Claims of professional negligence against engineers rarely reach the Supreme Court of Canada. However, it recently decided two such cases, establishing legal precedents that will affect engineers involved in construction projects. This article outlines the cases and provides advice on how to avoid professional liability in construction work.

To Err Is Human: Professional Liability in Construction

By John Tummers

(Reprinted from *Engineering Dimensions*, March/April 1994, PEO, with permission)

The cases involve Ontario and British Columbia construction projects, in which contractors filed suits against consulting engineers. Before reading the Supreme Court's decision on each case, you may wish to form your own opinion about the consulting engineer's liability. But be prepared to be surprised.

Engineers' Liability for Plans and Specs

The British Columbia Department of Highways retained N.D. Lea and Associates Ltd. to prepare plans and specifications for a 19.4-kilometre highway relocation project's tender and contract documents. Edgeworth Construction Ltd. was awarded a $7-million contract for a 6.8-km stretch of the highway project. Half of the contract amount was for the excavation of solid rock at a stipulated unit price.

After construction was completed, Edgeworth filed a $21-million suit against N.D. Lea, alleging that it lost money due to errors in the firm's specifications and drawings. Edgeworth did not sue the highways department directly, because it was naturally concerned this would prevent it from obtaining further work from the department. Through extra work orders, unit price charges and other contract procedures, the contractor was paid about $19 million instead of the $7 million specified in the original contract.

N.D. Lea brought a pretrial motion to dismiss Edgeworth's claim on the grounds that even if Edgeworth could prove that it incurred substantial economic loss by relying on N.D. Lea's engineering work, its claim had no legal basis. N.D. Lea argued that its contract was with the highways department and not Edgeworth. It further argued that Edgeworth's contract with the department stated that Edgeworth had investigated and satisfied itself about construction site conditions, and was not relying on any plans, specifications or other information provided by the department, including N.D. Lea's engineering work. The firm also pointed out that since it did not supervise site construction, it was unable to ensure that construction had been carried out according to its drawings and specifications.

Court Overturns Decision

Although the trial court and Court of Appeal found in favour of N.D. Lea, the Supreme Court overturned their judgments, holding that the engineer had a duty of care to the contractor.[1] It based its decision on a 1964 case decided by the British House of Lords, which determined that "a person who produces a report, knowing that another person may be relying on it, may be liable if that other person in fact relies on the report to his/her detriment, even if there is no contractual relationship between them."[2] The Court found that Edgeworth's reliance was reasonable because N.D. Lea knew it would be relying on tender documents in preparing its bid. The contract between the highways department and Edgeworth did not change this fact.

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Further, the Court found that the design work was a representation by N.D. Lea, and did not cease to be so merely because the highways department incorporated it into the tender package. It interpreted the exclusion clause in Edgeworth's contract with the department strictly, determining that it applied *only* to the department and *not* N.D. Lea. In rendering its decision, the Court was particularly concerned about setting a legal precedent that would cause successful bidders not to rely on engineering designs supplied with tenders, requiring them to redo engineering work. In addition, the Court found it significant that the short tender period required bidders to rely on tender documents to prepare their bids.

Engineers' Liability To Warn of Need for Permits

The South Nation River Conservation Authority decided to deepen a river running through the Ottawa Valley, and retained Kostuch Engineering Limited to prepare the tender documents. The project proceeded in six stages. The authority put the sixth stage out for tender four months after retaining Kostuch; Auto Concrete Curb Ltd. was the successful bidder for this stage. Although conventional draglines and backhoes had been used to remove earth during the first five stages of the project, Auto Concrete's bid was based on using a suction dredge and settling lagoon for removal, which was less expensive. Kostuch advised the contractor that it did not object to the use of this removal method, provided the required provincial environmental approvals were obtained. Ultimately, Auto Concrete was unable to obtain these ap-

provals and had to use the conventional removal method instead, thereby incurring substantial cost overruns.

Auto Concrete filed a suit against the authority and Kostuch to recover its cost overruns, alleging that Kostuch's failure to include all relevant information in the tender documents constituted a negligent misrepresentation. It argued that a reasonable and competent engineer would have considered that the successful bidder might want to use the suction dredging method, and therefore provided information on the required permits. Auto Concrete also argued that Kostuch knew bidders had only a short time to prepare their bids and should have anticipated that they would be relying on information supplied with the tender. Kostuch countered that it had no duty of care to warn the contractor of the need for permits, and that it was the contractor's responsibility to choose its own work methods.

Decision Again Overturned

Although the three Ontario Court of Appeal judges who heard the case found in favour of Auto Concrete, all seven Supreme Court judges hearing it overturned their decision. This turn of events indicates that this is a difficult area of construction case law, in which even experienced judges can reach different conclusions.

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In rendering its decision, the Supreme Court held that, unless there are specific arrangements to the contrary, the method by which contractors choose to execute work falls within their own sphere of responsibility.[3] It found that neither owners nor design professionals employed by owners have any duty to advise contractors about which work method to choose, or how to accomplish the work using the chosen method. Although some consulting engineers advise contractors about required permits, they are not legally required to do so. Accordingly, the claim against Kostuch and the authority was dismissed.

Limiting Liability

In the Edgeworth case, the Supreme Court extended an engineer's duty of care to include contractors who suffer economic loss resulting from inaccuracies in engineering plans and specifications. However, the Auto Concrete decision makes it clear that this liability is not automatic. In the Auto Concrete case, the Court relied on the established legal principle that contractors are responsible for their own work methods. So although engineers may clearly be held liable for damages incurred by contractors, engineers' actual liability will depend on the facts of each case.

In the Edgeworth case, the Supreme Court recommended specific measures the engineering firm could have taken to protect itself from liability. These included:

- placing a disclaimer of responsibility on construction design documents;
- refusing to provide a construction design without ongoing site supervision duties, and
- holding substantial liability insurance and building its cost into engineering fees.

As further protection, consulting engineers can request that clients indemnify them against potential claims by contractors and other third parties. They can also have clients agree to limits on their professional liability, since damage awards can quickly exceed the limits of even the largest liability insurance policy. As a last resort, consulting engineers could turn down work they believe could put them at significant risk of professional liability. It may be worthwhile for engineering firms to review their contracting procedures in light of these suggestions. A useful text on professional liability in construction and other legal topics of interest to engineers was co-authored by Madam Justice McLachlin, who wrote both the Edgeworth and Auto Concrete Decisions.[4]

> *"... litigation is probably the worst way to resolve construction disputes ...*

Perhaps the most important lesson that can be learned from these two cases is that litigation is probably the worst way to resolve construction disputes: both cases took about 12 years to reach the Supreme Court; the Edgeworth case is expected to be retried yet again. To avoid litigation, consulting engineers should consider including alternative dispute resolution clauses in construction contracts and encourage owners to do likewise.

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REFERENCES

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3. Auto Concrete Curb Ltd. v South Nation River Conservation Authority, Supreme Court of Canada per McLachlin J., Sept. 9, 1993.
4. McLachlin, Beverly M. and Wallace, Wilfred J. The Canadian Law of Architecture and Engineering, Toronto: Butterworths, 1987.

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