

HOW TO AVOID BEING SUED – 10 TIPS FOR CONSULTING ENGINEERS

IAN WATSON

I L Watson Consulting Engineer Ltd

Summary

Good Professional Indemnity practice should cover not only in-house office procedures and principles but also include an awareness of risks from external sources. This paper draws on the authors personal experience in managing risk drawing on lessons learnt.

Introduction

One Saturday in May 1995 was at home with the family when a car came down the driveway. The man in a suit stepped out and said

“Mr Watson?”

“yes” I said

and he handed me a ream sized bundle of Legal papers.

“You are hereby served with Notice of Proceedings in Court”. He said

It was a horrible shock. I felt physically sick

I took the documents and he left. My heart was pounding, I was red in the face and feeling sick. Over the coming days I found it hard to sleep, lying awake going over the events that led to this situation. Being sued is a very stressful process.

Today I will share with you my own experiences working as an Engineer and being taken to court on several occasions as well as the times when I had to work hard to avoid a dispute or failure. What lessons did I learn? How can we as practicing engineers best avoid events and disputes that lead to court action and protect ourselves?

Lesson 1 Choose your work colleagues carefully.

In facing these challenges, we as a profession tend to concentrate on issues such as the importance of keeping our records up to date and having our calculations checked, i.e. Good office procedures, but do we think about how to *avoid* getting in a position where we *might* get sued, for instance, through our relationships with other professionals? Let's say you have a house to design in Tauranga and you need help from another professional like a Geotech engineer and a Surveyor. You are referred to a local engineer in Tauranga but you don't know whether he is competent. If he is not competent you run the risk of being involved in a problem which is not your fault but you become drawn in anyway. To defend yourself will cost you time, money and stress, even if it doesn't go to court.

With regard to the regular colleagues you deal with, are they insured and do they take their responsibilities seriously? Their mistakes could draw you into a dispute or claim situation.

choose your work colleagues carefully.

Lesson 2 - Choose your insurance partner carefully

In evaluating which insurance partner to select for your Professional Indemnity cover make sure you compare the benefits each organisation offers. Some insurance partners like CEAS will cover the cost of defending a claim whether you are proved to have erred or not. Others may not have this provision. The annual premium we pay to for Professional indemnity is a significant cost but is it covering all the things you require? For me as a small practice engineer

having peace of mind in knowing that if a situation arose that needed advice from another engineer or a solicitor experienced in consulting engineering issues, that fact that I could obtain that advice free of charge was huge! Also, choose an organisation that's going to be around for the long haul – If they go bust you could be left high and dry with no cover. I personally have seen engineers caught out in this way. I unashamedly recommend CEAS because it is run by NZ engineers, will be around for the long haul, has engineers who can give advice and legal advice is provided without additional cost.

Lesson 3 Go easy on yourself.

Each time I was involved in a case it was extremely stressful. As a sole practitioner you carry that burden on your own. But we all work in a high risk industry. You may be designing a building worth \$10 million and you may do 10 of these a year. The chances are high that at some stage something could go wrong. That's why we pay comprehensive insurance premiums. So be easy on yourself and accept that it's not a disgrace to be drawn into a legal dispute. Mental Health is now an issue being addressed in the work place, and for engineers the responsibility we carry is huge. You will have times when the stress is immense, and you will feel emotions such as failure, inadequacy, and fear. Often I experienced these feelings when I found I had made a design error and had to front up to the client about it. It was hard but generally people accept that we are all human and we all make mistakes from time to time. It's just that in our case the mistakes can have huge consequences. So go easy on yourself.

Lesson 4 Be aware of how the legal system works.

I was involved many years ago in a case where a large 2 storey office building developed leaks. I didn't design the structure but I did a peer review of the structural design. The design engineer actually rented space in the building's ground floor and each time it rained he would walk around in soggy carpet! The owner/developer claimed that the roof leaked because among other things, some roof beams sagged and let in water, which was not the case of course, but I was drawn into the claim anyway because I was an insured party. In this case I attended meetings where all the parties sat around and after discussion we agreed on an amount each of us would contribute to the claim. It was that option, or go to court, and what drove each of those 15 or so parties, from roofers to plasters, builder, to engineer and architect was the knowledge that a court case would be so expensive it would be cheaper to accept some responsibility, on a "without Prejudice" basis pay out now, and go back to work. That's how the system works. Very few cases go to court so you need to be prepared to negotiate a settlement in pre-court meetings.

