

Can a Land Surveyor be Wrong Without Being Negligent?



By Will O'Hara

Introduction

Most professionals try hard to be perfect - or at least good. And if not good, they aim to be competent.

There are many good reasons for this. In many jurisdictions in North America there are professional standards and codes of conduct that impose ethical duties on professionals to be competent. The laws of negligence also impose standards on professionals in every discipline, and if the professional fails to meet these standards, he or she will face liability.

Most of us are not perfect. Even the best professionals make mistakes and face exposure to liability. Often our first reaction when we make a mistake is to say: "I might have been wrong, but I sure wasn't negligent."

Is there a difference between being wrong and being negligent? If there is, what practical difference does it make? The answers lie within an area of judge-made law, an area of the common law that is constantly evolving. Let's see what the judges say.

Negligence

Negligence in the context of professional liability is usually described as the failure to meet the standard of skill and care possessed by a person of ordinary competence in the same calling,^[1] or in general terms "the failure to use the requisite amount of care required by the law in the case where the duty to use care exists."^[2] Negligence is a finding made by a court of law and it usually carries with it the obligation to pay damages to the party affected by the negligence.

Standard of care

There is no question that professional land surveyors can be negligent. This universal truth is accepted throughout the common law world. The American approach is described in this way:

The liability of a surveyor for his errors does not differ from that of professional people generally. He may be held responsible for such damages as are sustained as the result of his negligence and lack of skill. He is obligated to exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances.^[3]

The subtle distinction in the law in various states was outlined in *Graves v. S.E. Downey Registered Land Surveyor*, from the Maine Supreme Judicial Court:

The duty of care that the Superior Court imposed in this case required the Graveses to demonstrate that S.E. Downey's work on the survey was below that of an ordinarily and reasonably competent land surveyor in like circumstances. Courts in other jurisdictions have articulated the duty of care of land surveyors in similar ways. For example, in West Virginia a surveyor is held to the standard of care that a "reasonably prudent surveyor" would have applied with regard to the same project. Both Maryland and North Carolina state that a surveyor must "exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances." We agree with the Superior Court that the duty of care a land surveyor is obligated to provide is that degree of care that an ordinarily competent surveyor would exercise in like circumstances.^[4] (citations omitted)

The Canadian approach was described by the Ontario Court of Appeal in 1881:

A surveyor is under no statutory obligation to perform the duty, but undertakes as a matter of contract, like any other professional man, to do the service required of him; and ... there must be evidence of a want of reasonable skill and knowledge or of gross negligence before he can be made liable.^[5]

Gross negligence is not required to show liability on the part of a land surveyor. The question now is whether there was a failure on the part of land surveyor to "use reasonable care and skill" of a person in that profession.

Error in judgment

Not every error amounts to negligence. Sometimes a professional can be wrong without being negligent. This fine but important distinction was made clear by Lord Denning, a judge with a rare gift of clarity:

Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure a patient. Nor does the solicitor warrant that he will win the case.^[6]

The distinction was explained with an example in *Wilson v. Swanson*, a case dealing with medical negligence:

An error in judgment has long been distinguished from an act of unskillfulness or carelessness or due to lack of knowledge. Although universally-accepted procedures must be observed, they furnish little or no assistance in resolving such a predicament as faced the surgeon here. In such a situation a decision must be made without delay based on limited known and unknown factors; and the honest and intelligent exercise of judgment has long been recognized as satisfying the professional obligation.^[7]

The authors of *Professional Liability in Canada* warn that the public - and the courts - will be more tolerant of errors made by some professionals than others. They argue that the courts accept the view expressed by Lord Denning in legal cases or medical cases, but they expect a standard approaching perfection in other professions, such as engineers or archi-

fects.^[8] Land surveyors are likely to fall within the latter group, as their work is more scientific, they have more control over their work, and are not usually forced to make instant judgment calls like doctors in the middle of an operation or lawyers in a jury trial.

Land Surveyors

Land surveyors can clearly be wrong without being negligent. The Chief Justice of Prince Edward Island adopted the law as stated in *Survey Law in Canada*:

In an action in negligence, the mere fact that there has been a mistake does not mean that the surveyor is liable in negligence. A surveyor is not a guarantor and, if the mistake or error in judgment occurs despite the surveyor having conformed to proper and prudent practice in accordance with the standards of the profession, there may be no liability.^[9]

On a cursory reading, statements like these may give comfort to land surveyors, but they deserve a closer look. In any action for professional negligence it will be necessary to determine whether the land surveyor has “conformed to proper and prudent practice in accordance with the standards of the profession” as a first step in determining liability. This is where the contest begins. A judge will want to hear evidence about the proper and prudent practice of others in the profession. This will require expert evidence to establish what the accepted practice was. An expert will describe the current practice and describe the legislation governing specific procedures.^[10] Then there will be evidence about whether the practice was actually followed.

