NEGLIGENCE AND THE STANDARD OF CARE

PROFESSIONALS (LICENSED OR NOT) ARE PERSONALLY LIABLE FOR THEIR PROFESSIONAL ACTS.

IN MOST STATES, ONLY PROFESSIONALS (NOT THE FIRMS THEY WORK FOR) CAN BE SUED FOR NEGLIGENCE.
THE FIRMS ARE FINANCIALLY RESPONSIBLE BECAUSE THE PROFESSIONALS BEING SUED ARE THEIR AGENTS.

PROFESSIONALS’ NUMBER-ONE FEAR

PROFESSIONALS’ NUMBER-ONE FEAR

NEGLIGENCE CLAIM
PROFESSIONALS’ NUMBER-ONE FEAR

LITIGATION

OUR LEGAL SYSTEM IN (VERY) BRIEF

Statutory Law
Statutory Law is based on statutes (laws) passed by a legislature, enacted by an executive, and not overthrown by the courts.
OUR LEGAL SYSTEM IN (VERY) BRIEF

Statutory Law
CRIMINAL
Misdemeanors
Felonies

CIVIL

Superfund (CERCLA)
Common Law is based on the Constitution and legal precedents.
OUR LEGAL SYSTEM IN (VERY) BRIEF

Common Law
CONTRACTS
TORTS

A contract is a legally enforceable agreement between two or more parties to do or not do something.

A tort is a civil wrong for which the law will grant a remedy.
NEGLIGENCE IS A TORT

The “Reasonable-Person Rule” Applies

PROFESSIONAL NEGLIGENCE IS A TORT
The “Reasonable-Professional Rule” Applies

WHAT IS PROFESSIONAL NEGLIGENCE?

PROFESSIONAL NEGLIGENCE IS A FAILURE TO ABIDE BY THE STANDARD OF CARE THAT RESULTS IN INJURY OR DAMAGE
WHAT IS
STANDARD
OF CARE?

STANDARD OF CARE
is the ordinary skill and
competence exercised by
members of a profession
in good standing in the
community at the
time of the event creating
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NO HARM, NO FOUL THAT RESULTS IN INJURY OR DAMAGE
The case of the HOUSE ON THE HILLTOP

MEETING THE STANDARD OF CARE IS A PIECE OF CAKE!

WHAT IS THE STANDARD OF CARE YOU MUST ABIDE BY?
You don’t learn what the applicable standard of care is until after the fact.

HOW IS THE STANDARD OF CARE DETERMINED?

THROUGH LITIGATION THAT CULMINATES IN A
THROUGH LITIGATION THAT CULMINATES IN A TRIAL

THE ACTION

THE ACTION THROUGH WHICH THE CREDIBILITY OF THE DISPUTED FACTS IS TESTED OR "TRIED"
(IF THE FACTS ARE NOT IN DISPUTE, THERE’S NO REASON FOR A TRIAL)

WHO DETERMINES WHAT THE STANDARD OF CARE WAS AT THE TIME OF THE EVENT CREATING THE CAUSE OF ACTION?

THE TRIER OF FACT
WHO DETERMINES WHETHER OR NOT YOU MET THE STANDARD OF CARE?

THE TRIER OF FACT

WHO DETERMINES WHETHER OR NOT YOU WERE NEGLIGENT?
THE TRIER OF FACT

WHO IS THE TRIER OF FACT?

THE JUDGE OR, FAR MORE COMMONLY, A JURY,
THE JUDGE OR, FAR MORE COMMONLY, A JURY, NEITHER OF WHICH KNOWS ANYTHING ABOUT WHAT YOU DO!

WHY?

Except when a judge decides it’s absolutely obvious, A TRIER OF FACT IS NOT ALLOWED TO DETERMINE THE STANDARD OF CARE OR PROFESSIONAL NEGLIGENCE WITHOUT
Except when a judge decides it’s absolutely obvious, a trier of fact is not allowed to determine the standard of care or professional negligence without an expert witness.

Experts are supposed to serve the trier of fact – not their clients – by providing factual explanations and unbiased opinions.

