

## Loss Control

# Bulletin

## Land Surveyors

### Professional Liability Insurance

#### Liability — To Tell or Not to Tell, That Is the Question

*Introduction by ENCON*

*This Bulletin has been prepared for members of the Canadian Council of Land Surveyors Professional Liability Insurance Program. The purpose of this Loss Control Bulletin is to provide some thought, insight and practical considerations from people directly involved with practice and professional liability issues on how to approach clients when there may be problems with survey services.*

#### Land Surveyors and Clients With a Claim

*by Gordon M. Thomson, BCLS*

What do you do when a client, former or current, calls you and says, "Surv, we have a problem! The building doesn't seem to fit and construction is underway." Do you immediately decide to take that trip to Mexico, particularly after you've checked your field notes and calculations, have discovered an error, and now have a terrible sinking feeling? What do you do next?

First and foremost, remember to keep notes of all your conversations and then report the matter to your insurer and broker.

Obviously, there is a need to assess the facts and deal with the problem, but how do you do that without admitting liability? You want to retain a good relationship with your client for the future. After all, this is not something that happens every day and you want to see any survey problems fixed with care. You vaguely remember being told to never admit liability to anyone — have you passed this important message on to your crew? How do you respond without, as the insurance and legal people put it, prejudicing your insurer's ability to defend your actions, or without placing your coverage in jeopardy?

Your client may be convinced you have caused a problem at this point but there are many things to be determined by you and your insurers. Tell your client you are looking at his concern and do so, not only from your records, but inspect the field as soon as possible and record whatever you find, with photographs as appropriate. Your client may also have to be encouraged to immediately investigate the problem from his perspective and find ways to mitigate and control damages.

If perchance you've set a monument or legal post in the wrong place, the posting has got to be checked, rectified or fixed so as not to cause further damage to adjoining property or problems in subsequent surveys. Do you go out at midnight and destroy the post? Obviously not. Even though a fence may have been built or concrete poured at a minimum setback, you should first advise your client that you will check the site. Then, if you determine a post is in the wrong position, it either must be reset or noted as a witness or reference to a corner

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and correctly marked both on the ground and as recorded on any sketch, plan or document and in your records. Methods of amending official plans under deposit and of filing corrections vary from province to province, and may, depending on the type of survey, and/or correction, involve other signatories to the plan. Proceedings of course must be undertaken in your own jurisdiction but at the same time it is particularly prudent to amend and re-date any prints or copies to replace those that have been issued to your client, an agent, a builder or an inspector of a local district or municipality.

Remember, only a land surveyor is lawfully allowed to take up and replace a legal survey post without committing an offense under the criminal code of Canada.

Claims may also involve vertical or horizontal construction layout and of course building location certificates or real property reports. In these and all cases, on notice of any problem, you must immediately check your work to determine whether or not there is a layout or tie problem. If an error is found, notify the insurer, and then record your findings and file amending data so that a contractor or owner or any user of your survey can take appropriate remedial and mitigating action. Have the data acknowledged, signed and accepted noting that any acknowledgment of ensuing damages is being investigated.

By addressing the issues in this manner, you have not admitted liability but you have addressed your client's concern, even if your client has threatened litigation and claimed "starry-eyed" damages. Your reaction to the initial call will be critical in negotiating a settlement and may well be judged in court.

You might also consider commencing procedures within your own practice and office environment that will eliminate any occurrence or re-occurrence of similar problems. Even if a posting or layout error did not happen — how about calmly initiating or re-instigating front line advice to ensure building layouts add up, including checking the far side property line, as well as a walk-about visible check? Before you leave for the next panic layout, check to make sure things look right.

What about elevation? So simple, how can anything go wrong? Well, Peter's Principle sure shows its stuff in these surveys. It's always wise to run closed loops from two known bench marks to set temporary bench marks. Do you have someone else check the addition, figures, etc. and then compare notes as well as markings on the ground? Is it possible to get shots or ties to pipe inverts, mapping or other topographical features for leveling checks before packing up?

The sinking feeling you will experience when you realize something's gone wrong is no fun.

To acknowledge a claim or potential claim without liability:

- **Get immediate help** — your CCLS program insurer has claims analysts who are familiar with land surveyors' problems, knowledgeable adjusters and access to the most appropriate legal counsel. Peer support is available through your Professional Liability Insurance Committee with representative land surveyors from Newfoundland, Nova Scotia, Ontario, Saskatchewan and British Columbia. Your association office can also provide direction and advice. Address the concern with fast priority and refer any claims to your insurer.
- Keep factual notes and document your files.

Remember the determination of any liability is a matter for your insurers, legal council or perhaps the court.

## A Bad Day

*by Craig A. Wallace, P.Eng., LL.B.*

Arriving at the site of your client's dream home a few days after your crew has laid out the foundations, you notice that the forms, now ready for the concrete, appear much closer to the road than you had expected. The construction crew observes curiously as you scurry between the forms and your benchmark on the road. Your worst fears are confirmed by a few quick measurements just as the concrete truck pulls up to the curb. The house is eight feet too far north. The anxious owner asks if everything is okay. With the concrete hardening in the truck and a crew of workers at the ready, you remember something in your insurance policy about admissions of liability voiding your insurance coverage. What do you do?

