

Sorting Out Liability after a Disaster

A Blueprint is Key in Minimizing Exposure

By Julie B. Negovan, Esq. and John F. Mullen, Esq.

Picture this: Heavy steel beams collapse at the work site, injuring more than a dozen. First, focus on getting people to safety and preventing additional injuries. Next, who may be legally responsible for those injuries? "Tort liability" involves such things as contractual relationships, legal and professional duties of those in control, and activities of all involved. More than one party may have contributed to the cause of the collapse. Allocation of liability is the key. This article discusses minimizing allocation of liability to you and maximizing allocation to others when multiple parties contributed to these construction disaster injuries, and notes protective measures to put in place before calamity strikes.

Tort Liability for Designers

Architects and engineers are often involved in all aspects of planning and designing a building, perhaps supervising construction and maintaining safety standards. A person providing such professional services has the legal duty to exercise the degree of skill, care and diligence common to other professional members under similar circumstances. Because architects and engineers possess knowledge, skill and training superior to that of the ordinary person, the law demands their conduct be consistent with this professional standing. A breach of this duty may lead to liability for negligence where it is deemed to be a "proximate cause" of injury.

Designers who are not always on site during construction are vulnerable targets. In fact, injuries to workers employed by other potentially responsible parties often create a greater percentage of liability under Workers' Compensation Acts, which bar claims against employers of harmed individuals. As a result, allocation for liability is pushed elsewhere, often onto designers.

Allocation of Tort Liability

Once it is established that a designer breached a duty by failing to comply with its standard of care, injured parties must establish the breach contributed to the harm.

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Courts employ various tests to determine "proximate cause," which is at the heart of allocating liability among multiple parties. The most commonly used "foreseeability" test says it is not negligence unless a reasonably prudent person in the same position would have predicted the probability of harm resulting from his acts. Courts also rely on the "substantial factor" test, measuring whether the breach played a substantial role in the injury.

Where more than one actor (e.g. structural engineer, general contractor, and possibly other subcontractors) is negligent for an injury, courts apportion liability between negligent parties. At trial, it is the jury's duty to weigh the egregiousness of the breach and assign percentages of liability to each party it determines has breached the standard of care and caused the injury.

In most states, parties allocated a percentage of liability are only responsible to pay that percentage of the total award. For instance, if a jury finds a general contractor and engineer each 50% liable for an award of \$100,000, they will individually be responsible to pay \$50,000. However, in some states, if any one party's percentage of fault is above a minimum threshold (often 60%, but sometimes as low as 1%), the injured person can collect 100% of the amount awarded from that party. The party paying greater than its allocated percentage has the right to seek contribution from the other liable party. That is easier said than done.

A Blueprint for Minimizing Tort Liability

Of course, an engineer can avoid liability by always meeting the applicable standard of care. An engineer, however, may increase the standard by which he is measured, and the risk he faces, by inadvertently contracting for services "in accordance with the highest

standards of the profession," or by promoting himself as a "specialist." Therefore, contract documents should clearly identify the engineer's scope of services and functions to be performed. There should be reasonable and clear protocols in place to ensure timely and adequate performance of the agreed-upon services.

Designers can be particularly vulnerable when contract provisions require inspection of the work. Inspection duties open the door, beyond design issues, for allocation of liability for construction defects onto designers. To the extent feasible, structural engineers should restrict their contractual services/obligations in connection with site inspection. Typically, structural engineers will limit their inspection obligations to simply observing general work progress. Unless qualified, and paid to do so, stay clear of performing exhaustive and continuous inspections during construction.

Another potential pitfall is shop drawing review, often left to your least experienced structural engineer and leading to an increased potential for errors causing injuries. That said, engineers should ensure sufficient time and resources are dedicated to shop drawing review at critical connections. They can limit exposure here by utilizing provisions from AIA and EJDC form contracts, which define division of labor between the architect, engineer, and general contractor. Typically, the structural engineer's responsibility is to review shop drawings for compliance with design intent, not for means, methods and verification of field dimensions.

Whatever the scenario, designers and engineers are vulnerable to allocation of tort liability when their breach is foreseeable and plays a substantial role in injury. But, taking advance steps to limit liability, from clarifying the contract scope of work to limiting inspection and review responsibilities, will improve the outlook of a disastrous situation. ■

