Standard of Care in Professional Liability Actions

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A Guide for Design Professionals

Introduction

Actions for professional malpractice may allege a host of claims, theories and causes of action. At their core, however, these actions are suits for negligent performance of professional responsibilities, i.e., breach of the standard of care.[1] This paper addresses the legal principles and practical issues surrounding the standard of care in professional liability actions.

Standard of Care-Practical Considerations

In a malpractice action, the claimant must prove every element of its case against a design professional, including breach of the standard of care. But in practice, the standard of care is viewed as the professional's defense, and it is the accused professional, and not the claimant, who expends the greatest effort to define and prove the relevant standard of care.

But defending strictly on the standard of care is a difficult task.

- By focusing on the standard of care, the designer tacitly admits that an error was made. If the designer cannot convince the jury that the standard was met, it will have predisposed the jury to finding liability.
- Unless sensitively handled, juries interpret a standard of care defense as "hiding behind

[1] American jurisdictions generally apply one of two theories of designer liability. One is based on the professional standard and the other on warranty law. The majority of American jurisdictions apply the professional standard when accessing designer liability to third parties. In applying the professional standard, courts look to what has come to be known as the "standard of care."

technicalities." Arguing that an error was excusable contradicts Calvinistic notions of responsibility and may annoy the jury.

- Standard of care evidence is often confusing since multiple experts will disagree about the standard. Juries often choose between conflicting testimony by concluding that errors do not occur without negligence.
- Standard of care evidence is theoretically prospective. The trier of fact should determine what the defendant should reasonably have done given the defendant's knowledge at the time. But juries use hindsight. Once damage has been caused, especially serious personal injury, juries will tend to apply a standard which would have prevented the injury. Similarly, reasonableness is often related to whether the resultant injury was foreseeable. Since it occurred, most juries will believe that the injury was reasonably foreseeable.
- Standard of care testimony usually focuses on a few specific actions or inactions—a detail or a calculation buried in reams of competent work. Rarely can one have the trier of fact consider the defendant's conduct on the project, as a whole. Thus, competently executed projects inevitably have pockets of malpractice.
- Standard of care is often intertwined with causation. The defendant may have breached the standard in some discrete way, but the damage was caused by an unrelated occurrence. Juries are easily confused by this situation and do not correctly associate the specific cause with the actual breach.

For these reasons, a defendant should rarely base its defense solely on standard of care.[2] The strongest defense utilizes standard of care to buttress a finding that a different cause or a different party (either plaintiff or another defendant) is responsible for the damages. In this strategy, standard of care provides a justification for the jury deflecting liability elsewhere.

Standard of Care-Legal Principles

STANDARD OF CARE DEFINED

The standard jury instructions for professional malpractice actions contain the traditional definition of the standard of care.

> In performing professional services for a client, defendant has the duty to have that degree of learning and skill ordinarily possessed by reputable engineers practicing in the same or a similar locality and under similar circumstances.
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> It is his or her further duty to use the care and skill ordinarily used in like cases by reputable members of his or her profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his or her best judgment in the exercise of his or her professional skill and in the application of his or her learning, in an effort to accomplish the purpose for which he or she was employed.
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> A failure to fulfill any such duty is negligence.[3]

This definition raises three primary issues: *locality, similarity and time*.

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[2] The standard of care is a stronger defense when it is being evaluated by a judge, not a jury. This occurs in bench trials (no jury) or where a pre-trial motion, such as a motion for summary judgment, is made directly to the judge.

[3] §6.37, BOOK OF APPROVED JURY INSTRUCTIONS (B.A.J.I., 8th Ed.).

Locality

Originally, standard of care testimony was very regionalized. Standards varied from state to state and often even within a particular jurisdiction. City standards might not apply to a rural location.

The global village has homogenized standards of care and reduced the importance of this issue. This is especially true where standards are based on federal statutes or regulations. An engineer from New York or Alabama is probably competent to testify concerning the errors and omissions of a California engineer. Where, however, the alleged error relates to application of a peculiar state, county or parish regulation, the expert will probably need to have some familiarity with local practices.

The primary reason extra-jurisdictional experts are not used is practical. Most juries wonder why you had to scour the continent to find an expert who would support your position. If your position was correct, they reason, you should be able to find a local expert who would agree. Only where a truly exotic issue is involved, or where the expert is clearly the leading practitioner, will juries forgive use of a non-local expert.

Time

The time issue has two facets. First, as was alluded to in the introduction, juries have difficulty placing themselves back in time when assessing a defendant's conduct. Second, there may be multiple standards of care present concurrently.

