



## *The Site Professional's Value to Legal Defense*

By John L.A. Lyddane, Esq.

When litigation follows structural failure, the value of experienced on-site observers should not be understated. Those on-site professionals who prefer to leave such matters to insurance investigators and hired expert witnesses need to reconsider. Without a solid basis in fact, the legal process has a decreased probability of achieving the justice which is expected.

### The Legal Process

Stripped to its basic components, the legal process involves three stages leading to the allocation of responsibility and assessment of damages based upon underlying facts. The parties begin by exchanging pleadings which, in theory, contain the basis of the contractual and legal claims among the parties. This stage is followed by discovery in which documentary, testimonial, and other evidence are developed and exchanged. The third stage involves the process of mediating or adjudicating the various claims. The quality of justice rendered during this process is dependent upon professionals from diverse callings contributing their best efforts to a process which many of them do not fully understand. Without high-quality factual input on the underlying event, the ability of those professionals to reach a valid resolution of the claims is severely impaired. The better understood the on-site professional's role is, the more likely it is that the process will achieve an evidence-based resolution.

### Immediate Concerns at the Time of the Event

The primary advantage that the on-site engineer or other professional brings to the process is the factual understanding of the circumstances before, during, and after the structural failure. The investigators who will respond will not have the same technical ability to make valid observations even if they have arguably equivalent expertise. After the safety of personnel, equipment, and structures is secured, the on-site professional is presented with an accident scene where information may already have begun the process of deterioration. Those in control of the site may have an obligation to mitigate the further effects



of the failure by protecting the remaining structure, which may effect changes to the site almost immediately.

It is the background and experience of the on-site professional which makes him/her critical to the process of documenting the event for future proceedings. The most professional law enforcement responders will not photograph the scene of structural failure with the same attention to important details which can define the failure. The on-site engineer is also in a better position to assess which subcontractors were involved in the aspects of the work leading to the event, and who among the workers on-site has the requisite understanding and vantage point to assist in the process of determining cause and effect.

Although there are formal processes on the construction site for reporting incidents, there is a valid reason to commence the information gathering process even before the dust has cleared. A recent case involving extensive flooding of a New York City apartment complex was determined without a jury trial based largely on a seconds-long video clip taken by an astute building employee during the process of the water entry. Because the metadata from the employee's mobile phone allowed the court to determine exactly when the flooding occurred, the claims of the plaintiffs could be conclusively disproven without a lengthy trial. The employee who made the video was only trying to show his supervisor what he was dealing with in real time but, in doing so, he created a valuable piece of evidence. The on-site professionals secured the video clip, recognizing that it was an important piece of evidence. It would have been unlikely that their incident reporting process would have identified this defining piece of evidence.

The on-site professional hopefully has the depth of understanding to appreciate who among the witnesses to the event are the persons with the expertise to understand what they have witnessed and can explain it in proper and understandable terms. A first responder may be able to take down names and contact information of the bystanders but, without an appreciation of the work and the skills applied to complete it, the resultant list may not include the witnesses which a court and jury will need to hear from to do justice. How far the on-site professional should proceed in securing the recollection and observations of witnesses is debatable, but establishing and recording their identity is always useful. It is not always the closest observer to the structural failure who has the valuable evidence, and the on-site professional has the best opportunity to better identify witnesses in that category.

Frequently there are critical pieces of evidence which may be secured and labeled at the scene of the failure for subsequent analysis and use. Where the stone facing on a building under construction failed, it was possible to test samples of the fractured facing to demonstrate that the stone supplied to the job site did not satisfy the architect's criteria for strength. The supplier of the stone had produced samples for testing prior to cutting the stone facing, but the samples had come from a separate area of the quarry, and the tested stone met the established criteria.

In a case where the failure of the tubular steel leg of a hospital gurney caused severe injury to a patient who was being transported, the risk manager of the hospital secured the wheel assembly which had broken off the gurney, labeled it, and placed it in the closet in his office. Months later, when the lawsuit had been initiated and reached the point where the attorneys became interested in testing the gurney, that gurney was no longer available. However, the risk manager was able to produce the wheel assembly from his closet and establish a sound chain of custody documentation. The tubular steel portion of the gurney leg was sent to a metallurgist who was able to establish that the failure of the gurney leg was the consequence of a manufacturing defect of which the hospital and its orderly could not have been aware. Without that critical piece of evidence, the hospital would likely have been

held responsible for a serious accident which it had no opportunity to prevent.

Making an accurate judgment as to what is important to preserve immediately after a structural failure is not a simple task. There may be a confusing set of circumstances to begin with, compounded by the relationships among parties that create indemnification and other responsibility which is not apparent to the observer. Years later, when the insurance coverage and the relationship among the parties are clarified, the issues in litigation may be entirely different from what was expected at the time of the event. However, even so, careful attention to the evidence of the cause of structural failure in the period immediately following the event has a value which is impossible to duplicate as days pass following the event.

