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ENGINEER AND OWNER BOTH LIABLE FOR NEGLIGENCE DESIGN THAT FAILED TO PROTECT PUBLIC SAFETY

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In preparing their designs, professional engineers owe a duty to take reasonable care not to create a hazard that will cause physical harm to members of the public. The recent decision from the British Columbia Supreme Court in *Lovely v. Kamloops (City)*¹, examines the scope of this duty in the context of the design of a waste transfer station, where the design engineers had no prior professional experience with such facilities. The case also addresses the responsibility of the owner for its unsafe facilities. Both design consultants and owners can take important lessons from the case.

The court confirmed that the standard of care for professionals generally is one of “reasonableness and ordinary competence, commensurate with the position of the person or entity in question and prevailing internal professional standards”. With respect to professional engineers specifically, the court held that “there is a paramount professional duty to ensure public safety in all designs signed and sealed by a professional engineer”, as well as a duty “to remain current on developments in the field of engineering in which they practised.” The court noted that other aspects of the duty include the duty to make inquiries regarding how the facility is going to be used, and to communicate any key assumptions or conditions for any designs approved by the engineer. Framing the court’s analysis of whether the duty of care was met by the engineer or not, was the fact that neither the retained engineer nor the City’s staff

involved had any professional experience with waste transfer stations.

The underlying facts of the case are simple. The City of Kamloops retained a professional engineer to assist in the design of their new waste transfer facility. After the facility opened to the public, two serious accidents occurred involving falls off of an unloading platform. One individual sued the City and the engineering firm for negligent design. The court found that the professional engineer breached his duty to ensure public safety by designing the unloading platform without sufficient safety measures and held the engineer 35% liable for the injuries suffered.

Interestingly, in retaining the professional engineer in this case, the City did not conduct any procurement process. Instead, the City simply asked their current primary engineering consultant if he wanted the work at his current hourly rate. As a result, there was no written contract between the parties regarding the project. This became important because at trial, the City and the engineer disagreed about the scope of the engineer’s role in the design of the project, and without a written contract, the court was forced to infer the terms of the engineer’s retainer from the sometimes conflicting evidence of the parties. The lack of a written contract, coupled with the fact that neither the professional engineer nor any of the City staff involved had any experience in designing waste transfer stations, played a large role in the court’s ultimate decision.

Despite his lack of specific experience with waste transfer stations, the engineer argued he had fulfilled the standard of a reasonable prudent engineer. As part of his defence the engineer relied on his classification of the unloading platform as a “loading dock”. Under the *Occupational Health and Safety Regulations*, “loading docks” do not require installation of guardrails. In rejecting that argument, the court held that a fundamental aspect of a design engineer’s duty is to communicate any key assumptions or conditions of that design, which the engineer failed to do in this case. More generally, the court held that using the “loading dock” classification as a justification for the absence of

¹ 2009 BCSC 1359

fall protection was a failure to meet the duty to ensure public safety.

The engineer also argued that in approving the design, he had assumed that as part of the operation of the facility there would be a site safety plan in place during operations. However, such a key assumption was not written on the drawings or any related documentation and there was no evidence that the engineer attempted to confirm this assumption with the City. The court held that this was a violation of the duty to communicate such a condition to the approval of the drawings and a violation of the duty to inquire as to the use of a facility.

It is worth noting that the City argued that it should not be liable because it had relied on the expertise of the professional engineer it had retained. The court flatly rejected that argument. The court stated that the City knew the engineer had no direct professional experience in waste transfer station design and that the installation of safety measures was not of an overly technical nature requiring professional training or any special knowledge, but more to do with common sense. Accordingly, the court found the City 55% liable for the injuries suffered.

This decision underscores the fact that an engineer practising without prior professional experience will be held to a high standard of care and can be judged harshly by a court when doing so. In this case, there is no doubt that the professional engineer's lack of specific experience influenced how the court viewed and characterized the engineer's actions.

This decision also confirms that an owner cannot be absolved of design liability simply because a professional engineer was retained and that an owner may be held responsible for aspects of design that are based on common sense.

Finally, this decision is also an example of what can go wrong when parties operate without a written contract to clearly establish the scope of the engagement. While it may initially appear that the parties have reached consensus on the scope of the retainer, once an issue arises, the parties often have divergent opinions. In that case, the court must determine the scope of the retainer, which may lead to unexpected or undesirable results for both parties.

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