Foresters and the Law of Professional Negligence

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Introduction

Several years ago on the Squamish highway in British Columbia, a massive slide roared down a mountain side during the night in a rainstorm. It damaged homes and took out a bridge on the highway. Several vehicles plunged into the gully before the highway was closed to traffic, killing some of the people in the vehicles. The slide resulted from debris that had plugged a creek on the slopes above the highway, creating a dam which burst in the rainstorm. There is disagreement on whether logging caused the slide. but acceding to newspaper articles on the subject, logging was implicated at least in part by the presence of chainsaw marks on some of the logs and stumps that washed down the mountain.

In other cases, floods from higher rainfall runoff caused in part by logging practices have resulted in property damage. And there are practices that have more subtle effects but which may nonetheless be considered "harmful" over time, such as the practice of harvesting forests without ensuring regeneration. Where logging and other forestry practices that cause harm are recommended, implemented, supervised or authorized by professional foresters, it is possible the foresters may be held partly accountable.

Professional foresters have generally escaped the kind of public scrutiny that has contributed to an increasing number of professional negligence lawsuits in other professions. But given increasing public awareness and militancy regarding all matters relating to the environment, and the increasing tendency of the public to question professional advice, one wonders whether the forestry profession will escape much longer. In anticipation of this, at least one insurance company has begun efforts to sell "errors and omissions" insurance to Canadian foresters.

Accountability of foresters as professionals might best be discussed under three levels: administrative, ethical and legal. Administrative accountability refers to specific requirements imposed by an employer. These can include job duties, production targets and other standards and codes of behaviour related to the job for which the employee was hired. Ethical accountability refers to guidelines imposed by a governing professional organization. Legal accountability refers to duties and standards imposed on professionals by law.

This article deals with the legal accountability of foresters in relation to the law of professional negligence. Legal principles are discussed, and then applied to hypothetical examples of forestry practices. The paper concludes by summarizing the duties of care of professionals and pointing out that poor forestry practices can be considered negligent in a court of law. An understanding of the legal duties and standards applied to professionals may serve both to improve the quality of the practice of forestry, and to limit foresters' exposure to potential liability for professional negligence.

The Law of Professional Negligence

The Canadian legal system comprises both public and private law. Public law deals primarily with the relationship between the individual and the state. Criminal law, constitutional law and law dealing with administrative tribunals are some examples of aspects of public law. Private law, on the other hand is

concerned with disputes between individuals. Property law, contract law and the law of torts are examples of branches of private law. Negligence law is a branch of the law of torts, the purpose of which is to compensate victims of conduct that has caused harm or injury.

Professional negligence law is a subdivision of negligence law. It imposes certain duties of care on all professionals, and requires that certain standards of care (level of skill that must be applied) be met in providing advice to clients and in carrying out professional activities. If a person wants to sue a forester for professional negligence, it must first be determined whether the forester owed that person a duty of care. It must then be determined what standard of care was owed to that person, and whether that standard was breached.

Early court decisions establishing a duty of care on the part of a professional towards a client were based primarily on contract law, since the professional relationship is also a contractual one. The law implied a term into these contracts to the effect that the professional must exercise due care, skill and judgement in the delivery of professional services. Subsequently, courts expanded a professional's exposure to negligence beyond the parties to a contract by outlining a duty of care based on the tort law concepts of foreseeability and relationships of proximity [1]. As a result, a duty of care is owed to someone if it is reasonably foreseeable that they could be harmed by negligent conduct.

Standard of Care

Professional negligence law operates as a form of regulation by imposing liability for conduct that falls below the legal standard. The legal standard for professional negligence has traditionally been based on the objective standard of the average, reasonably competent and prudent practitioner of similar experience and standing. In other words, what would such a person have done in the circumstances? Or, put another way, were the same steps followed that other practitioners normally follow?

This traditional standard of care has been interpreted by courts to refer to practitioners in the same jurisdiction or general area, or alternatively a practitioner in the same area of specialization and expertise (Rice 1987). Thus, a junior field forester will not be held to the same standard as an experienced forest geneticist. The standard of care expected of professonals is based on current knowledge and techniques. It is therefore flexible and will adapt to changes in professional practice as a result of new methods and new knowledge.

Customary Practices

According to the standard of care discussed above, a forester may argue as a defence in a professional negligence law suit that a generally accepted customary practice was followed. But this will not always be a successful defence if the customary practice itself is negligent or did not prevent a known risk from causing harm (Rice 1987).