Innovation and knowledge percolate slowly from research sources to professional societies to practitioners. At any point in time the practices advocated at each level may differ significantly.[4] In an evolving discipline, a key issue will be the extent to which the practitioner will be judged by the latest developments. When faced with state-of-the-art standards, the practitioner must, at a minimum, show that its actions were not only consistent with its peers, but that it took reasonable steps to keep its practices current.

Similarity

The standard applied by a particular expert is flavored by that person's prior experience. The standard of care for structural engineers, for example, varies depending upon the structure being constructed. Nuclear power plants, hospitals, and tilt-up slab structures all require different levels of work, and thus have different standards of care.

INFORMED CONSENT

Informed consent is an overlooked aspect in engineering cases. In many instances, defensible conduct results in liability because the engineer never discussed the risks with the client. Not addressing this issue in litigation can lead the defendant into a serious trap.

Plaintiff will argue that the defendant's conduct breached the standard of care. The defendant will counter that the conduct did not; that it cannot be held to a standard of perfection; and that the damage is one of the risks inherent in this type of activity. Plaintiff will ask why, if the occurrence was an inherent risk, the defendant did not advise plaintiff so that plaintiff could assess whether it wished to accept this risk. By aggressively defending the negligence cause of action, the defendant may inadvertently prove lack of informed consent. Further, the jury may infer that the defendant glossed over risks to assure that the project would be executed and the professional fee earned. Before arguing that a result was an inherent risk, the defendant should assess any potential informed consent liabilities.

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[4] A good example of this phenomena occurred in California during the late 1970's. During the 1940's, geotechnical researchers were aware that the zone of seasonal moisture change could reach six feet. This affects the design depth of friction pier foundations. During the 1960's, papers appeared in professional journals advocating greater standard pier depths. Practitioners generally used shorter depths based on an incorrect belief that the zone of seasonal moisture change was only two to three feet deep. Only after a severe drought was followed by a wet winter did practice correspond to academic recommendations.

PUBLIC STANDARD OF CARE

The standard of care is linked to the scope of work. An engineer may limit its undertaking, and its responsibility, by carefully describing the work which will and *will not* be performed. An informed client who limited the engineer's scope of work cannot later argue that the standard of care required more.

But what about third-parties? At the extreme it seems clear that an engineer cannot contract to negligently perform services and jeopardize the lives and property of third-parties. Certain duties may be irreducible.[5] It is also clear that a designer does not assume all liabilities merely by undertaking work.[6] Between these limits the degree to which a designer can contract to perform to a lower standard of care is less clear. Engineers should thus be wary of undertaking limited work where the interests of third-parties will be affected.

RELIANCE BY THIRD-PARTIES

Although a professional's primary duties are to his or her clients, under some circumstances the professional can be liable to other persons as well. Site assessments, seismic surveys and environmental audits may create unexpected liability to third-parties in two ways. First, parties other than the client may rely upon the professional's recommendations. Second, the professional may become aware of information that should be disclosed to protect third-parties from environmental hazards.

ECONOMIC RELIANCE ON A PROFESSIONAL'S REPORT

Four analytical models are used to assess a professional's liability to third-parties who have relied on the professional's opinions: *actual privity, privity of relationship, intended beneficiary and foreseeable reliance*.

Actual Privity

Third-parties cannot sue under the common law for negligent injury to their economic interests. Only those who contracted with the defendant and were in *privity of contract* can bring suit. Under the actual privity rule, a person cannot rely upon a professional's report or opinion unless the relying party has a contractual relationship with the consultant. This rule is intertwined with the unavailability, in certain jurisdictions, of economic damages in negligence actions.

The actual privity approach sharply limits the potential class of plaintiffs. Third-parties, such as lenders, attempt to circumvent the rule by obtaining the professional's explicit acknowledgement of the lender's right to rely.

Privity of Relationship

As the law developed, courts realized that *some* circumstances did warrant allowing third-parties to recover without privity. But if parties not in contract could sue, how could limits be maintained on the extent of liability?

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[5] In a published opinion letter, the California Attorney General has stated that a structural engineer who is inspecting a building and discovers a condition which imminently imperils life has a duty to the tenants if the engineer is aware that the owner does not intend to take corrective action. 68 Ops. Cal. Atty. Gen 250, 257. Under this rule, the limited scope of the inspection would seem to be a defense.