In this case I refused to contribute and would have been prepared to go to court, as was my insurance partner. I could only do that because I knew my legal costs were being paid by my insurer who was supporting me. Others in the room were not in that position so felt forced to pay up because the cost of engaging a solicitor and going to court would have been prohibitive for them. It may not appear fair but **That's how the system works.**

Lesson 5 Identify who takes responsibility for what.

There are projects where there is higher risk than normal. If you look at the Claims notification records from CEAS a large percentage are Geotechnical related – about 30 %. So if you are designing a building on difficult soils make sure you are getting sound advice and that the documentation clearly states who is responsible for the foundation design. Get the plans signed off by the Geotech engineer and insist he inspects the work in progress. Have clear documentation which delineates which work is covered by each party.

Lesson 6 Identify Types of situations where the risk is high i.e. potential Red Light projects.

The classic situation for me is a retaining wall on a property boundary. Two neighbours each with their own insurance company so if something goes wrong you immediately have two parties arguing as to what went wrong and who is to blame. Visit the site, see the contours,

see the potential surcharges, get a Geotech report and proceed with caution. Watch for safety issues around retaining walls where a worker may be asked to work between a cut bank and a newly constructed wall. Ensure your documentation Requires that the contractor shall provide supports for cut banks during construction. Foresee the problems and design accordingly. What are high risk projects in your line of work?

Lesson 7 When something goes wrong DON'T admit liability but DO everything you can to mitigate the fall out.

Show the client you are keen to help rectify the situation without saying who was to blame. Often a client will be happy to fix the problem at their cost if they have your support. I used to think that not admitting liability meant that I shouldn't get involved in remedial work, as that could be seen as admitting liability, but often the client just wants it fixed quickly so he can move on and complete the project.

Lesson 8 Don't work outside your level of competence.

As a young engineer working for myself I had a go at many disciplines. It was common for Civil Engineers to do soils investigations for instance back then. So I thought I would give it a go. I purchased equipment so I could drill holes 3m deep and take soils tests, and soon I was producing soil reports. But on one job I was caught out. A reputable company had carried out a soils investigation and stated that "the site was stable from slips". The client wanted to shift the approved house site from a low spot to a higher place about 50m away. My tests on the new house site were ok so the house was duly constructed. During Cyclone Bolar in 1988, the heavy rain caused many slips in Northland and on this site the whole 10 acres went on the move including the house! The owners were evacuated in the middle of the night by the police. The house itself was a right off.

After that I put away the soil testing equipment. The claim against me and the geotechnical engineer was upheld.

If the project looks tricky for you– get some help- don't exceed your level of expertise and competence.

Lesson 9 Keep your documentation and invoicing up to date and relevant

Arrange your invoicing so that the client is aware of what your invoices are for and ensure that you have forewarned them of additional work, with estimates. Get your final claim in early. If the client runs out of money, he may withhold funds on all parties and find some nebulous technical reason to without payment and a P/I claim may ensue.

Have a carefully worded contract and exclude work you are NOT engaged to do. Make sure your plans and calculations have clauses which exclude areas you are not accepting liability for. ENZ and Sesoc have lots of information about the documentation you need to show in your standard documentation. Discuss these with colleagues and share lessons. Keep up to date. Which draws me to lesson 10.

Lesson 10 Allow your work habits and knowledge to be scrutinised by your peers. Get vulnerable. Where I work in the Rodney area we have a local group that meets once a month for a coffee- No Agenda – we've been meeting for over 10 years now. We mostly grizzle about Auckland Council! But it's a great way to get to know other engineers who face the same challenges and if I need help there are engineers who I know well enough, that I can open up to. We need to be able to share our work issues and be a little vulnerable with each other, rather than pretend that we know everything. I had a misconception that if I allowed my colleagues to know how little I knew about some aspects of design, that they would judge me badly. As I opened up to others I realised that they too had weaknesses and that in fact I could assist them and also I could get their help with my shortcomings. **Get vulnerable.**

Finally, today, go easy on yourself. Get some colleagues and have a coffee on a regular basis, and if the worst happens and you get caught in a case, know that many of us have been there

before you, and know how it feels. We work in a business which has high associated risks. Let yourself be vulnerable to your trusted colleagues.

Are there any questions.

Ian Watson ME CPEng