In the 1984 case *Edward Wong Finance Company Limited v. Johnson Stokes & Master (a firm)* [2], a young lawyer was following a customary and prevailing practice in a mortgage transaction when a client incurred financial loss as a result. The customary practice in a mortgage transaction in Hong Kong was to forward the purchase price to the vendor's solicitor on his promise to deliver the properly executed documents. This was done, but instead of completing the transaction, the vendor's lawyer absconded with the money to parts unknown. The court asked,

1. Does the customary practice involve a foreseeable risk?
2. Could the risk have been avoided?
3. Were the solicitors negligent in failing to take avoiding action?

The court answered all questions in the affirmative, finding the law firm negligent as a result.

These principles have been applied in Canada, resulting in a finding of negligence on the part of a solicitor in Ontario. Undoubtedly, courts will find the same principles are applicable to all professions, such that even a reasonably prudent practitioner can be found negligent if the customary practice or the policy itself involves a foreseeable and avoidable risk. It remains to be seen whether courts will extend these tests beyond cases involving customary practices, to all negligent acts or omissions. Either way, the outcome may not change significantly since the traditional test of the ordinary prudent practitioner could produce similar results to the tests of foreseeability and avoidability. For example, an ordinary prudent practitioner should not cause harm that is foreseeable and avoidable.

Negligence and Engineers

Although there are no reported cases where a forester has been sued for professional negligence or malpractice, engineers have not been so lucky. Perhaps this is because foresters' activities have been, until recently at least, removed from public view whereas engineers' activities are normally close to or in populated areas. In any case, there are numerous examples of professional negligence lawsuits involving engineers.

Although engineers are more closely regulated and disciplined by their professional governing bodies, the engineering profession has traditionally been considered by foresters to be most analogous to their own. Therefore, examples of negligence cases involving engineers may provide some idea on how a court might deal with a case involving a forester.

In a 1979 British Columbia case, *District of Surrey v. Carroll-Halch & Associates* [3], the District of Surrey wished to have a building designed and constructed. They hired an architect, who in turn hired Carroll-Hatch & Associates, a firm of engineers. The building, once built, subsided due to lack of support from the soil. The District of Surrey sued the engineers. The court found the engineers negligent since their report implied the soil would support the building, and did not recommend that testing be carried out. The court stated that the engineers owed a duty to point out the risks to the architect, and owed a duty to the District of Surrey to warn them of the risks even though they were not a party to the engineers' contract with the architect.

In a 1983 Ontario lawsuit involving negligent advice, *Unit Farm Concrete Products Limited v. Eckerlea Acres Limited et al* [4], a private contractor received advice from an engineer with the Ontario Ministry of Agriculture regarding engineering plans for a cattle barn. When the barn was built, the walls collapsed as a result of design deficiencies. The engineer was sued and was found negligent. The court stated that he was asked to exercise skill as an engineer, and that the contractor was entitled to rely on his advice since it was given without a disclaimer. The engineer knew he was being relied upon, and had a duty to call attention to the deficiencies in the plans. The court also noted that being a government employee does not reduce the standard of care required of a professional, although the Crown is responsible for any negligence attributable to government employees.

In both the above cases, if the tests of foreseeability and avoidability had been applied, they would probably also have resulted in findings of negligence, since the negative results were both foreseeable and avoidable.

Professional Negligence Applied to Forestry

There are many ways a forester can end up in court being sued for negligence. In cases similar to that of the District of Surrey a forester may fail to warn a third party directly affected by his or her recommendations regarding potential problems. Or, in circumstances similar to the Unit Farm Concrete

Products Case, a government employee may give negligent advice to a woodlot owner or company who relies on that advice to their detriment.

In hypothetical examples relating to forestry practices, what if a forester in British Columbia authorized the complete harvest of an old growth coastal rainforest on a steep mountainside and subsequent erosion caused a loss of forest productivity and damaged the water supply of a small town? Assuming the forester is sued for negligence and the court applies the tests of foreseeability and avoidability, what is the possible outcome? Is it foreseeable that a sleep hillside may wash out after being cleared? The answer must be yes. Heavy coastal rains and unstable soil conditions can make it quite possible (washouts sometimes also occur on sites with a full forest cover). Is it avoidable? In many cases, yes, since logging methods exist to harvest unstable sites with a minimum of damage. Therefore, in these circumstances logging that causes damage or loss of forest productivity may be considered negligent in a court of law.

What if a forester in New Brunswick authorized the harvest of a mature mixedwood stand including fir, spruce, birch and maple knowing that post-cut treatment would be required to suppress fierce competition from "weed species" to ensure that planted trees can grow? And what if the forester knew that the treatment would not occur since the area was not zoned for herbicide use and there were insufficient funds for manual treatment? The result could be an area that is insufficiently restocked, and/or choked with undesirable species. This is not as clear an example since no immediate harm or injury is apparent. However, assuming harm can be proven and quantified, (i.e., loss of forest productivity), and assuming the forester is sued and the court applies the tests of foreseeability and avoidability, what would be the result?