### Protect Yourself

This dilemma is a particularly difficult one for surveyors. Like most professionals, surveyors believe they should stand behind their mistakes. They maintain, correctly, that their professional duty to their client requires them to inform the client when something is wrong so that the client can take the appropriate steps, even if it means ultimately suing the surveyor. But there are good reasons for being cautious and making sure no admission of liability is made.

A crucial reason the surveyor should not admit liability on the discovery of an error is that his insurance policy contains a clause providing that an admission of liability will void his insurance coverage. This proviso is to provide the insurer with an opportunity to assess the situation, obtain legal advice and determine the extent to which its insured is actually liable. If the surveyor deprives his insurer of that opportunity, he may lose his coverage.

Another important reason the surveyor should not admit liability is to preserve all defenses available to him until all of the facts are known. In many cases, liability for the error is not seriously contested. However, the consequences and exact cost of the error remain in dispute. There may be confusion and the parties may not later agree as to exactly what was

admitted. In some cases unscrupulous owners will attempt to take advantage of an admission. In the example above, an owner who is facing a claim by the contractor for extras or delays may try to exaggerate the impact of the surveyor's error. In admitting liability, the surveyor may unwittingly admit responsibility for costs which do not properly flow from the error. If an admission is to be made, it is essential to have agreement on all of the facts, and that it be made only after due investigation and legal advice. It's only fair, to everyone.

The dilemma is complicated by the fact that surveyors' mistakes are so often black or white. The house is either in the right place or it is not. If it is not, there are few cases in which this would not be the result of an error or omission on the part of the surveyor. It would, therefore, seem difficult to tell the client of the problem without admitting the error. So how does the surveyor do it? Unfortunately, there is no easy answer to this question. Each different situation will involve a delicate balance of client relations, professional ethics and preservation of the surveyor's own rights. The most important thing for the surveyor to remember is that the problem should be addressed only with the assistance of his insurer and legal counsel.

### Assess the Situation

The first task will often be one of buying some time. In the example above, the surveyor would have to stop the concrete pour. The owner, of course, is going to want an explanation. The surveyor should explain that he believes the forms could be in the wrong location. He should not say that the forms are in the wrong location, but only that this is a possibility and he needs to do some checking. The surveyor should in no circumstances say that the reason the forms are in the wrong place is because he has made an error in his calculations or field work.

Practically speaking, of course, advice like this will tip off the owner to the fact that the surveyor has made an error. But it does not amount to a legal admission and will not void the surveyor's insurance cover. If the client presses for details, the surveyor should simply say that he is not yet at liberty to

discuss the reason the forms are in the wrong location. Although it would be preferable to leave the question of insurance out of the discussion, the surveyor may tell the client that he must discuss the matter with his insurer before he says anything more. Although this advice may leave the client wondering, most clients will be understanding if the surveyor acts quickly. Clients very often appreciate that the surveyor must consult his insurer; after all, the client in this situation also has an interest in preserving the insurance.

This course of action will provide the surveyor with the time to do the necessary checks and to contact his insurance broker. If an error has been made, the surveyor, his insurer and legal counsel must be involved in any decision to remedy the problem. The insurer or legal counsel may assist the surveyor in making a "without prejudice" offer to correct the problem.

### Without Prejudice Negotiations and Settlement

The term "without prejudice" is often misunderstood. It does not have a complicated legal meaning; it is simply a way of communicating to a party that the suggestion or offer which follows is not an admission of liability or a waiver of rights. This communication should be handled by the surveyor's insurer or legal counsel, or at least in consultation with them.

In the example above, if the surveyor offers to relocate the forms "without prejudice", he does so without admitting it was his error that placed them incorrectly in the first place. If the offer is accepted, construction can continue and the question of the surveyor's liability, and most importantly, any costs for which the surveyor is responsible, can be resolved at a later date. Of course, the client will likely know in these circumstances that the surveyor has made an error, and the case may ultimately have to be settled on the same terms as if an admission had been made, but the project can proceed while these decisions are made and the rights of the surveyor will be preserved.

In some cases, correcting the error will be more difficult than simply moving some form work. Other surveyors and even the other professionals may be involved in designing remedial work. But whatever the remedy, any offers to perform remedial work, as well as any work done, should be on a "without prejudice" basis. In many cases, the client and the surveyor's own legal counsel will require that a full and final settlement be agreed upon before any remedial work is done. There may, therefore, be negotiations involving several "without prejudice" offers between the parties before a final settlement can be reached. All of this should be done in conjunction with the surveyor's insurer and legal counsel.

If these procedures are followed, the error can be addressed as quickly as possible and the surveyor will have the benefit of the insurance for which he has paid with his premiums. Most importantly, he will have prevented a bad day from becoming even worse.



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