

Avoiding Professional Liability

By William S. O'Hara

1. INTRODUCTION

Members of the Association of Ontario Land Surveyors (AOLS), in all five branches of geomatics, have the same rights and obligations as other members of professional bodies. They are governed by legislation and by common law concepts that affect professional liability. But land surveyors enjoy a unique position as quasi-judicial figures with privileges not shared by other professionals. On one hand this special position shields AOLS members from criticism and exposure to liability. On the other hand it imposes additional obligations on AOLS members.

The purpose of this article is to provide a brief synopsis of the law affecting members of the AOLS as it relates to professional liability issues so that members and the people they deal with have a clearer understanding of their respective rights and obligations. This article is designed to provide a portable reference guide only. Where professional liability issues arise members of the AOLS should obtain legal advice.

2. RETAINER

The basis of most professional liability issues between AOLS members and their clients is, of course, the contract between them which sets out the professional services required of the AOLS member and defines, as well as possible, their respective duties. The AOLS member should take care to ensure that the contract will provide the client with the services and/or information required. The contract should set out the agreed upon terms as clearly and precisely as possible to avoid interpretation problems in the future.

It is not necessary that a contract be in any particular form. It can be written

or oral or inferred from conduct. Obviously, written contracts are subject to fewer interpretation problems than oral contracts or contracts based solely on conduct. As a matter of good practice, AOLS members should avoid performing any service or giving any advice except in accordance with a clear written agreement.

3. LIABILITY TO CLIENTS

There are three main streams of law that provide a means of assessing professional liability. The two most commonly used are based on the common law principles of breach of contract and liability in tort. The distinction between these concepts is blurring with time and the courts are increasingly willing to find concurrent liability in contract and in tort. The third stream is the equitable concept of breach of fiduciary duty. Historically the courts of equity were asked to intervene when the common law provided unfair or inadequate results.

(i) *Liability in Contract*

A contract (including a retainer) is a voluntary agreement that is intended to create legally binding obligations, which can be enforced in the courts. The legal ingredients of a contract are offer and acceptance, certainty of terms and an intention to create legal relations. Usually some form of consideration (or payment) is required as well to distinguish a contract from a gift. Once a contract is proved either party can enforce any breach of contract by the other party and recover damages. Unlike liability in tort, liability in contract only applies to the contracting parties.

A well-drafted contract will provide the best protection against uncertainty and possible litigation to interpret the

meaning of contractual terms, but it does not provide complete protection. A court will often imply terms into a contract where the contract is silent. The provisions of governing legislation will be looked at as a guide to what the parties must have meant. In virtually all contract cases there will be a dispute about whether or not the contractual obligations were performed. In the case of an AOLS member suing for unpaid fees this will not be difficult to prove, but in the case of a client suing an AOLS member for services not provided, or inadequately provided, the challenge will be greater. The courts will examine any evidence of the course of conduct between the parties and, if necessary, examine the prevailing practice of AOLS members to determine whether there has been a breach of an express or implied term of the contract. A careful AOLS member will be able to provide complete documentation to show what the agreement was and how the terms of the agreement were complied with by the member, as required by s. 4 of the *Surveys Act*¹.

(ii) *Liability in tort*

The two main torts alleged against professionals are negligence and negligent misrepresentation.

Allegations of negligence are likely to be made by clients of an AOLS member, while claims of negligent misrepresentation are more likely to be made by non-clients.

Negligence

Negligence in the professional context requires an error or omission on the part of the professional that causes damages to a client, or possibly a non-client. Negligence is indicated when the professional falls below the standard of care required in the

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circumstances. The courts have attempted to define this nebulous concept for over one hundred years. In *Badgely v. Dickson*² the court said that “a professional person is responsible if he fails to do his work with an ordinary and reasonable degree of care and skill.” Similarly, in *MacLaren-Elgin Corp. v. Gooch*³ the court said that when a professional man such as a surveyor undertakes work in the exercise of his profession he impliedly undertakes to exercise a reasonable amount of care and a reasonably competent degree of skill and knowledge. At least one court has articulated the expectation that an AOLS member will carry out his work in a careful and meticulous manner: *Hayes v. Pathfinder Surveys Ltd.*⁴

The legislation and the regulations applicable to AOLS members referred to below set out in some detail the procedures to be used in the course of

a land survey. This sets the bar high for the profession and makes it easier for plaintiffs to prove their claims against AOLS members who do not reach the bar than against other professionals whose obligations are not codified to the same extent. As Burton, J.A. observed in *Stafford v. Bell*⁵, at page 274:

The law respecting land surveyors does, it is true, define the method of procedure to be observed in making survey in many supposable cases, and affords greater facilities for proving negligence than in actions against others undertaking a professional duty...

How do these general statements of the law translate into assessments of liability? In effect anything that an AOLS member undertakes to do can be done poorly, and that exposes the member to

liability in negligence. Some examples are:

- certifying the accuracy of inaccurate information on a plan of survey
- giving incorrect measurements
- preparing an inaccurate building certificate
- inaccurately calculating the area of a property
- negligently staking the location of a proposed building

Negligent misrepresentation

A plaintiff who alleges the tort of negligent misrepresentation must prove:

- a special relationship giving rise to a duty of care;
- an untrue or inaccurate misrepresentation;
- negligence on the part of the person making the representation;
- reasonable reliance by the plaintiff on the misrepresentation;
- and damages suffered by the plaintiff after relying on the misrepresentation.

