

Professional Liability of Architects and Engineers

 Harrison Streeter

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Dudar F Kocaoglu, Series Editor

PROFESSIONAL LIABILITY OF ARCHITECTS AND ENGINEERS

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PROFESSIONAL
LIABILITY
OF ARCHITECTS
AND ENGINEERS

WILEY SERIES IN ENGINEERING MANAGEMENT

Series Editor: Dundar F. Kocaoglu

STATISTICAL QUALITY CONTROL FOR MANUFACTURING MANAGERS

William S. Messina

PROFESSIONAL LIABILITY OF ARCHITECTS AND ENGINEERS

Harrison Streeter

*TO IMIE,
AN EXTRAORDINARY LADY*

PREFACE

The stimulus for the writing of this book was the teaching of a one-semester course entitled "Legal Problems in Engineering Design," which included the topics of products liability, intellectual property, and professional liability. Although there are many excellent references and sources of information on the latter topic, no one book included all of the specific subject matter I thought essential in providing the student with a true appreciation of the issues involved.

The scope and seriousness of professional malpractice are most dramatically illustrated in the medical profession, where claims, lawsuits, and skyrocketing insurance costs deter the physician wishing to concentrate simply on providing care and healing for his or her patients. One result has, of course, been a sharp rise in medical costs, both in the fees charged and the extra, often unnecessary precautionary steps that may be taken in diagnosis and treatment. No professional can hope to escape the problem. Accountants, clinical psychologists, architects, engineers, the clergy, and lawyers themselves are all targets for disgruntled or sometimes opportunistic claimants seeking payment of damages for some alleged wrong.

This is not to suggest that all such claims are without merit. The majority of claims are, in fact, justified. Even the most skilled and careful practitioner can make an error which he or she should properly be called on to rectify or pay damages. But the number, scope, and magnitude of claims being made have expanded very sharply in recent years, reflecting what has been happening more generally in the legal arena. Our society has more people and many more lawyers than ever before, and prevailing attitudes seem to foster a willingness, even an eagerness, to file a lawsuit. Further encouragement has been provided by changes in our substantive and procedural law, which make it easier for a plaintiff to succeed. Juries have become more and more generous in awarding verdicts, and the legal profession has

become increasingly skillful and adept at preparing and presenting plaintiffs' cases.

Thus it has never been more important that architects and engineers be prepared to cope with the threat of professional liability. They must begin with knowledge and understanding of the issues. This book seeks to provide that understanding. Initially, it was projected as a textbook for use in classes dealing with the legal implications of engineering and architecture practice. As such it is suitable for a variety of approaches, from a course in "Professional Practice" in which only a few classroom hours are devoted to professional liability, on up to a course devoted entirely to the topic. The depth and breadth of coverage will depend on the choice of chapters assigned and the extent to which the instructor supplements the material with additional case studies.

Unfortunately, most architects and engineers have not had the benefit of a course in professional liability. This book is structured and written in a way that should enable those without any sort of legal background to learn and understand its contents. It is aimed at readers seeking a first look at professional liability and those who desire a quick reference for fundamentals of the subject. The individual topics are broken down into their most basic form or definition and discussed according to the general and usual rules of law.

This book should also make worthwhile reading for people who deal with architects and professional engineers, either as owners who engage the services of these professionals, or as contractors called on to perform the work of making a design a reality.

Legal rules can only be understood and appreciated when their application is seen. The edited case decisions that comprise the second part of this book are a necessary part of the reading, illustrating fact situations that led to lawsuits involving architects and engineers, and the reasoning used by the courts in interpreting and applying the various rules of law. Each of the cases has a reference number and these numbers appear in the first part of the book, in parentheses, when the cases provide examples of the topic under discussion. The introduction to the case materials must be carefully read before delving into the actual case reports, and should be kept in mind at all times.

Reference is also made in the general discussion to certain sections and paragraphs of two forms of the American Institute of Architects: Document B141, Standard Form of Agreement Between Owner and Architect, and Document A201, General Conditions of the Contract for Construction. These documents are reproduced in the appendices and the reader will want to read and become familiar with them, referring to the specific provisions when they are noted in the text. The kind generosity of the American Institute of Architects in permitting reproduction of these documents is gratefully acknowledged.

