

ACENZ - Risk & Insurance Seminar

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TOPICS

- Risk
- Ways to manage your risk
- The legal perspective
- Insurance
- CEAS – the New Zealand Solution

Risk

- Living is risky – we all will die
- Public understanding of risk is not good
- Humans/clients need to keep taking risks but paradoxically are becoming highly risk adverse
- Engineers are risk managers for their clients
- Engineers use codes and other methods to help manage their risk
- Engineering requires us to be professionally innovative & take appropriate risks while living in the shadow a potential negligent claim

Risk management principles

- Choose your client and project scope carefully
- Ensure written and fair conditions of engagement: signed by client
- Keep to the scope or get agreement on a revised scope
- Share risk by excellent communications
- Perform the work to a high standard
- Learn from mistakes
- Transfer residual risk to insurance programs, and carry reasonable levels of PI / PL cover

Contracts of engagement

Use ACENZ / EngNZ model conditions where possible (they match your insurance cover). These are currently being reviewed.

- SFA – Short form agreement **and** model conditions of engagement
- SFA for secondary consultants
- CCCS – Conditions of contract for consultancy services for larger projects (requires decisions for Appendix A and B).

Termination – normally only by the client unless the client has materially breached the engagement terms, but is changing slowly

Limiting your liability

- Always limit your liability
- Avoid unlimited liability
- Be careful if limitation clauses have been “removed” from standard contracts, default then means **unlimited**
- Not possible to limit liability if the Consumer Guarantees Act applies i.e. Domestic work
- Think carefully about the level of Professional Indemnity cover you carry especially if working in domestic sector and whether adequate.

Client prepared conditions of engagement

- Avoid if possible and try to get clients to use industry standard (EngNZ - ACENZ) documents
- Always read and understand what is in them
- Don't trust that they appear the same as a previous version and haven't been altered
- "Hold Harmless" and "Indemnify" mean what they say
- Avoid references to "all, every, must, best, fully etc"
- May exceed your common law liability and hence the insurance cover you have
- Be prepared to walk away, "everyone else has signed it" does not mean you have to
- Good response is "we pay for quality insurance in case we make a mistake, we don't want to agree to something that negates that cover for your project"

Define your scope

- Be wary of limited engagement, there will be increased risk
- Be specific in your agreement scope what you are doing and not doing
- Define the end points of your work in terms of deliverables you will produce
 - reports, design features reports
 - drawings, specifications and PS1
 - observation and PS4
- Ensure your staff understand the scope

Communications

Provide concise and clear drawings, specifications, reports and letters.

Meetings and phone calls allow you to judge the other person's understanding and reaction. Confirm key items with minutes or an email.

Emails:

- same status as any other written communication (and better than verbal!), but may have to prove it was received
- don't be flippant, they last forever and are easily circulated.

Keep accurate files

Keep good records of:

- correspondence (including records of discussion) with clients, contractors, suppliers, authorities
- collected data and measurements, calculations, assumptions
- safety and hazard reviews (H&S at Work Act 2015)
- every revision of drawings, specifications and reports that were sent from the office.

Back up electronic records.

Technical quality

Many claims arise from:

- incorrect assumptions
- haste, leading to errors
- working beyond area of expertise
- poor, or lack of, communication with client.

Quality Management (requires a documented system):

- check lists, proven methods, standard drawings
- checking by another team member (assumptions, details) – another fresh set of eyes
- final documents signed by a professional engineer.

Have you completed the agreed scope? – Review and ensure complete

- Invoice early and ensure prompt payment of fees before problems arise.

Learn from mistakes

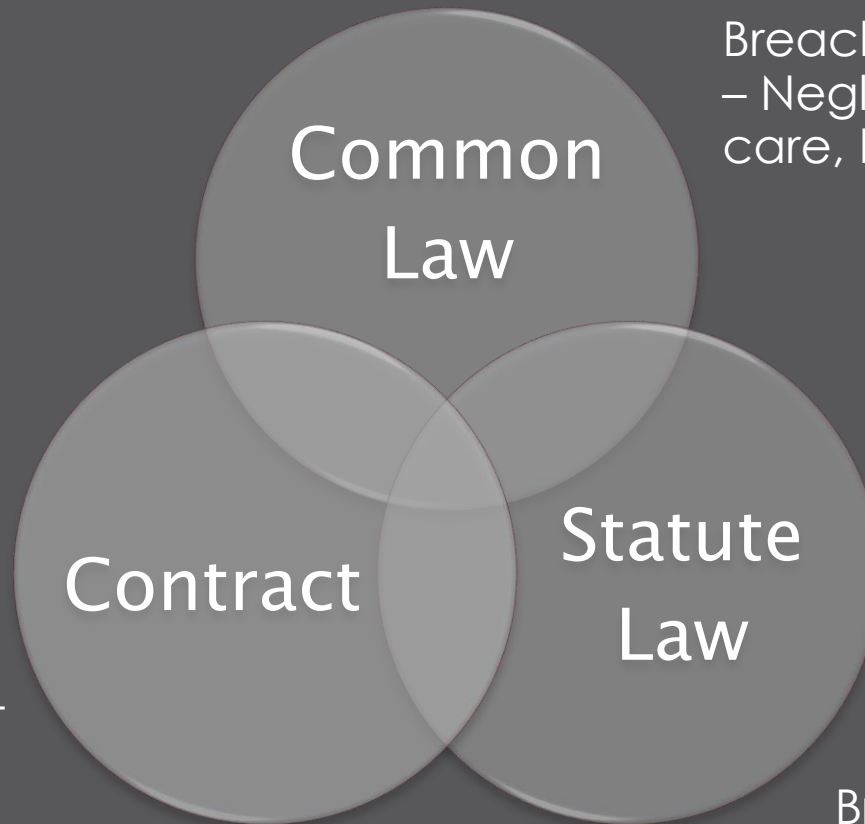
We all make mistakes.