The broad scope of this tort extends the duty of care owed by AOLS members

beyond clients to non-clients who are able to establish a “special relationship” and prove the other elements of the tort. If a member is aware that a non-client solicitor or a bank or some other non-client will be relying on advice or information (even without knowing the person's specific identity) then a court will likely find that the member owed a duty to the non-client. AOLS members should be cautious about releasing their work product to anyone who is likely to circulate it to someone else. At the very least, any documentation that may be circulated should include a limitation of liability clause of the type described below.

Proving an allegation of professional liability is usually done through the evidence of expert witnesses. The expert will give opinion evidence that the conduct of the professional, assuming certain facts as proven, fell below the standard required of a reasonably competent and diligent practitioner. If the expert evidence is accepted as tendered the court will likely conclude that the professional fell below the requisite standard of care. In all cases of negligence or negligent misrepresentation it is also necessary for the plaintiff to prove that the alleged error caused damages or the plaintiff's claim will fail.

(iii) Breach of fiduciary duty

A fiduciary relationship arises when one person can exercise some discretion or power over another person, the power can be exercised unilaterally to affect the beneficiary's position, and the beneficiary is in a vulnerable position with respect to the fiduciary holding the power: *Frame v. Smith*⁶. The essential quality of a fiduciary relationship is loyalty. The beneficiary is entitled to the single-minded loyalty of his fiduciary. The fiduciary must act in good faith and must not place himself in a position where his interests and the interests of the beneficiary conflict: *Bristol and West Building Society v. Mothew*⁷.

Damages for professional negligence are those damages, which are a reasonably foreseeable consequence of the error or omission.

In *Poitras v. Wilson*¹¹ the plaintiffs became the owners of an inaccessible property of no value as a result of a land surveyor's negligence. The court ordered the land surveyor to purchase the property from the plaintiffs at the full price they had paid for the property before the error was discovered.

Under clause 11 of s. 35 of Regulation 1026⁸, issued under the authority of the *Surveyors Act*, the failure to disclose to a client or an employer a conflict of interest amounts to professional malpractice. If a loss flows from the failure to disclose, a finding of liability for breach of fiduciary duty or negligence will not be far behind.

Although it is conceivable that an AOLS member could owe a fiduciary duty to a client, or even a non-client, the basic function of an AOLS member greatly limits the scope of that duty. Unlike other professionals, AOLS members owe their primary duty to the public rather than to the client who retains them. They often function in a quasi-judicial capacity. When determining the location of a boundary, for example, they are required to make a determination without favouring the interests of the person paying their fees. In the words of one commentator, the land surveyor represents the interests of the public at large⁹. In view of this, it is difficult to imagine a claim based on an AOLS member's breach of a single-minded duty of loyalty to a client, or a non-client. A breach of fiduciary duty would arise only where an AOLS member made use of confidential information provided by the client, or non-client, or made a secret profit because of his or her fiduciary position, or otherwise abused the fiduciary obligations of the utmost good faith.

4. DAMAGES AND OTHER REMEDIES

The most common remedy sought in claims against AOLS members is damages. The scope of damages is broad enough to include damages for diminution of property values, the cost of reinstatement, damages for delays, the cost of purchasing adjoining properties and in general the cost of putting right whatever loss was incurred as a result of the negligence or breach of contract. In *Duguay v. H.G. Green Surveys Ltd.*¹⁰ the court found the defendant surveyor liable for removing mature sugar maple trees and awarded damages for the loss of the trees and compensation for the resulting loss of maple sugar production. Damages against professionals can also include aggravated damages or punitive damages, although this is unusual. In all cases the plaintiff has the onus of proving damages.

Damages for breach of contract are designed to put the aggrieved party in the same position as he would have been in if the contract had not been breached.

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paid for the property before the error was discovered.

Where liability is found in tort and in contract the courts will generally award damages in a way most favourable to the client.

Fiduciary based remedies are more restorative than compensatory. They usually require the fiduciary to relinquish a profit gained or to restore a loss incurred as a result of the breach of fiduciary duty.

5. LIMITATION OF LIABILITY CLAUSES

In an attempt to protect themselves against claims by non-clients, AOLS members can include clauses on their work product that limit the extent of their exposure by saying it should only be relied upon by the client who receives the document. A clause may indicate, for example, that the document was prepared solely for a named client and is not to be relied upon by any other party without prior written permission from the member. Alternatively, the disclaimer can limit the use of the work product to certain purposes, as was done successfully in *Peterson v. Power*¹². The aim in the case of non-clients is to eliminate the reliance factor - a crucial ingredient in the tort of negligent misrepresentation. It will protect the member and it will prevent others from relying on documents that may have been revised or redrafted since they were created. Since clauses of this type are clearly self-serving they are generally construed against the person who prepared them. If a surveyor actually knows that non-clients will rely on his or her work product, the limitation clause will not likely be enforced.