It must be emphasized that simplified versions of the law, such as are found in this book, are a danger to the reader who might seek to use them as the only source of guidance in legal questions. The law is very complex, and a book of this type can do no more than treat it in a superficial way. General rules of law have many exceptions, and interpretation of the rules may vary according to the facts of any particular case. The rules and their interpretations, as defined and announced by

legislatures and courts, also vary from state to state. As with any law book written for nonlawyers, readers must be strongly warned that there is no substitute for advice from a competent licensed attorney. In fact, the book's greatest value might be in suggesting when such advice should be sought, since it is axiomatic that legal problems are most effectively dealt with before they have a chance to grow.

For the patient, painstaking typing of the manuscript I thank Darcey Cuffman and my wife, Imie Streeter, who also provided valuable criticism and necessary moral support as the book developed.

HARRISON STREETER

Champaign, Illinois
November 1987

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PART I
THE LAW OF PROFESSIONAL
MALPRACTICE

--- 1

INTRODUCTION

The idea that a person must answer for a wrong he or she has committed is probably as old as civilization itself. Punishment of the offender, the basis of criminal law, is one possible response. The person damaged by the wrong can ask the wrongdoer for money compensation, and this is most often the reason for lawsuits between private parties. An architect or engineer who commits a legal wrong in the course of professional practice can expect to be called on to pay damages to any persons suffering loss as a consequence. The chapters that follow discuss such claims. This chapter provides a perspective on the development and current seriousness of the problem.

1.1 SOME BACKGROUND ON MALPRACTICE

There is little in the legal literature detailing the history and development of architects' and engineers' professional liability.

Many references cite the code authored by Hammurabi, who ruled as King of Babylon some 4000 years ago. A stone pillar bearing the code's provisions was unearthed early in this century and includes the following:

If a builder has built a house for a man and has not made strong his work, and the house he built has fallen, and he has caused the death of the owner of the house, that builder shall be put to death. If he has caused the son of the owner to die, one shall put to death the son of the builder.

Most of Europe operates under Roman law based on the Great Code of Justinian A.D. 533. Napoleon modified and reformed the Code, and Article 1792 of his version reads:

If a building, which an architect or other workman has undertaken to make by the job, shall fall to ruin either in whole or in part, on account of the badness of the workmanship, or even because of the badness of the soil, the architect and undertaker shall bear the loss, if the building falls to ruin in the course of the ten years.

The legal system in the United States is modeled on that in England and is called a common law system. Most of the rules of law are based on the custom, practice, and usage of the people, as determined and defined by written case decisions of appeals courts. Although legislatures may enact statutes to change, aid, or correct what are considered defects or deficiencies in the case law or even to codify the common law, statutes are not the main source of the law in our system. Under the Roman Civil Law system, the opposite is true: the whole body of rules of law is contained in statutes and codes.

Thus to describe the development of professional liability in the United States, one would have to trace the concept back through the written case decisions of both federal and state courts, and also take note of any statutes placed on the books. Not only are the federal and state systems separate, but the precedent created by a court decision in one state has no binding effect on courts in other states. People who do business in more than one state must be aware that the legal rules, whether common law or statutory law, often vary widely from state to state.

One development common to all of our court systems relates to the concept of privity, which once limited legal rights and duties to those parties who had actually entered into a contractual relationship. Architects and engineers owed no legal duties to people with whom they had no legal contract. This concept has been carved away at by the courts to the point where, for all intents and purposes, it no longer is important. Anyone who can establish a cause-and-effect relationship between the professional activities of an architect or engineer and resulting personal injury or property damage will be given opportunity to seek their alleged money damages from the professional. The resulting increase in potential for malpractice claims has had a profound effect.

1.2 THE SERIOUSNESS OF THE MALPRACTICE PROBLEM

The Continental Casualty Company, a professional liability insurance carrier, has compiled some statistics showing the frequency of claims made against architectural or engineering firms. In 1960 there were 12.5 claims per 100 firms. By 1974 this annual rate had almost doubled, to 24.3, and during the 1980s the number has risen to about 44 claims per 100 firms. Less than 25% of these claims resulted in payments indemnifying the insured, but in 1983 the average claim payment was reported to be \$148,000, up from about \$108,000 per claim 5 years earlier. The majority of the claims are, fortunately, for remedial work, property damage, or economic loss, and are for comparatively small dollar amounts. But a single bodily injury or death claim can easily run into hundreds of thousands of dollars in damages. The collapse of the elevated walkways at the Hyatt Regency Hotel in Kansas City, Missouri on July 17, 1981, where 114 people were killed and over 200 people