Is it foreseeable that the harvested area would become choked with competition? Anyone familiar with such a stand type knows that it is possible. Is the result avoidable? A more difficult question, but it could be argued that harvesting and silvicultural methods exist that would promote natural or planted regeneration of desired species. Therefore, knowingly harvesting an area in a manner that results in an insufficiently restocked area may meet the tests for professional negligence.

If the court applied the traditional test of the ordinary prudent practitioner, the foresters in these examples may still be found negligent if harm resulted to someone, since it would be difficult to argue that an ordinary prudent practitioner would permit practices to occur that caused harm or had an adverse effect on forest productivity.

Other examples of situations where a forester could be liable for professional negligence can include:

- Improper application of pesticides leading to contamination of soil, water or non-target vegetation and organisms.
- Improper design of harvesting operations leading so damage to adjacent forests, i.e. blowdown.
- Ill considered advice to landowners that leads to loss or injury.

Limitation Periods

A person's right to bring a lawsuit does not last indefinitely, it expires after a certain time has elapsed. For most matters, including negligence actions, the limitation period is normally six years. The Limitations Act in each province specifies the period applicable for various types of legal actions, and other statutes may also impose limitation periods. For example, the *Ontario Professional Engineers Act* [5] imposes a one-year limitation period for negligence or malpractice actions to be commenced against a professional engineer. As a further example, the Ontario *Public Authorities Protection Act* imposes a six-month limitation period for legal actions against a person who is acting under a statutory or public duty [6].

One Purpose of a limitation period is to protect the person who has caused the harm from being indefinitely exposed to a potential lawsuit. Lawsuits involving forestry may be problematic since it can often be difficult to determine when a cause of action arose. Further, the problem may not be discovered or even realized until years after the causal event occurred. However, as a general rule, the time does not begin to run until the victim discovers or ought to have discovered the material facts on which a lawsuit could be founded. Thus, even if 10 years elapse before the facts are discovered, the victim will still have the limitation period from the date of discovery to bring an action.

The Problem of Standing

"Standing" refers to the notion that to be entitled to bring or take part in a legal proceeding, a person must have a sufficient stake in its outcome. In most cases, it is expected that persons bringing the lawsuit are directly affected by the subject matter of the proceedings. The law of standing is intended to ensure that only the proper persons come before the courts in matters dealing with legally protected and tangible interests. The law of standing distinguishes between public and private interests, applying more liberal requirements where public interests are concerned. For example, increasingly, public interest organizations are being granted standing to commence or intervene in proceedings involving a public interest, such as an environmental issue.

An action in professional negligence, although possibly raising issues of public concern, involves primarily a private interest. As a result, more stringent tests of standing would be applied. However, with more and more of the public in the woods these days, there are more people who could argue they are directly affected by poor forestry practices, giving them the right to sue the forester responsible. Hikers, hunters and trappers are examples of people who could have standing to bring such a lawsuit.

It is questionable whether poor forestry practices on public land, which harm forest productivity but which otherwise cause no direct harm to anyone, can give a member of the public the right to sue the forester responsible. However, the law of standing, particularly in relation to public interests is still evolving, and courts may be receptive to new arguments. Nevertheless, a challenge to the courts jurisdiction based on a lack of standing on the part of the person suing may be a forester's first line of defence against a negligence action where the person suing was not directly harmed.

Limiting Liability

Contractual methods exist to limit professionals' exposure to negligence actions, but are not uniformly successful in doing so. For example, a forester may negotiate with the client or employer to include indemnification clauses in contracts such that the employer would take responsibility for the forester's negligent actions. Few employers may agree to such a clause although where the forester is acting as the employer's agent, the employer may share liability in any case. Contracts may also clearly outline a professional's duties and obligations, although a tort action in negligence may still be commenced against them by third parties and the other parties to the contract.

A contract may also attempt to limit a professional's liability for negligence. However, some professions do not permit this. For example, in Ontario, the *Solicitor's Act* [7] tenders void any limitations of liability for negligence of solicitors. In Quebec, the *Forester's Code of Ethics* [8] prohibits a forester from including in a contract for professional services a limitation of liability clause, requiring instead that foresters accept full personal civil liability for their actions.

Errors and omissions insurance, if available, may serve to indemnify the insured professional against damages awarded against them in a professional negligence law suit. For example, the Consulting Foresters of B.C. have recently arranged to obtain Professional Foresters Errors and Omissions Insurance [9].

