If he does not become aware until 1995, he has six years from that date to sue the surveyor.

In addition to this line of responsibility, there appears also to be a serious potential jeopardy for what the Courts call negligent misrepresentation. By holding out the survey which may come into the hands of any people affected by it (adjoining land owners, developers, subsequent purchasers of lots, etc.), the surveyor is making a representation of the size and shape of the plot involved. If the survey is wrong, it may be a negligent misrepresentation of the size and shape of the plot, giving yet another basis of liability against the surveyor by anyone in the community who may reasonably have been affected by his bad work.

The net result of all of this is that the performance by the surveyor is measured by what another expert surveyor called as a witness will testify as being reasonably expected from an average surveyor."

"In a recent case in which I am involved, the surveyor showed some topographical features of a building lot, but did not show the slope at a forty-five degree angle at one side of the lot. This turned out to be where the lane driveway was being located, and there is an action against him for failing to show the slope. His immediate reaction is that he never shows that kind of information on a survey. Nevertheless, he is involved in what could become expensive litigation.

Now let us consider the results in terms of dollars. It is astonishing how these cases can be built up into an alarming amount of money. I hope that it will demonstrate to you that the old insurance policy with $50,000.00 limits is as archaic for surveyors as it is for the driver of a motor vehicle.

We are presently involved with a survey which was three inches out in the boundary along one side of a lot. An apartment building was built close to the edge and then developed a serious spalling brick problem. The exterior of the building required an overlay of an extra wythe of brick to solve the problem. When they went to do it, they found that the survey was in error and there was no room to build the extra wythe of bricks. As a result of the error, the surveyor was faced with the cost of either removing exterior walls which had spalled, or paying the diminution in value of the building when it was clad with a wafer thin steel cladding, which was the only thing they could squeeze onto the lot. That involved several hundred thousand dollars.

Similarly, we were involved in a case where the surveyor indicated an angle as being a right angle. The architect designed on that assumption but it turned out that it was not a perfect right angle. The building was already started and the steel members had to be sent back to be refabricated, resulting in substantial expense, they also claimed for loss of rents because the building was not completed in time, there were claims with the contractor for loss of profit on other projects because he had been delayed in getting to them; there were expenses for the supervisors who were sitting around waiting until the work could recommence; and there were mortgage and other carrying charges in the interval borne by the owner. All together, it amounted to a claim in excess of half a million dollars."

"In another example, a surveyor made an error in a survey to be used by a developer for a checkerboard registration to protect himself against legislation freezing development. It turned out that the checkerboard was wrong and had to be removed from title. A lawsuit ensued in which there was a substantial claim for the loss of the entire project which had now been frozen by legislation.

You may say that there is no liability there and that it was ridiculous to be faced with such a lawsuit. But there are many motives for bringing a lawsuit other than the belief that the surveyor has made an error.

For example, there is a nuisance value to any defendant which is represented by the cost of having to fight a case out at trial. Even if he wins, there is a difference between the amount that he pays his lawyer and the amount he receives from the other party if he wins. This amount is often demanded as blackmail contribution simply because he is a party to the action.

As well, the surveyor can be added as a party simply to get his evidence of conversations and what went on at the site. As a party, he can be examined for discovery early on in the action under oath, and his evidence is then available to the parties. It can then be used against other parties to the action.

Often when a surveyor sues for his fees, he is faced with a substantial counterclaim which is nothing more than an effort to delay the fee or to saw off the claim against counterclaim to eliminate the fee. The cost of defending the counterclaim could greatly exceed the amount of fee that is being claimed. Thus the client cannot only delay paying the surveyors fee, but may succeed in wiping it out.

Perhaps the most dangerous situation can develop if the surveyor refuses to contribute to a settlement. The other parties may well settle up their differences and all gang up on him calling evidence of how they would have done their work differently if only the survey had been correct. The Court only hears this evidence and could reasonably conclude that the surveyor was the source of all of the problems. Judgement against him could well be totally disproportionate to the role that he played in the project."

* * *

Note: The following motion was passed at the open Forum session of the Annual Meeting.

WHEREAS a trend is becoming apparent that the professional is being held more accountable to the public for his services and that actions for damages are increasing in number and scope;

WHEREAS as human beings we are all prone to error and have a moral and professional responsibility to make just compensation for damages suffered on account of our errors and omissions, and

WHEREAS premium rates and terms of insurance policies can best be negotiated by a large group as evidenced by the experience of the Corporation of Quebec Land Surveyors.

BE IT RESOLVED that Council be requested to investigate, report on and make recommendations to make professional liability insurance (negotiated and obtained as a group policy by the A.O.-L.S.) mandatory for all members of the Association.

POET'S CORNER

He says that when he has a drink
His steadiness will improve.
Last night he got so steady
That he couldn't even move.

Anonymous