Experts are supposed to disagree with one another only because of honest differences of opinion.
It doesn’t always work that way.

Some experts are hired guns who will say anything for a buck.

Rather than conduct the research needed to know what area peers were doing at the time of the event creating the cause of action,
Rather than conduct the research needed to know what area peers were doing at the time of the event creating the cause of action, they’ll testify it involved far more than you did.

How do triers of fact decide which expert to believe?
With their eyes and ears.
Which expert looks and sounds more like an expert?

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Especially when the plaintiffs are third parties – those other than the two parties to a contract – who have been injured and the triers of fact believe it’s their responsibility to make the injured party whole.

Homeowners often have the sympathy of the court. The trier of fact can relate.
Homeowners sue so often because:

• They have unrealistic expectations and feel swindled when they are not met.

• They’re told – correctly– that they have a good likelihood of winning, because they have the sympathy of the triers of fact, most of whom are homeowners, too.
Homeowners sue so often because:

- They have unrealistic expectations and feel swindled when they are not met.
- They’re told – correctly– that they have a good likelihood of winning, because they have the sympathy of the triers of fact, most of whom are homeowners, too.
- They often win damage awards that far exceed the real cost of making repairs.

The case of the FLORIDA HOME INSPECTION WORKERS’ COMPENSATION INSURANCE CAN AGGRAVATE THE PROBLEM WHEN THE INJURED THIRD PARTY IS A CONSTRUCTION WORKER.
Where does the field representative fit in? When you are on site you…

The case of GRIBALDO’S TRENCH

IN OTHER CASES FORESEEABILITY MIGHT BE THE ISSUE, BECAUSE PROFESSIONALS OWE A DUTY OF CARE TO ANY PARTY THAT COULD FORESEEABLY BE INJURED BY THEIR NEGLIGENT ACTS.

The case of the CONDO CONVERSION
The case of the HOOK IN THE CELL

OWNERS FILE 60-70% OF ALL CLAIMS AGAINST DESIGN AND ENVIRONMENTAL PROFESSIONALS. MOST OF THESE CLAIMS ALLEGED NEGLIGENCE IN WHOLE OR IN PART.
WHY DO OWNERS SUE SO MUCH?

- The owner representative’s ridiculously optimistic budget is exceeded.

- The owner believes that the project team should participate in the shortfall.
The owner representative’s ridiculously optimistic budget is exceeded.
• The owner believes that the project team should participate in the shortfall.
• The owner retains counsel (or has lawyers on staff) to identify the vulnerable.

To be vulnerable, you need:
To be vulnerable, you need:
• deep pockets (through insurance or your own means), and
• a defense that will be difficult to explain to a trier of fact.

Besides...
IT’S EASY FOR THEM TO WIN!

They know and you know that, from a business point of view, it’s better to spend $75,000 to avoid litigation than it is to spend $100,000 (or more) to prove you should not have been sued to begin with.

“You’ll have your day in court” is almost always (95% of the time) a myth.
STAY OUT OF COURT

ASFE CAN TEACH YOU HOW

LESSON ONE:
LESSON ONE:
FRIENDS DON’T SUE FRIENDS

Our Next Webinar Is Titled
“Resolving To Win the War against Commoditization”
Led by Vic Donald, P.E. (Terracon)
The Date Is
Wednesday
January 16, 2013
The Time Is
Noon EST

In February
“The Case of the Contaminated Project”
Led by Kurt Fraese, L.G., (GeoEngineers)
Wednesday
February 13, 2013
The Time Is
Noon EST
Also in February
“Clients for Life: Their Worth; Creating Them and Keeping Them”
Led by John Bachner

Wednesday
February 27, 2013
The Time Is
Noon EST

Also Scheduled
March 6, 2013: Expectations Management (John Bachner)
March 20, 2013: Justice Theater: Litigation and the Resolution of Your Disputes (John Bachner)
April 3, 2013: Gaining Referrals: Their Worth; Gaining More of Them (John Bachner)
April 17, 2013: Limitation of Liability (John Bachner)

Questions?

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