# Supporting the Litigators...

## The Need to Step Up to a Standard of Care

*By Emile W.J. Troup, P.E., Past President, NCSEA*

Licensed design professionals in structural engineering have their hands full today with litigation: breach of contract, violation of statutes, infringement of regulations (all based on *rules*); and tort (wrongful acts that cause injury or damage, based on *methods*). We willfully generate a lot of business for our fellow professionals in law. It's really not surprising when you consider that neither the public nor the courts have a benchmark to measure the competency of the work performed by the Structural Engineer of Record (SER). There has never been a "Standard of Care" by which the services of the structural engineer from project to project can be assessed. The "Standard", fresh for each case, is established by the court with the aid of the battling attorneys and their expert witnesses.

### A Bit of History

After the market crash in 1929 and the crackdown on business scandals by Congress (through the newly formed SEC), Lloyds of London became the first insurer to offer business liability, circa 1933-1934. The subsequent environment was virtually claimless until 1964 because Society accepted unintended consequences as the price of progress. Defendants received the benefit of the doubt that the damage, however lamentable, was objectively unforeseeable.

Fast-forward to the mid-1960's. Coincident with the burst in engineering technology and computers, plaintiffs started to win tort cases as their lawyers used these advances and became more proficient in showing forward-looking negligence. Increasingly, plaintiffs could establish that defendants did not implement measures to avoid those conditions that caused the damage and that were foreseeable.

Around 1971, insurers fundamentally changed "errors and omissions" coverage. To avoid big increases in premiums, insurers "partnered" with the AIA to revise its standard contracts to disconnect the responsibility (liability) of design professionals from the constructors. The age of the missing (forseeabley disconnected) design professional at the construction site had begun. This further limited the application of an SER's traditional design services. As lawsuits against design professionals (and other businesses) sided with the plaintiffs, Lloyds abandoned the business liability market altogether in the mid-1990's. In 2002, the Sarbanes-Oxley Act served notice that all business – including the legal profession – would be benchmarked with standards as never before.

### Today

The risk of litigation has increased due to the lack of benchmarks for design competency, construction documents and professional oversight of construction. But our failure to limit client expectations is as much to blame. All too often in their fervor to land a client, design professionals will overstate capabilities, underestimate the effort (resources) required, promise specific outcomes, and then fail to deliver on promises and commitments.

The SER should be responsible for the safety and performance of the completed and occupied or functional structure. How can this responsibility be met if there is this disconnect between the SER and the constructors? In many jurisdictions codified "Special Inspections" are now in effect, but often they are not enforced nor is the responsible design professional's presence during construction substantially increased. Indeed, even within our own profession, the debate rages on about the duty of the SER to check compliance of construction with the structural design. Is it any wonder that we get little recognition or respect and squabble about fees that we contend are not commensurate with our duty to protect the public, with the escalating complexity of our scope of work, or with our liability exposure?

Note that we invite construction attorneys to speak at our business practice meetings and write for our newsletters and magazines, but are we ever invited to speak at (or attend) their meetings, or write articles for

their publications? The ABA's Forum on the Construction Industry has 12 Divisions, including Division 3: Design. There are nearly 6,200 members of the Forum and its Design Division is planning a program for development of a national Standard of Care for design professionals. Just what we need: a Standard of Care for the structural engineering profession created solely by those profiting from the lack of such a standard. Even if you are ultimately dismissed from culpability in a dispute, how much has it cost? Tougher question: Will that insurer renew your policy?

Past suggestions to establish a Standard of Care have been rejected by our profession as a "full employment act" for construction lawyers. Perhaps that is because we perceive that developing a Standard of Care would require us to yield a perfect result. There is no such thing in the law to warrant outcomes. The Standard of Care is about means, not ends: The client is owed the Standard of Care, not results.

This is not a call for action. Our track record for addressing issues to benefit our profession is depressing. (Would we otherwise be in this mess?) How many design firms have subscribed to guidelines recommended in the 2003 CASE Document 962 D? The popular fiction is that this document will be construed as a "Standard of Care" and used against us in litigation; The reverse is the reality. Another recent CASE-inspired initiative is the new Risk Management Program (RMP) that will address space shot insurance premiums (second attempt, by the way). Can professional liability insurance policies be written without a Standard of Care that design firms can use in order to protect themselves from lawsuits claiming negligence? And without a method to assess the SER's competency, the RMP's effort, joining with others, to achieve nationwide tort reform may be of little relief to our profession.

I invite readers to visit **www.nursingworld.org**, the web site of the American Nurses Association. It took many years, but registered nurses and nurse practitioners developed their own Standard of Care during the 1970's. They wanted more recognition from doctors and the public for their efforts, and higher salaries to reflect their professional contribution to quality health care. They have six Scope and Standards of Practice and nine Standards of Professional Performance, as well as a Code of Ethics, Social Policy Statement and Bill of Rights. Check out the details of this Standard by ordering the four or five volumes.

When we do not step up and develop an unfailing method to benchmark our services, it will continue to be done by the courts. Our self-inflicted diminishing role as professionals in Society will continue. We will become more and more subservient to the design-builders and construction managers. But take notice: this task will be no "torte-walk". And the litigators cashing in on "business as usual', at our expense, are banking on us not pursuing it.▪

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