In some provinces, government foresters may be protected by statute. For example, the Ontario Ministery of Natural Resources Act protects employees from lawsuits for acts that are done in the execution in good faith of their duties [10]. However, one might question whether foreseeable and avoidable harm can be considered as being in good faith. In any case, the Crown is normally held responsible for the negligence of government employees in the course of their employment.

The best way to limit liability for negligence is the preventative approach. By maintaining continuing competence and bringing a reasonable level of skill and diligence to their professional actions and statements, foresters can greatly reduce the likelihood that a negligence action against them will succeed.

Liability as Regulation

As a form of professional regulation, civil liability is not always effective for several reasons:

- It is reactive in that it generally addresses problems after damage or injury has already occurred. The legal system is not always effective in anticipating and preventing harm.
- A victim must recognize that an injury or harm has occurred, that it resulted from negligence, and then must initiate a legal action. The burden of proving these elements generally falls on the victim.
- It often takes the skill of a professional to even recognize that an injury has occurred.
- Because of group loyalty, other professionals may be reluctant to help a victim in court
- Standards of competence can be difficult to determine where, as in forestry, there is often wide scope for professional judgment.
- Legal actions are expensive and time consuming.
- The losing party may be penalized by being required to pay court costs.
- Harmful effects of negligent conduct may not be fully compensated for by monetary awards.

However, despite these shortcomings, professional negligence lawsuits are becoming increasingly common in all professions, serving to remind professionals that the law requires skill and competence to be brought to bear on professional decisions and activities. In the absence of a professional governing body, or where such a body is inactive, ineffective or does not apply to all professionals, a legal action based on professional negligence may be the only means of regulating professional competence.

Summary and Conclusion

The law of professional negligence makes it clear that professionals are personally responsible and liable for their negligent actions.

Liability for negligence can result from any act or omission in the performance of services for which the professional is employed. Professional negligence law acts as a form of regulation of professional competence by imposing certain duties on all professionals. These duties include:

- the duty to apply a reasonable level of skill and diligence in advice given or activities carried out in a professional capacity. The duty is owed to all persons who may be injured, economically or physically, as a result of negligence. It is for the courts to determine the scope of the duty in the circumstances, and whether it has been breached.
- the implied duty to maintain a minimum level of skill and to conform to current criteria, experience and knowledge.

Professional competence is a continuing concept.

- the duty to warn principals, and third parties where the possibility of harm is reasonably foreseeable, of risks inherent in particular courses of action.
- the duty to avoid foreseeable harm, even if a customary practice is involved.

It is important to note that the law does not require that all foresters be perfect, or be experts in their field. In the 1825 British case *Montrious v. Jeffreys* [11], in a law suit involving a lawyer, it was stated:

> "no attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law."

Similarly, no forester is required to know everything about forestry. The minimum required is the skill of an average, reasonably competent practitioner of similar experience and standing. Mistakes made in good faith may result in harm but will not necessarily be considered negligent. Following customary practice may provide a defence, unless the practice involves a foreseeable and avoidable risk of harm.

Professionals may also be liable for negligent statements or advice that someone relies on to their detriment. This may be of particular concern to government foresters who often give free advice to landowners. Foresters must therefore ensure their advice is accurate or include a disclaimer to the effect that the advice should not be relied on.

In evaluating the conduct of professionals, a court may adopt the standards of the profession unless the standards themselves are inadequate. Courts determine which standards will apply, such that negligence can be whatever a court considers it should be in the particular circumstances.

Although the public generally places blame for poor forestry practices on government or industry, there are signs that the public may soon be looking at the professional foresters as well. If lawsuits are to occur, they will probably occur first in the context of a forestry consultant acting for a client directly. However, the principles apply to all foresters equally, including government foresters. Since poor forestry practices could be considered negligent in a court of law, the slogan "Be Careful in the Woods" takes on a new meaning.

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Footnotes

1. See for example. Donoghue v. Stevenon (1932) A C 562; Hedley & Co. Limited v. Heller & Partners Ltd. (1964) A.C. 4654. and Anns et al v. Morton London Borough Council (1978) A.C. 728
2. (1984) 2 W.L.R., 1
3. (1979) 101 D.L.R. (3d) 218
4. (1983) 5 C.L.R. 149
5. S.O. (Statutes of Ontario). 1984. C.13. s47(1)
6. R.S.O. (Revised Statutes of Ontario). 1980. C.406. s.11(1)
7. R.S.O. (Revised Statutes of Ontario). 1980. C.478. s.24
8. R.S.O. (Revised Statutes of Ontario). 1977. C.l-10. R2. s.3.04.01
9. B.C. Professional Forest, June. 1989. p.9.
10. R.S.O. (Revised Statutes of Ontario). 1980. C.285. s.5(2)
11. (1825) 172 E R 51. at 53