[6] For example, in the case of *Yow v. Hussey, Gay, Bell & DeYoung Int'l, Inc*., 412 S.E.2d 565 (Ga. App. 1991), the court held that an architect was not liable for jobsite injury, although it was actually aware of the dangerous condition, since it had only agreed to inspect the project to determine conformance with plans and specifications. See also, *Rodriguez v. Universal Fastenings Corp.*, 777 S.W.2d 513 (Tex. App. 1989), in which the court held, on basis of standard contract language, that the engineer was not responsible for death of the contractor's employee notwithstanding the engineer's contractual requirement to make periodic site visits and observe the condition and progress of the work.

[7] *Ultramares Corp. v. Touche,* 174 N.E. 441(N.Y. 1931).

In the 1930's, the New York courts concluded that an auditor should not be liable to third-party claimants unless there was a *privity of relationship* between the auditor and the claimant.[7] Under this approach, an accountant is liable if he or she was aware that the financial reports were to be used for a particular purpose, and knew of the existence of a party or parties who would rely upon the reports. In addition, there must be some conduct on the part of the auditor linking him to the relying party and which shows the accountant's understanding of that party's reliance.[8] This relationship substitutes for the requirement of contractual privity.

The *privity of relationship* approach limits the expansion of third-party liability, but the distinction between those who can and cannot rely is often arbitrary. Determining what conduct is a sufficient linking between auditor and third-party is difficult, causing uncertainty over the extent of liability and the risks assumed.

Foreseeable Reliance

Other courts have adopted a pure foreseeability approach.[9] Under this approach, liability attaches if the third-party's reliance upon the professional's work was foreseeable.

Although satisfyingly simple, this approach considerably expands the professional's liability exposure. As stated by the California Supreme Court, "...[T]here are clear judicial days on which a court can foresee forever."[10] For example, it is generally "foreseeable" that purchasers, lenders or investors will receive and rely upon a professional's site assessment report.

The extensive sweep of a foreseeability rule is exacerbated by the practicalities of litigation. Issues of fact, such as foreseeability, are generally reserved for a jury. This greatly reduces the likelihood that a defendant will have a claim quickly dismissed. Faced with the expensive and uncertain prospect of a jury trial, many professionals must necessarily settle claims of dubious validity.

Intended Beneficiary

Some courts have recently abandoned the foreseeability rule and adopted the intended beneficiary rule.[11] For example, in *Bily v. Arthur Young & Co.*,[12] the California Supreme Court adopted the intended beneficiary approach of § 552, RESTATEMENT OF TORTS, 2nd.[13]

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[8] *Credit Alliance v. Arthur Andersen & Co.,* 483 N.E.2d 110 (N.Y. 1985).

[9] *Rosenblum v. Adler,* 461 A.2d 138 (N.J. 1983); *Citizens State Bank v. Timm, Schmidt & Co.*, 335 N.W.2d 361 (Wis. 1983).

[10] *Thing v. LaChusa*, 48 Cal.3d 644, 668 (1989).

[11] See, *International Mortgage Co. v. John Butler Accountancy Corp.*, 177 Cal.App.3d 806 (1986).

[12] 3 Cal.4th 370 (1992).

[13] §552: Information Negligently Supplied for the Guidance of Others.

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:
   (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intents to supply it; and
   (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends in a substantially similar transaction.

> [W]e hold that an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client; i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory.
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> There is, however, a further narrow class of persons who, although not clients, may reasonably come to receive and rely on an audit report and whose existence constitutes a risk of audit reporting that may fairly be imposed on the auditor. *Such persons are specifically intended beneficiaries of the audit report who are known to the auditor and for whose benefit it renders the audit report*. While such persons may not recover on a general negligence theory, we hold that, for the reasons stated in part IV(B), *post*, they may recover on a theory of negligent misrepresentation.[14] (Emphasis added.)

The Court also sent a clear message that the liability of other professionals would also be governed by the intended beneficiary rule.

> [This] approach is also the only one that achieves consistence in the law of negligent misrepresentation. Accountants are not unique in their position as suppliers of information and evaluations for the use and benefit of others. Other professionals, including attorneys, architects, professionals, title insurers and abstractors, and others also perform that function. And, like auditors, these professionals may also face suits by third persons claiming reliance on information and opinions generated in a professional capacity.[15]

The comment h to § 552, RESTATEMENT OF TORTS, 2nd discusses the test of who is an intended beneficiary by stating:

> …[I]t is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence…a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.

