



# Couldn't Care Less: A Malpractice Primer for Structural Engineers

Part 1

By Matthew R. Rechten, P.E., Esq.

Tort – the word is familiar (even in a non-pastry context), as are its menacing children: malpractice and negligence. They trigger visceral reactions in many a structural engineer (and lawyer). The word “tort” creeps in and out of the public consciousness, perhaps most often with its partner du jour: “reform.”

We hope to avoid torts. As structural engineers, however, we cannot ignore them, for tort law sets the standard that our professional engineering services are expected to meet or exceed.

The purpose of this article, the first in a two-part series, is to provide the reader with a basic understanding of the building blocks of tort law generally, before graduating on to explore the fundamentals of malpractice law, for, as the proverb says, “better the devil you know than the devil you don't know.”

## Liability and Claims, Background

*To entitle a plaintiff to maintain an action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff. Cox v. Burbidge (1863).*

*That great principle of the common law... declares that it is your duty so to use and exercise your own rights as not to cause injury to other people. Gray v North-Eastern Rail Co (1883).*

Understanding the basics of tort law presumes an understanding of liability. Liability is legal responsibility. As the Idaho Supreme Court put it in *Feil v. Coeur*, liability is the condition of (in certain circumstances) being bound by law and justice to pay an indebtedness or discharge an obligation. Or, put differently by the California Supreme Court in *Lattin v. Gillette*, liability is the state or condition of a person after he has breached a legal obligation. Although there are all sorts of liability (contractual, equitable, criminal, etc.), at the end of it all, liability, its imposition and avoidance, is what tort law is all about. That

is because the liability of one arises from the claim of another. A claim, also called a “cause of action,” is a set of facts that, if established, invest a person with a right to relief, enforceable in court. In a word, then, a claim is what creates liability.

## Torts, Generally

The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not.... The law of torts abounds in moral phraseology (*The Common Law*, Oliver Wendell Holmes, Jr).

With an understanding of claims and liability, we turn to torts, the very name of which originates from the French word for “wrong.” Simply put, torts are a species of claim, or cause of action, and therefore a species of liability.

What kind of claim are they? According to the Georgia Supreme Court (in *Union Tel Co v Taylor*), torts are claims founded on breaches of **non-contractual** duties that the law imposes on one party with respect to another. “Non-contractual” is a critical qualifier, for the touchstone of contractual is consent. Thus, tort duties are those that the law imposes, in certain circumstances, regardless of consent.

The estimable jurist, Oliver Wendell Holmes, Jr., ably drew the distinction in his magnum opus *The Common Law*:

*The liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are independent of any previous consent of the wrong-doer to bear the loss occasioned by his act. If A fails to pay a certain sum on a certain day, or to deliver a lecture on a certain night, after having made a binding promise [i.e., a contract] to do so, the damages which he has to pay are recovered in accordance with his consent that some or all of the harms which may be caused by his failure shall fall upon him. But when A assaults or slanders his neighbor, or converts his neighbor's property, he does a harm which he has never consented to bear, and if the law makes him pay for it, the reason for doing so must be found in some general*

*view of the conduct which every one may fairly expect and demand from every other, whether that other has agreed to it or not.*

Justice Holmes' final line is the nub of the duties tort law imposes on us all; they arise from society's (typically through the judicial branch) view as to the norms of acceptable conduct.

## Kinds of Torts, and Negligence Generally

Justice Holmes' quote reflects another truth: torts are a broad topic within the law. There is a great variety of them. Indeed, not all torts are “sins” of commission. Torts arise from not only malfeasance, but nonfeasance and misfeasance, too. The law, to illustrate by a simple example, imposes a duty to drive with reasonable care, regardless of consent. A driver may breach that duty by nonfeasance (e.g., neglecting to brake), misfeasance (e.g., making too wide a turn), and malfeasance (e.g., speeding). This example illustrates another important concept in tort law. Although tort law tells us *how* we should drive, it does not require us – as a general matter – to drive. In other words, tort law, with few exceptions, does not require action, but, if we do act, it governs our actions.

In terms of substance, there are as many specific torts as kinds of conduct that society eschews. There are intentional torts, like battery and libel. There are property torts, like trespass and conversion; strict torts, where liability attaches regardless of care or intent. Then there is negligence, a tort that arises from one's failure to act with proper care.

