MINDING YOUR BUSINESS

Limitation of Liability Clauses
They Look Good, But Do They Work?

By William S. O'Hara

Picture yourself on your first skydiving lesson, the moment after you are pushed out of the plane. The parachute should open automatically but it fails. You hear the chute sputtering and you see it flapping as you plummet closer and closer to the ground. Your thoughts may be about the limitation of liability clause that you signed before the jump absolving the club from any liability. You may wonder, as the ground gets closer, whether these clauses are enforceable. When will the courts refuse to enforce them? Then again, maybe you have other things to think about as you watch the chute struggling to escape.

Now picture yourself practising as a professional land surveyor in a litigious world. You know that your plans of survey are being circulated to non-clients and are often used for unintended purposes. You know you have very little control over the plans of survey once they leave your office. Land surveyors are in some respects in the same position as the plummeting skydiver. They routinely use limitation of liability clauses (or "exclusion" clauses or "exemption" clauses or "disclaimers"). Sometimes land surveyors sign agreements that limit the liability of others. Other times they use limitation clauses to limit their own liability, for example, by adding a clause to a plan of survey. They look good on a plan of survey. They may help land surveyors as a group to sleep at night. But do they work? Do the courts enforce them?

The answer is that the courts are inconsistent in the enforcement of these clauses. In one case a spectator at a jalopy track was killed during an accident at the racetrack. The estate of the spectator sued the race organizers. The race organizers argued that they were protected by a limitation of liability in the form of a warning sign at the track entrance. The sign read: **Warning to the Public. Motor racing is dangerous.** The wording on the sign purported to absolve the organizers and drivers from any loss (whether fatal or otherwise) arising out of accidents. The court agreed that the warning did absolve the organizers and the drivers.[1]

In another case that hits closer to home, the court found that an agreement between a parachute jumping school and a student that purported to absolve the school from liability after a disastrous jump did not extend so far as to release the school from its own negligence.[2]

Where does this leave land surveyors and other professionals who would like to limit their liability from all causes? Generally the courts will enforce limitation clauses if the party accepting the limitation clause had notice of the clause and accepted the risk - like the unfortunate spectator at the jalopy track - or if he actually accepted the terms as part of a contract. The courts will even enforce limitation clauses that preclude claims in negligence if the clause is clear about the intention of the parties to exclude claims for negligence. An exemption in a contract for "any act or omission" is wide enough to cover negligence.[3]

These general principles have been tested in the land surveying profession on rare occasions, but a recent case from Indiana is good news to land surveyors on both sides of the border. In Crowe v Boofter[4] the clients wanted to purchase some property. The transaction involved a title insurer. The title insurer insisted on a Surveyor Location Report and the defendant surveyor was retained to perform the report. The Surveyor Location Report contained the following disclaimer:

> This report is designed for use by a title insurance company with a residential loan policy. No corner markers were set and the location data shown is based on limited accuracy measurements. No liability is assumed by the Surveyor for any use of the data for construction of new improvements or fences.

On delivery of the Surveyor Location Report, the clients signed a document entitled "Survey Receipt and Acknowledgement with Hold Harmless." This document confirmed that the clients had received a copy of the report and that they were aware of and accepted the limitations and/or conditions in that report.

The clients later used the Surveyor Location Report to build a pole barn on the property. As it turned out, the pole barn encroached about 20 feet on to their neighbour's land. They sued the surveyor for negligence based on the faulty report.

The surveyor brought a motion to strike out the claim based on the

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disclaimer. He argued that the plaintiffs could not sue him for negligence as they had agreed that the surveyor would assume no liability. The clients were specifically informed, as evidenced by the "Survey Receipt and Acknowledgement with Hold Harmless", that they could not rely on the report for purposes other than that the title insurance relating to residential loan policy. The court accepted the surveyor's argument and dismissed the plaintiffs' claim. The clients appealed to the Indiana Court of Appeals.

