

Consultant Liability for Field Review: Roundup

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CE 402

October 17, 2019

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There is a misperception on behalf of owners and contractors that when a design consultant inspects the work at the site they are “supervising” construction

...an architect or engineer must properly supervise the works and inspect them with sufficient frequency to ensure that the materials and workmanship conform to the contractual requirements.

Hudson’s Building and Engineering Contracts

Cases establish that field review by a consultant involves periodic review of the construction to check whether it is in general conformity with the design

Letters of Assurance - “substantially comply, in all material respects, with the applicable requirements of the Code and the plans and supporting documents submitted in support of the application for the building permit”

***Coast Hotels v Bruskiwich* 2001 BCSC**

- P sues contractor and mechanical engineer in respect of plumbing system which failed prematurely.
- Court found that the bulk of liability was the result of the faulty workmanship of the contractor, but did assess the engineer with a portion of liability for failing to conduct adequate field reviews (80/20)
- 14 inspections but stupid timing
- Two duties owed by consultant:
 - exercise professional engineering skills in preparing the design;
 - not to supervise but to *inspect* work performed by the contractor

***Homes by Jayman v. Kellam Berg Engineering*, ALTA**

- P sues contractor and engineer in relation to deficient septic system
- System complied with Code requirements but not in accordance with specs
- Court found contractor liable for failing to meet specs
- On appeal, Court found that compliance with the Code was not a complete defence to negligence – must look to the expectations of parties and the contract
- Liability split 50/50
- *Privest Properties v. Foundation Co*: Compliance with Code may be evidence of compliance with standard but not determinative

Auto Concrete Curb Ltd v South Nation River Conservation Authority, SCC

- P hires contractor to dredge a river
- Contractor unable to obtain the necessary permits to undertake the work = delays
- contractor sues engineering firm which had prepared the specifications – duty to warn that permits required
- trial court and the CA found the engineering firm liable for the loss

SCC allowed the engineering firm's appeal:

McLachlin J: [T]he courts below erred in holding that the standard of care imposed on an engineer preparing tender documents requires it to advise prospective contractors of the need to obtain permits to do the work by the particular method proposed...It has long been established that, barring specific arrangements to the contrary, the method by which a contractor chooses to execute the work falls within its sphere of responsibility, and that neither the owner nor the design professional employed by the owner have a duty to advise the contractor as to what method to choose, or how to go about accomplishing the work.

***Zimpro Inc v Fischbach & Moore of Canada Ltd.*, Ont HJC**

- Flood during construction of sewage plant - supply valve was left on and a compressor turned off
- P sues contractor – who TPs sub. P also sues engineer
- No duty on contractor to advise sub if within expertise
- Engineer is not responsible to “teach every trade the knowledge that trade should possess so that hazards that should be known to them are in fact known to them”
- Engineer entitled to assume that the subcontractor who installed the piping and valves knew how the system operated and the consequences of leaving a valve open when the compressor was off.

***Willis, Cunliffe, Tait & Co v Harmony Estates (1977) Ltd*, BCSC**

- Developer sues engineer and mechanical installer. Claim against engineer is failure to supervise sprinkler install
- Court found that the testing was the obligation of the installer and not the obligation of the engineer
- The engineer had no authority to direct the contractor on testing, as there was no specific contractual requirement. The engineers' obligation was "to ensure that the testing [was] carried out in compliance with the by-law and to observe and witness the results, both with the view that the installation [was] in general conformance with the design"

Roco Developments Ltd v Permasteel Engineering Ltd., (BC SC)

- Defendant engineers prepared a preliminary soil report – feasibility
- Report was not intended to be used for the construction of specific project
- Court agrees that the engineer could not have been expected to foresee the possibility of another professional referring to this report as an instruction on preloading

[Where] he knows that another member of his calling has been retained in a matter, it is difficult to conceive of such circumstances – short, in any event, of those involving hazard to life – in which he would be under a duty to involve himself without first receiving a formal request for his opinion...

- 25% liable b/c they were silent on a question concerning potential for settlement

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Vanessa has expertise in professional negligence claims, construction, builders Liens, commercial Litigation and insurance law.



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FOR YOUR TIME

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