

Professional Legal Liability and Liability Insurance

By Frederick C. McElman

“The Insurance Crisis”

In recent years there has been much publicity concerning the so-called “insurance crisis” in Canada. This “crisis” has affected almost all of the professions and municipalities, and many corporations. Engineers and engineering firms have seen their liability insurance premiums sky-rocket; even the availability of liability insurance has, in some cases, been severely reduced.

There are a number of theories concerning the causes of these changes, and indeed a number of people dispute whether there are any rational reasons for the insurance problems which have arisen. Whatever the causes, recent problems in the insurance industry have increased the awareness by professionals of their responsibilities and liabilities.

Individual Legal Liability of Engineering Technicians and Technologists

Persons possessing special training, skill or knowledge are responsible for its careful application. Engineering technicians and technologists are individually responsible for meeting the standards of performance expected of a professional. Each engineering technician or technologist is responsible for performing services in a reasonable and prudent manner, according to the standards set by his or her discipline.

Engineering technicians and technologists owe a personal duty to the persons affected by their work, including both clients and employers. If the standard of performance of a reasonable, prudent engineering technician or technologist is not met, the individual technician or technologist is personally liable for his or her negligent acts. Similarly, engineers and other groups must also meet the standards of their particular disciplines.

The individual responsibility of engineering technicians and technologists applies to those who are employees, as well as to those who are engaged in private practice.

Liability of Self-employed Engineering Technicians and Technologists

Self-employed engineering technicians and technologists are liable for their work to the persons who may be affected by it, whether they are the professional’s own clients or third parties who foreseeably could suffer damage as a result of negligence in the technician’s or technologist’s work.

For example, if a technician is negligent in providing services to an engineering or construction firm whose client suffers a loss as a result, the technician, in the absence of a contract or circumstances limiting his liability, would be liable to both the engineering firm and to the engineering or construction firm’s client.

Self-employed technicians and technologists should examine their liability insurance coverage to determine if it adequately covers all or almost all of the situations for which they may be held accountable. Such an examination should at least determine whether the policy covers situations where services are not provided directly to the ultimate user, but rather are provided to an intermediary such as an engineering or construction firm.

Perhaps the best way for a self-employed professional to evaluate his or her insurance coverage is to consider first what the client expects when engaging a professional. Clients engaging a self-employed professional expect that the engineering technician or technologist will use a professional degree of skill and care. The client also expects that, if the professional is negligent, the professional will be financially responsible for the consequences.

It is very common today for clients to enquire about the level of liability insurance carried by the professional, before engaging his services. If such enquiries cannot be answered positively, the professional is probably carrying inadequate coverage.

If adequate coverage is not available or affordable, the self-employed technician or technologist may have to consider a number of alternatives including the following:

1. Will clients agree to limit the technician's or technologist's liability to the amount of the insurance he can obtain?
2. Will clients pay a separate premium for a special policy for jobs which have a potential liability beyond the limits of the professional's policy?
3. If coverage is unavailable, will clients agree to limit the professional's liability to a fixed pre-determined amount?
4. If services are provided to engineering firms or government agencies, will they agree, by contract, to provide coverage under their policies?

Decisions on liability insurance for self-employed technicians and technologists are complicated and vary according to the type of practice carried on and by the insurance market at the time coverage is required. There are no easy solutions. Contracts which effectively limit the professional's liability require careful drafting and the services of a lawyer.

Each self-employed professional must acknowledge the fact that clients engaging his or her services expect the professional to be responsible for the services performed and to carry adequate coverage should a mistake occur.

Liability of the Engineering Technician or Technologist as an Employee

All too often, technicians and technologists assume that - because they work for an engineering firm, a corporation or a government - their employer, is responsible for any mistakes which they may make. While employers are responsible for an employee's acts and omissions which occur in the course of the employee's work, the employee is also individually responsible. A negligent employee may be sued directly by the third party who suffers damage and, possibly, by the employer as well.

If an employer must pay a third-party claim as a result of the negligent act of an employee, in most cases, the employer has a right of action against the employee to recover the amount paid on the claim. While such lawsuits are not common, the possibility of their occurrence has increased.

Indeed, depending on the terms of the liability insurance carried by the employer, the insurance company may have the right to pursue a claim against the employee to recover the amounts paid. In those circumstances, the

insurance company is said to be subrogated to the rights of the employer to recover against a negligent employee. Where the right of subrogation exists, it will be the insurance company which decides whether to sue the employee - not the employer.

The possibility of lawsuits by employers against negligent employees to recover amounts paid to third parties has increased, partly because of the high cost of insurance premiums and also because the deductible amount under many liability policies has increased dramatically. Employees often have homes, savings, RRSP investments, automobiles and other assets which could be seized to compensate an employer for a \$50,00 or \$75,000 deductible amount the employer may have to pay, even if the employer has insurance coverage.

Protection for Employees

Because of the factors discussed above, every employee engaged in work which could lead to a liability claim against the employee or the employer should make enquiries concerning the insurance coverage carried by the employer. Among the questions which should be asked and answered are the following:

1. Does the employer carry liability insurance and, if so, what is the amount of the insurance and the deductible amount?
2. Does the insurance cover the employee, as well as the employer?
3. Does the policy specifically state that individual employees are covered by the policy?
4. Has the insurance company waived any right of subrogation against employees?
5. If the employer has to pay the deductible under the policy because of a claim caused by the employee, will the employer bear that expense - or is it the employee's responsibility? Who is responsible for the deductible if the employee changes employers? This should be settled as a matter of contract between the employer and the employee before a problem arises.
6. If adequate coverage of the employee is not provided by the employer's policies, what alternative insurance is available to the employee?

Conclusion

Engineering technicians and technologists are increasingly performing professional services requiring higher degrees of knowledge and skill. At the same time, the potential liability of engineering technicians and technologists has also increased.

The duty of care owed by engineering technicians and technologists is a personal duty which is not eliminated merely because he or she works for an engineering firm, a government or corporation. Engineering technicians and technologists are not relieved from their duty of care simply because an engineer or an employer claims that he will "take responsibility" for the work of the technician or technologist.

Fortunately, there have been very few claims against engineering technicians and technologists for negligence. However, the recent problems in insurance markets and the financially ruinous results which could occur from a lawsuit should cause all engineering technicians and technologists, whether they are employees or self-employed, to re-examine carefully the legal liability insurance which is available to them through employers

and personally. This may also be an opportune time for the governing societies of engineering technicians and technologists to re-examine whether professional liability insurance for their members is available and affordable.

Mr McElman is a partner of the law firm, Stewart McKelvey Stirling Scales, Fredericton, New Brunswick. He is also the legal counsel of NBSCETT.