All staff should learn from every significant mistake or “near miss”

Corrective Action Report

- describe problem (notify insurer if possible claim)
- describe fix for immediate issue
- list preventative actions
 - when, where could it occur again
 - how to prevent this
 - tell all staff
- follow-up (1 to 3 months) to check preventative actions
- then close the report, file with the project and the Q.M. records.

How does your liability arise?



Breach of tortious duties
– Negligence, Duty of care, Defamation

Breach of contract
(in common law)

Breach of statute giving rise to civil liability e.g. FTA, Building Act or Consumer Guarantees Act

How does your liability arise? – Professionals

A professional is anyone who provides advice or a service drawing on distinctive qualifications such as education or training, essentially they provide specialist expertise.

A professional can be held liable to any party to whom they owe a duty of care

Generally, a professional will be held to owe a duty of care to anyone they should reasonably have foreseen could be harmed (loss suffered)

A Client or a Third Party may bring an action against a professional in negligence if the professional fails to exercise the required standard of care.

A failure to exercise reasonable, skill care or diligence in the performance of the services.

How does your liability arise? – Personal

It is likely that for any professional person they will owe their clients a personal duty of care and hence they are liable for the resulting loss

If you are an employee of an entity then it follows that that entity will also be liable for your actions

Usually an employer is obliged to assume the liabilities caused by their employees' negligence - vicarious liability

It naturally follows that entities seek to mitigate this risk through risk management and risk transfer

Stuff happens - Insurance

For professionals there are two primary ways to mitigate or control risk

- Through effective systems and process to ensure quality of advice and service
- The purchase of suitable insurance to transfer these risks to a third party
- Liability Insurance is typically viewed as a low frequency high severity insurance product

Professional Insurance - Cornerstone

- Professional Indemnity Insurance
 - Protects against negligence claims from third parties
- General (Public) Liability Insurance(Products Liability)
 - Covers compensation claims for personal injury and property damage
- Directors and Officers Liability
 - Claims against Directors
- Statutory Liability Insurance
 - Costs of defence and certain fines or penalties under various statutes

Professional Insurance

- Cyber Liability Insurance
 - First and third party costs of a cyber incident
- Employers Liability Insurance
 - Claims beyond the scope of ACC
- Employment Practices Liability Insurance
 - Employer's costs of defence and certain awards made against an Employer for breach of employment contracts
- Trustees Liability Insurance
 - Protects Trustees

Claims are legal and commercial issues

- Professional Indemnity Insurance is for the sole benefit of policyholders
- Once negligence is established the issue may no longer be one of Engineering
- Insurance companies are commercial entities that make money by paying out less in claims than they collect in premiums
- Pragmatic resolution is an uncomfortable reality

Engineers may be seen as “deep pockets”

New Zealand is a Joint and several liability jurisdiction. The Justice of this is often a matter of perspective

Joint and several liability means that when more than one party has contributed to a plaintiff's loss the plaintiff is able to recover the full amount of the loss from any one defendant or more likely combination of defendants

If a defendant pays more than their share they are permitted at law to seek recovery from other defendants – Insurance subrogation

In reality neither a plaintiff or defendant is likely to seek recovery from an insolvent party

CEAS

- The New Zealand solution – A risk management organisation run by NZ Consulting Engineers for Consulting Engineers
- Formed in 1966 by the Consultants Division of NZIE (now EngNZ) – now 52 years young
- Arranges comprehensive Professional Indemnity insurance on behalf of it's members
- CEAS owns an insurance company the I & G which provides part of the insurance cover
- CEAS governed by a board of consulting engineers from throughout NZ
- Professional advisors are used for insurance, claims handling , technical experts & investments
- Provides members with advice on negotiating fair contract terms
- Monitors proposed legislation and lobbies government and other major players in the construction and engineering industry
- 350 member firms
- Regular Indemnity Matters newsletter, case studies and other useful resources on it's website

