



Consultants' Liability: The Civil Side

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Consultant Liability

- Consultants, despite being liability managers, may incur liability themselves
- Disclaimer: no simple legal formula fits every conceivable set of facts or combination of circumstances. Seek specific advice on matters of concern.



Liability in contract

- Key is to understand and define your contractual obligations
- Develop clear expectations and put them in writing - keep a paper trail
- Avoid oral agreements
- Have client directly retain sub-consultants if possible, or allow your client to select from a number of options



Liability in contract

- *North Fraser Harbour v. Hardy BBT Ltd.*
 - consultant sued for failing to identify the extent of contaminated soils; consultant claims over against the lab which did the analytical work
 - Court left open for determination whether or not the lab should be made responsible, or whether the consultant would be responsible for any errors made by the lab



Liability in negligence

- Consultants owe their clients a duty of care unless somehow limited in scope
- Competence, performance of required services while avoiding conflicts of interest and deception, and avoidance of negligence



Liability in negligence

- Standard of care:
 - that of a reasonable and prudent consultant, measured by the professional standards of the time
 - perfection is not expected, but inexperience is not a defence
 - industry or association standards may provide guidance



Liability in negligence

- To limit liability:
 - practice with care
 - recognize your limitations and stay within your area of expertise
- Even where negligent, negligence must directly cause damage in order to give rise to liability, and that damage must be a “reasonably foreseeable” consequence of the negligence



Liability in negligence

- Examples of negligence
 - inaccurate cost estimates
 - negligent site testing and examinations
 - negligently prepared proposals, designs, plans and specifications
 - negligent supervision and inspection



Liability in negligent misrepresentation

- special relationship gives rise to a duty of care
- representation which is untrue, inaccurate and misleading
- negligence in making the misrepresentation
- reliance on the misrepresentation by the client
- client suffers damages as a result



Liability in both contract and negligence

- *Simons v. Diagnostic Engineering Inc.*
 - Consultant found to have made negligent misrepresentation by failing to demonstrate skill, care and diligence in accordance with generally accepted industry standards
 - Court interpreted contract strictly against engineering company that drafted the contract and had plaintiffs sign contract in haste without attention drawn to limitations and exclusions



Reliance by unknown third parties

- *Wolverine Tube (Canada) Inc. v. Noranda Metal Industries*
 - A generic disclaimer contained in a consulting contract was not sufficient to absolve the consultant of liability when a third party relied on the inaccurate report
 - However, a specific disclaimer contained within the report itself was sufficient to absolve the consultant of liability to the third party



Fiduciary duties

- Elements of trust, confidence and reliance on skill and knowledge and advice
- In order to limit liability, recognize the existence of conflicts or potential conflicts, assess their seriousness and fully advise your clients
- You may need to withdraw or obtain the consent of both clients



Other considerations

- Incorporation to reduce personal liability
- Obtain consultant's insurance, although premiums tend to be high and exposure limits tend to be low
- Obtain legal advice to review letters of intent, contracts and proposals
- Where appropriate, obtain legal advice regarding plan of action that will be recommended



Questions?