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In this last category lies this article's subject. Even negligence, however, subdivides into a number of categories: ordinary negligence, gross negligence, and negligence per se, to name a few. Gross negligence is a conscious act or omission in reckless disregard of a legal duty and of the consequences to another. Negligence per se is typically negligence that arises from violation of a statute. Finally, ordinary negligence arises from the lack of using "ordinary care." This article and the second installment to follow, concerns professional negligence, commonly known as malpractice.

## Malpractice

What is malpractice then? Black's Law Dictionary defines malpractice as "[a]n instance of negligence or incompetence on the part of a professional." In short, malpractice is professional negligence. It is a kind of tort, a kind of claim. It gives rise to certain liability. As a kind of claim, malpractice consists of a set of facts to be established, elements, if you will. The elements of malpractice are a duty, its breach, resulting damages, and a causal link between the two. We close this article by examining that first element – duty – before turning to the others in Part 2.

## Duty

*"[O]bjective standards [for the level of care owed by professionals] avoid the evil of imposing a different standard of care upon each individual."*  
*Heath v Swift Wings, Inc (1979).*

The practice of structural engineering imposes on its practitioners the duty to exercise the ordinary (customary) skill of the profession. Although each jurisdiction's

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formulation varies somewhat, the Minnesota Supreme Court, in *Richard Dempsey Contracting Co, Inc v Atlas Pile Driving Co*, ably put it: "[o]ne who ... render[s] professional services is under a duty ... to exercise such care, skill, and diligence as men in that profession ordinarily exercise under like circumstances." If he or she does not, he or she has committed malpractice.

This deceptively simple formulation packs several concepts that are central to malpractice law. First, as the Wisconsin Supreme Court held in *Nowatske v Osterloh*, the care required is not the care an "average" member of the profession would exercise; that would suggest that half of the members of the profession could not meet the standard. Instead, the required care is that which members of the profession would ordinarily exercise under like circumstances.

Second, courts measure the required care objectively. They compare the care that structural engineers use against that benchmark, rather than their own personal abilities or habits. And although this objective standard may be hard to measure (more on that below), the care that structural engineers "ordinarily exercise under like circumstances" simply does not vary engineer to engineer.

Third, in describing the care a structural engineer must take, the above-formulation also clarifies the limitations of a structural engineer's obligations. For example, because an engineer need only exercise ordinary care, it is not a warrantor of his or her plans. In other words, an engineer is not liable (at least not in malpractice) for every aspect of his or her design that causes injury – only for those where the engineer failed to exercise proper care. As another, an engineer has no legal obligation to "be the best." He or she need only be ordinary.

Fourth, as a malpractice claim inevitably presents the question of what care is ordinary in the profession, it usually invites the admission of expert testimony. In *Aetna Ins Co v Hellmuth, Obata & Kassabaum, Inc*, for example, a federal appeals court confirmed that where a design professional is engaged in work that is technical in nature, and not a matter of common knowledge, a plaintiff must offer expert evidence on the standard of care to give the jury sufficient evidence on which to make a determination. The exception, of course, is the rare

case where that degree of care is obvious to the layperson. In *MJ Womack, Inc v State House of Representatives*, for example, a Louisiana case, a court held that expert testimony was unnecessary to prove that an engineer's failure to discover and design around non-removable x-bracing in a renovated structure breached the standard of care.

One final observation: the standard of care varies with the specialization of the profession. Multiple courts have held that specialists who hold themselves out as having higher skills are held to a higher standard of care.

Having defined the duty of structural engineers, the question arises: to whom is this duty owed. Put differently: who are the potential plaintiffs? In days gone by, that class was often limited to those who hired the professional. Thus, the 1926 case of *Geare v Sturgis* dismissed a claim against a design professional for injuries suffered from a roof collapse, holding that the design was not liable to third parties, after the owner accepted the project. That restriction has eroded steadily (if not uniformly) over the years. In a 1959 case (*Pastorelli v Associated Engineers, Inc*), the Rhode Island Supreme Court held that a design professional owed his duties not just to his employer, but also to future patrons of the building.

In the second article in this series, we will continue by examining the other elements of, and common defenses to, malpractice claims. ■

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