Still, sophisticated third-parties take steps to assure that they are intended beneficiaries. For example, lending institutions may require that a professional's opinion or certificate be sent to them directly. Where a report has already been issued, the third-party may write to advise the consultant that it will be relying upon the report. This permits an argument that the consultant "re-issued" the report if it permitted reliance by the financial institution. The consultant should, therefore, object to any republication or reuse of the report. Sophisticated third-parties may ask for a letter specifically allowing the third-party to rely on the professional's opinion. This type of "reliance letter" should not be issued unless accompanied by a side agreement that binds the relying party to any conditions or limitations of the professional's contract.

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(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

[14] 3 Cal.4th at 406.

[15] *Id.* at 410.

LIMITATION ON RECOVERABLE DAMAGES: ECONOMIC LOSS RULE

In many states parties to a commercial transaction are not liable for economic damages caused by the negligent performance of their duties. This is now known as the economic loss rule. Under the economic loss rule, a person not in contract with the defendant cannot recover pure economic damages under negligence or strict liability. Economic damages are lost profits, increased costs, loss in value and damage to the product itself.[16]

The economic loss rule has been inconsistently applied to professional negligence actions. In some jurisdictions, the economic loss rule limits third-party actions against designers. In other jurisdictions, professional negligence actions are seen as exceptions to the general rule. In *Cooper v. Jevne*,[17] the defendant architect unsuccessfully argued that it could not be sued for economic damages by homeowners with whom it did not contract. The Court of Appeals disagreed, stating:

> Unfortunately for the architects, the liability at issue in this case is the malpractice liability of a professional for negligence in the rendition of his service and not that of a manufacturer for defects in his product.
>
> We find nothing in the following test enunciated in [the applicable case law] that would lead us to refrain from imposing liability for economic loss to the purchasers upon the architects for the latter's alleged negligence in the rendition of their professional services.

Proving the Standard of Care

EXPERT TESTIMONY REQUIREMENT

In most instances, breach of the standard of care is proven by testimony of competent experts.[18] As stated in a professional negligence case involving attorney malpractice:

> Proof of liability for failure to possess or exercise those professional attributes requires the testimony of a qualified expert where the claimed injury and its cause are beyond common knowledge.[19]

Early decisions (mostly medical) required that the testifying expert have personal experience in the precise procedure at issue. Obtaining an expert was often difficult because specialists were often acquainted and refused to testify against another specialist. Courts, therefore, reduced the knowledge requirement and a witness *acquainted* with the standard of care, i.e., a neurologist could testify concerning the standards followed by neurosurgeons even though the neurologist had not performed the procedure. Thus one may not be able to *exclude* testimony based on the witness's lack of actual experience, although the testimony will be subject to impeachment.

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[16] While the strength of the economic loss rule has eroded through the years, there is a recent, rejuvenating trend. In *Calloway v. City of Reno*, 993 P.2d 1259 (Sup. Ct. Nv., 2000), the Nevada Supreme Court embraced the economic loss rule in a homeowners construction defect case. Last year, the California Supreme Court has confirmed the rule in *Aas v. Superior Court* (2000) 24 Cal.4th 627.

[17] *Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 868-9.

[18] *Miller v. Los. Angeles Co. Flood Control District* (1973) 8 Cal.3d 689, 701-703; *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 313.

[19] *Estate of Beach* (1975) 15 Cal.3d 623, 625.

Expert Selection

Since opinion testimony is the basis for determining standard of care, considerable attention should be given to selecting an appropriate expert. Except where the issues are unusually technical, the best expert is a design professional whose practice and experience is similar to the defendant's. Since standard of care testimony is often contested, the expert should be chosen based on integrity, honesty and communication skills. Academic experts, because they often have little experience in performing similar work, may not be good standard of care experts, even if they are preeminent in their field.

STANDARD OF CARE SOURCES

Text, Papers and Treatises

Texts, papers and treatises are excellent sources of standard of care evidence. Since they were not written for the benefit of either party, they are cloaked with an aura of honesty. In addition, during trial the documents may be marked and admitted in evidence. As admitted evidence, they can be taken into the deliberation room by the jury. Because they are readily at hand, they may have greater impact than partially forgotten expert testimony.

Written Standards and Regulations

Obtaining all applicable written standards is a first step in evaluating standard of care cases. Because juries have difficulty following technical issues, they focus on concepts within their ken. Failure to adhere to established guidelines is very effective evidence. Once a failure is established, the defendant will have difficulty showing that the failure is unrelated to the damage.

Written standards may be used defensively, as well. Although adherence to standards may not conclusively establish adherence to the standard of care, it typically creates that presumption.