The on-site professional should also recognize that he could be found to have a legal responsibility to preserve evidence following a structural failure under the legal doctrine known as spoliation. (Spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, or destroying of evidence relevant to a legal proceeding.) Where a party has control of the location of an accident, and the ability to safeguard and preserve important evidence, there can be a legal responsibility to prevent evidence from being lost, or even an obligation to take affirmative steps to preserve evidence. If this obligation is not met, another party to the ensuing litigation may be able to show that it is legally disadvantaged by the loss of that evidence and request that the Court cure that disadvantage. Courts have precluded opposing evidence, determined issues as a matter of law, and given limiting instructions to jurors to deal with spoliation claims. Clearly, the prevention of a spoliation issue is preferable to having to devise a cure.

In an era where high-quality photographs and video are routinely produced from handheld devices possessed by virtually everyone, it may be difficult to explain the absence of good evidence from those who were in a position to obtain it at the time of structural failure. There is a natural reluctance of non-attorneys to become involved in situations which might lead to litigation but, weighed against the possible loss of evidence which may be important to disproving legal claims, the potential inconvenience and discomfort must be seen in context.

## Long-Term Preservation of Evidence

Once physical evidence is secured, records are made, or images are captured, the body of evidence must be appropriately preserved



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to ensure its value to the disposition of subsequent claims. Procedures on site will vary widely, but the central concern is that the evidence is kept in a format which assures that it will continue to be available and identifiable when needed months or years later. Labeling the evidence with the name of the individual who collected it and the date and location where it was collected is a necessity. Further explanatory information may also be useful. If physical evidence is removed from the site of failure, it is useful to have photographs of that evidence as it existed before it was removed.

Preserving the collected evidence is of critical importance, again because of potential spoliation issues. If the evidence were removed from the site and subsequently lost, its import would certainly be magnified by parties who may not have had access to it or responsibility for its preservation. Those who do bear responsibility for the evidence will not only have difficulty explaining how at first it was worthwhile to secure and preserve it as evidence, but also will have difficulty explaining its lost importance when they became unable to produce it for analysis by the other parties to the dispute.

Photographing the collected and labeled evidence is helpful, especially if there are chain

of custody issues or other questions regarding the identity of physical evidence after removal from the site in question. Without labeling and careful records of the chain of custody, one piece of masonry, wire, or metal may be indistinguishable from another. If the evidence cannot be reliably tracked from the failure to the courtroom, it will probably not be admissible evidence at trial.

With regard to photographs, the evidentiary rules are generally less stringent. Once the photographs are dated (and timed if possible), the collection itself is usually adequate to show where the photographs were taken. The field of vision overlaps from one photograph to another, allowing them to be identified as a collection from the same site. If the witnesses at deposition or trial can identify the photographs as "fair and accurate depictions" of the objects portrayed, the photographs will usually be qualified as evidence. The dating of each photograph is critical, however, because it is likely that photographs will be taken by others and some will be taken after the fact. The subsequently-taken photographs may not reflect the conditions at the time of the structural failure and may not be able to pass the "fair and accurate" threshold to become evidence at trial. Dated photographs avoid many of those issues.

## Cooperation with Defense Efforts

Virtually all insurance policies written to cover property damage and personal injury liability contain a "cooperation clause" of some variety. The insurer will pay the damages for covered events, but the insured parties have the obligation to assist the insurance company and the defense attorneys in gathering, protecting, and understanding the evidence which relates to the claims.

Because of the inherent problems in determining the cause of structural failure in a complex environment, insurers require, by contract, that they are given prompt notice of the event of structural failure even before a claim is advanced. The on-site professional needs to develop a sense for which events are likely to result in future claims and work up the chain of command to assure that proper notice is given. This will involve both internal risk management personnel as well as any insurers whose coverage may become involved in compensating for property damage or personal injury. There may be more than one set of insurance interests involved, but that determination will not be made by the site professional.

Once the appropriate notifications are made, investigators, attorneys, and consultants will be retained. Contact should be established with a clearly-defined liaison relationship among the insured, the insurer, and defense counsel. The preserved evidence and identity of witnesses will be an early subject of discussion. The defense of any subsequently presented claims will be greatly facilitated by the prior efforts of the on-site professionals to understand and preserve the evidence, which will hopefully establish the causes of the structural failure.

## Conclusion

Most sites of structural failure are complex in that a number of trades and subcontractors are present and the potential contributors and witnesses may be numerous. The knowledgeable personnel on the site at the time of the event are a valuable resource which needs to be tapped to assure the correct outcome of the resulting claims.■

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