In many cases where an error was made there will be (perhaps coincidentally) examples of where he or she did not “conform to proper and prudent practice in accordance with the standards of the profession”. This is especially so when the services that were provided are subjected

to the closest scrutiny. Any examples of transgressions or short comings will provide a basis for a court to conclude that the land surveyor was not only wrong, but negligent.

The concept that “an error of judgment is not negligent” has been criticized in the English case of *Whitehouse v. Jordan*, a medical malpractice case:

...an error of judgment “is not necessarily negligent.” But, in my respectful opinion, the statement as it stands is not an accurate statement of the law. Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligent.^[11]

Based on this statement of the law, it is important to look at the nature of the error and ask whether it would have been made “by a reasonably competent professional man professing to have the standard and type of skill that the [professional] held himself out as having, and acting with ordinary care.” If the answer is no, then the error was a negligent error.

Practical differences between being wrong and being negligent

The critical difference between being wrong (making an error that was not negligent) and being negligent (making a negligent error) is that liability flows from being negligent, but not from being wrong. With liability comes the obligation

to pay damages, which usually means calling on your errors and omissions insurer, paying a deductible and paying increased liability insurance premiums.

It is possible for a land surveyor to make errors that would be considered negligent but for the fact that there were no damages caused by the error. In *Parrot v. Thompson & Monty*^[12] the Supreme Court of Canada stated that without damages caused by the land surveyor’s error there can be no negligence. Again, this is a judge-made rule of law. The aim is to avoid clogging up the courts with needless law suits. The rule may allow a careless professional to avoid liability for a clear error in some rare circumstances, although it would not insulate the professional from disciplinary proceedings.

Conclusion

Based on the statements of law from the judges who make the common law, it is possible for a land surveyor to be wrong but not negligent. The courts do not expect perfection and will not insist on land surveyors warranting or guaranteeing the results of their work. The courts do insist that land surveyors comply with the generally accepted standards and procedures in the profession, especially when the standards are clearly set out in legislation. Assuming there are damages, those who do not meet the standards will be wrong and negligent. The consequences of being negligent are far more severe than the consequences of being wrong.



Will O’Hara is a partner at the firm of Gardiner Roberts LLP, practicing in professional liability litigation, intellectual property, insurance and dispute resolution. He is certified by the Law Society of Upper Canada as a Specialist in Civil Litigation and teaches a post-graduate course at Ryerson University entitled Legal and Ethical Issues in GIS and Data Management.
wohara@gardiner-roberts.com.

^[1] Campion and Dimmer, *Professional Liability in Canada*, 1994 to 2007, at paragraph 1.4

^[2] *Riddell v. Reid*, [1943] A.C. 1 (H.L.)

^[3] *Reighard v. Downs*, 261 Md. 26, 273 A.2d 109 (1971)

^[4] *Graves v. S.E. Downey Registered Land Surveyor, P.A.*, 2005 ME 116, paragraphs 9-11, 885 A.2d 779, 781-82.

^[5] *Stafford v. Bell* (1881), 6 O.A.R. 273 (Ont. C.A.)

^[6] *Greaves and Co. (Contractors) Ltd. v. Baynham Meikle & Partners*, [1975] 3 All E.R. 99 (C.A.)

^[7] [1956] S.C.R. 804 (S.C.C.), at pp. 812-13

^[8] *supra*, footnote 1

^[9] *Morris Land & Engineering v. Goldsen*, [2002] 217 Nfld. & P.E.I.R. 65 (P.E.I.S.C.), citing *Survey Law in Canada*, Carswell, 1989

^[10] For example, in Ontario the *Surveyors Act*, R.S.O. 1990, c. S.29 and the *Surveyors Act*, R.S.O. 1990, c. S.30, and regulations made pursuant to those Acts.

^[11] *Whitehouse v. Jordan*, [1981] 1 All E.R. 267, at page 281

^[12] *Parrot v. Thompson & Monty* (1984), 51 N.R. 161 (S.C.C.), see *Survey Law in Canada*, Carswell, 1989, at page 341