The Court of Appeals upheld the initial judgement. The court stressed that the disclaimer clause was unambiguous. The words were not subject to more than one interpretation as viewed by reasonable persons. The clients clearly were aware of and acknowledged the limitation in the report. In the face of the clear wording in the report and the undisputed acknowledgment signed by the clients, the Court of Appeals found for the surveyor.

Although it is not clear whether the surveyor was actually negligent (this issue was not before the court), it is clear that a properly worded disclaimer clause can be helpful in mounting a defence against claims by former clients. This proposition is true in Canada as well as the United States.

A similar Canadian case is *Peterson v. Power*[5]. That case was tried in the British Columbia Supreme Court. The defendant's former clients, the Petersons, had the opportunity to purchase a campground. They retained the services of a solicitor. The solicitor helped the Petersons with their purchase along with the financing. The Federal Business Development Bank, the lender, required a Surveyor's Certificate certifying that the buildings were wholly within the lands to be mortgaged. The defendant surveyor, on the solicitor's instructions, surveyed the campgrounds. The surveyor assumed from the tone of the solicitor's letter that cost was a factor and that he should keep costs as low as possible. The solicitor instructed the surveyor to prepare a plan showing only those buildings that were sufficiently close to the lot line to constitute a problem for the lender. For this reason the surveyor did not include an evaluation of a number of mobile homes that were on the property. The surveyor included the following on the Survey Certificate:

> This plan is to be used for mortgage purposes and is not to be used to define property boundaries.

The Petersons accepted this provision without protest. A few years later the Petersons' neighbours complained that some of the Petersons' buildings encroached on their property. Even taking into account the fact that the mobile homes were intentionally excluded from the Survey, the surveyor was negligent. He had missed a log shed and a log lean-to addition and failed to check all four corners of a mobile home. The surveyor admitted his negligence.

However, because the disclaimer clause had clearly limited the liability of the surveyor, the court dismissed the action against the surveyor. The trial judge stated: "I conclude that the disclaimer on the Survey Certificate is a complete defence to the claim against [the surveyor]."

The court's conclusion is based on the fact that the surveyor was asked for a certificate that would meet the requirement of the bank. He was not asked to prepare a document to be relied upon for any other purpose other than in satisfying the bank's survey requirement so that the client could obtain mortgage financing. The client received the mortgage financing. There has been no evidence that the client's banking arrangements were in any jeopardy on account of errors in the Survey Certificate. The claim against the land surveyor was dismissed.

The lesson to be learned from these cases is to include the clearest possible wording in the limitation of liability clauses. If a land surveyor wants to limit the use of a plan to a specific purpose that should be made clear and should be accepted by the client. If the land surveyor wants to restrict the use of the plan to certain individuals - like his paying clients - the land surveyor should make that clear on the face of the document. Although limitation clauses are by no means airtight they will in most cases protect the land surveyor and limit his or her liability. This protects the members of the land surveying profession and it protects members of the public who have a right to know what limitations there are on a professional's liability. A member of the public who is not satisfied with a proposed limitation clause can refuse to accept the limitation clause and negotiate a less restrictive limitation clause. This should involve expanding the scope of the land surveyor's retainer to reflect the additional exposure to liability. The surveyor's fee should be commensurate with the broader retainer and the increased exposure.

Picture yourself again jumping out of a plane with a parachute that won't open. Picture yourself this time with a backup chute that you packed yourself. Good limitation of liability clauses are like good parachutes. They can mean the difference between a smooth descent and a crash landing.

1. *White v Blackmore*, [1972] 2 QB 651
2. *Smith v Horizon Aero Sports Ltd.* (1981), 130 D.L.R. (3d) (B.C.S.C.)
3. *Walters v Whessoe & Shell Refining Co.*, [1960] 7 C.L. 1306 (C.A.)
4. Crowe v Boofter, 790 N.E. 2d 608
5. *Peterson v. Power*, [1997] B.C.J. No. 2778 (B.C.S.C.)

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