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6. LIMITATION PERIODS

For causes of action based on breach of contract arising before January 1, 2004, the limitation period for commencing an action is six years from the date of the breach. For causes of action arising after January 1, 2004, when the sweeping amendments to the *Limitations Act, 2002* become law, the limitation period will be two years.

The limitation period for commencing an action in tort before January 1, 2004 is six years from the date of the act or omission giving rise to the cause of action. However, limitation periods for actions in tort are subject to the discoverability rule. The limitation period begins to run only when the tortious conduct was discovered or ought to have been discovered by the plaintiff with the exercise of reasonable diligence. After January 1, 2004 the limitation period for actions in tort will be two years from the date the tort occurred, subject to the discoverability rule. Also on that date a new ultimate limitation date will apply. The maximum limitation period will be fifteen years from the date of the breach, without reference to the discoverability rule.

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A claim based on equitable relief, such as breach of fiduciary duty, is not subject to a defined limitation period

but it is subject to the ancient doctrine of laches. This doctrine means essentially that an aggrieved person will lose his equitable remedies if he waits too long before enforcing them. Equitable remedies have to be enforced promptly. What is "too long" will depend on the circumstances. It is not clear whether the doctrine of laches will be affected by the amendments to the *Limitations Act, 2002*. The old *Limitations Act* states clearly that it does not interfere with "any rule of equity". The new *Limitations Act* has no similar provision.

Under the new legislation a limitation period can not be waived or varied by agreement. There are a number of complicated transition provisions in the new *Act* to deal with the change from a six year limitation period to a two year period. In case of doubt, the *Limitations Act, 2002* should be read carefully to determine the applicable limitation period.

7. LIABILITY INSURANCE

Section 32 of the *Surveyors Act* requires all AOLS members in Ontario to carry professional liability insurance. The *Act* gives the Association authority to make arrangements for insurance and to collect premiums. The liability insurance requirements are set out in more detail s. 36 of Regulation 1026¹³.

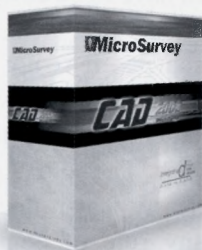
8. APPLICABLE STATUTES

*Surveyors Act*¹⁴

The *Surveyors Act* provides the legal framework for the Association of Ontario Land Surveyors. The *Act* sets out the way the AOLS operates and how the profession is governed. The *Act* provides authority for extensive regulations applicable to the AOLS

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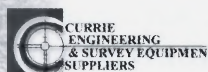
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and its members. Regulation 1026¹⁵, includes a codification of the Standards of Practice in s. 34 and a definition of Professional Misconduct in s. 35 of the regulation. The performance standards for the practice of cadastral surveying are detailed in O. Reg. 42/96 under the *Act*. These regulations set clear standards for all surveyors practising cadastral surveying. The failure to comply with these regulations will almost certainly amount to negligence or breach of contract if losses are suffered as a result.

Surveys Act¹⁶

The *Surveys Act* sets out the way surveys are done in Ontario in different locations and determines who can conduct surveys. It also provides powers to AOLS members to enable them to conduct their professional services.



William O'Hara is an experienced liability litigator who practices with the firm Gardiner Roberts LLP, Lawyers in Toronto. He can be reached by phone: 416-865-6635 or by email: wohara@gardiner-roberts.com

SELECTED BIBLIOGRAPHY

- Survey Law in Canada* (Toronto, Carswell, 1989)
- Surveys, the ticking time bombs* (CBAO, 1987)
- Professional Liability in Canada*, Campion & Dimmer, (Toronto, Carswell, 1994)
- Professional Negligence and Liability*, Editor: Mark Simpson, (London, LLP, 2000)
- <http://www.aols.org> - web site of the Association of Ontario Land Surveyors
- <http://www.e-laws.gov.on.ca> - Ontario legislation and regulations

END NOTES

1. R.S.O. 1990, Chap. S.30.
2. (1886), 13 O.A.R. 273 (Ont. C.A.)
3. [1972] 1 O.R. 474 (Ont. H.C.)
4. (1979), 19 A.R. 460 (Q.B.)
5. (1881), 6 O.A.R. 273 (Ont C.A.)
6. [1987] 2 S.C.R. 99 (S.C.C.)
7. [1996] 4 All ER 698
8. R.R.O. 1990, as amended by O.Reg. 509/99
9. G.K. Allred, "The Surveying Profession", *Survey Law in Canada* (Toronto; Carswell 1989), at pages 472 and 497.
10. [1988] N.B.J. No. 1078 (N.B.Q.B.)
11. [1998] N.B.J. No. 57 (N.B.Q.B.)
12. [1997] B.C.J. No. 2778 (B.C.S.C.)
13. R.R.O. 1990, as amended by O. Reg. 509/99
14. R.S.O. 1990, Chap. S. 29
15. R.R.O. 1990, as amended by O.Reg. 509/99
16. R.S.O. 1990, Chap. S. 30