Firm Guidelines and Manual

Failure to follow firm guidelines and manuals is even better evidence that the standard of care has been breached. Guidelines and manuals are a necessary part of modern consulting practice. It is important, however, that they be current and that they be used.

QA/QC Reports

Quality Assurance/Quality Control ("QA/QC") documentation has been used to prove breach of the standard of care. Firms with QA/QC protocols should ensure that the distribution of QA/QC reports is strictly limited and that reports are destroyed after their purpose is served. As with destruction of any potentially relevant documents, destruction of QA/QC reports should be governed by established firm guidelines.

Contractual Agreements

Contractual agreements establish the scope of work, and to a lesser degree, the standard of care. Where the work undertaken does not seem to be adequate, one must also question whether the designer informed the client of the inherent risks.

EXPERT TESTIMONY NOT REQUIRED IF…

Obvious Negligence

In many jurisdictions expert testimony is not required where the negligence is so obvious as to be apparent to the layperson.[20] This situation occasionally arises in design matters.

Negligence Per Se *(Failure to follow the law)*

Failure to follow statutes or regulations may presumptively establish negligence. Expert testimony is, therefore, not required.

In some jurisdictions, negligence per se does not apply to all types of damages. For instance, in California, negligence per se only applies to personal injury or property damage actions,[21] and does not apply to actions for economic damages.

[20] *Chaplis v. County of Monterey* (1979) 97 Cal.App.3d 249, 265-266.

"Res Ipsa Loquitor" (Negligence Assumed)

The latin phrase "*res ipsa loquitor*" means "the thing speaks for itself." In a *res ipsa loquitor* case, the plaintiff asserts that the defendant had complete control over a situation where damage does not occur in the absence of negligence. Occasionally this requirement is met in a construction case, but more typically too many parties are involved for a single defendant to have complete control over a situation.

Environmental Projects

Environmental projects have all of the standard of care problems reviewed above. In addition, they have problems which are peculiar to environmental claims, or which are substantially more severe than encountered in non-environmental actions.

EVOLVING TECHNOLOGY

In theory, where technologies are rapidly evolving, it should be difficult to determine the standard of care for work performed in the past. When the "state of art" is in flux, there are often competing, alternative technologies that are concurrently accepted and used. Plaintiffs should have a difficult time defining the standard of care and a more difficult time showing that it was breached.

In practice, however, evolving technologies work to plaintiff's benefit. Since no specific standard prevailed, experts are free to testify based upon their particular experience. Plaintiff can find an expert who favored a more successful alternative. These experts see the evolution of the technology as a vindication of their earlier decision. Disagreement with their position is viewed as a breach of the standard of care and not a reasonable choice among competing alternatives. Since no prevailing standard existed, the court cannot disregard the expert's testimony and the action must proceed to the point where a jury can determine which expert is right.

Thus, evolving technologies make it easier for a plaintiff to get their case to a jury.

NOVEL TECHNOLOGIES

Novel technologies present a different problem. If a technology is new and untried, how can a standard of care exist?

In these instances, the litigants will focus on the acceptability of other alternatives, the potential advantages of the technology chosen, and the level of the client's understanding and participation in the decision to utilize the novel technology. In such projects, candid risk/benefit discussions with the client are absolutely mandatory.

REGULATORY CHANGES

Environmental engineering, more than most design disciplines, is faced with a changing regulatory environment. Decisions which were reasonable under an existing scheme may prove inadequate when measured against changed laws and regulations.

Engineers must remain ever aware of impending regulatory changes. Clients can, and have, asserted that an engineer should have known that a proposal would not be sufficient because of proposed regulatory changes.

PUBLIC TRUST

The public perceives environmental engineers as fulfilling a public trust to preserve the environment. Environmental projects, with their specter of toxic chemicals and noxious gases, frighten lay people. In projects such as these, the public wants superior services by environmental engineers, not "OK" or average services. The public's fear raises the standard of care.

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[21] California Evidence Code §669.

MULTIPLE STANDARDS

Multiple standards cause confusion and the possibility that an engineer following one standard may be held to have breached another. Multiple standards exist where there are competing written standards (as in environmental site assessments) or where different design approaches are taught at different universities (such as empirical design rules for aeration horsepower).

Where competing standards exist, the scope of work must explicitly indicate which standard the designer will follow.

Conclusion

The standard of care is the critical, but elusive, concept at the center of every professional negligence action. Although the standard is easy to state, it is determined with difficulty. Focusing solely on the standard of care is thus a risky legal strategy. A comprehensive defense integrates standard of care with other defensive arguments.