



PERSPECTIVES

Explaining Standard of Care in Construction Disputes

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SETTING THE STAGE FOR CONSTRUCTION LITIGATION SUPPORT

The scale and complexity of construction projects often lead to a different outcome than expected, creating a dispute between the parties. Many construction disputes boil down to the question of whether a practitioner met the standard expected in that circumstance. The experience and proficiency of expert witnesses in legal proceedings can be game-changing since they can develop impartial, multi-layered arguments, incorporating engineering principles and practical experiences to effectively educate the tribunals. This article delves into the definition and application of “standard of care” in construction litigation, focusing on the roles of construction professionals, e.g., engineers, architects, and contractors, and references a few Canadian case laws.

HOW DISPUTES ARISE IN COMPLEX PROJECTS

Imagine hiring a contractor to transform your kitchen into your dream space, but once the project is completed, the result does not match your vision. Disagreements and challenges often emerge when the expectations of the parties involved in a project aren't fulfilled. Despite modern project control tools such as contracts, detailed drawings, and 3D designs, the scale and complexity of the projects often lead to a different outcome and, eventually, a dispute between the parties involved in a construction project. In many construction disputes, the key issue is whether a practitioner adhered to the expected standards defined in the project specifications, applicable regulations, general scientific principles, and common practices. This necessitates a standard of care assessment.

DEFINING STANDARD OF CARE IN CONSTRUCTION

Standard of care is often defined in the contracts, code

of ethics, or practice guidelines to delineate a framework for the performance of a practitioner. While often defined in a project's contract, the common definition accepted in the construction industry is:

“A practice that an ordinary or prudent practitioner would exercise in the same circumstances.”

This definition, although helpful, is qualitative and subjective since everyone's experiences and expectations differ.

The definition of the standard of care in Canada's construction industry has evolved significantly over the past decades. Past interpretations tended to focus on contractual obligations, and the court's rulings historically emphasized the explicit terms of the contract between parties. The judges tended to limit the scope of professional liability to the contractual obligations, often requiring clear evidence of negligence directly tethered to the professional's actions (*Mabe Canada Inc. v. United Floor Ltd., 2016 ONSC 1060*).

However, recent interpretations of the standard of care have changed. Court rulings now generally define a broader duty of care for professionals, expanding it to include not only contractual obligations but also industry standards and good practices. *In R. v. Greater Sudbury (City), 2023 SCC 28*, the court relied on both written and unwritten policies, reflecting a more comprehensive approach to defining the standard of care in the construction industry. The rationale behind this broader interpretation by the court was to ensure that the construction professionals are held to higher standards and current industry expectations. This aligns with the current agenda of the regulatory bodies, such as engineering boards, which nowadays issue more frequent practice advisories and guidelines and require license holders to update their knowledge through continuing annual education programs.

The other major change in modern rulings is the increased emphasis on expert testimony to establish what constitutes reasonable care in the context of the construction industry (*Stanley v. Grech, 2023 BCCA 348*). This shift underscores the importance of specialized knowledge in the interpretation and application of the standard of care.

KEY ELEMENTS IN ASSESSING STANDARD OF CARE

There are two critical components in the application of the standard of care by an expert witness:

- i. The performance of a practitioner should meet the minimum requirements and not the best industry practice. Hence, the standard of care is not the standard of perfection. For instance, in *Swagar v. Loblaw's Inc.*, 2014 ABQB 42, the Court ruled that an occupier is not required to take every possible precaution to remove every potential hazard. Instead, the duty is to take reasonable steps to ensure the premises are safe.
- ii. In the Standard of Care assessment, the expert should go back in time, review the contemporaneous evidence available to the practitioner, and consider the common knowledge in the industry at the time of practice. For instance, in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206, the court found that the evidence available to the engineers at the time of the design, along with the common knowledge in the industry, was insufficient to foresee the specific issues that arose during construction. The court emphasized that the standard of care is based on the knowledge and common practices available at the time of the work, not with the benefit of hindsight.

FOUNDATIONS FOR DETERMINING STANDARD OF CARE

The contract is the primary tool that defines the standard applicable to a specific project. The project owner can request a specific standard of care tailored for a project. For instance, if such considerations are exchanged in the construction of a museum, an atomic station, or a convention centre with specific architectural features, a higher standard of care may be defined in the contract. In *Terasen Gas Inc. v. Dominion Construction Company Inc.*, 2007 BCSC 537, the Court

enforced a higher standard of care as stipulated in the contract and found that general industry practices were not completely applicable to the matter in dispute, given the technical and safety particulars mandated in the contract. Hence, it is important that the standard of care expert identifies the nature of the contract, project needs, and the specific performance expected as the outcome of the contract when rendering an opinion on a higher standard.

However, in many disputes, the standard of care assessment goes beyond the written contracts and the specific standards thereto. This is because project specifications may be unconstructible or unclear in nature. In such cases, the expert relies on three main non-contractual bases as follows. There are three general bases for the standard of care assessment in engineering and construction disputes, which are explained in the following sections. (Figure 1)

1. Using Engineering Fundamentals in Expert Testimony

Engineering fundamentals are the most robust basis on which an expert can rely to establish facts based on physical principles. For instance, in *Metron Construction Corporation v. Her Majesty the Queen*, 2013 ONCA 541, which involved a tragic scaffolding collapse in Toronto, the court relied heavily on expert testimony that performed detailed structural analyses based on engineering and physics principles. Relying on these fundamentals provided a clear understanding as to why the collapse occurred.

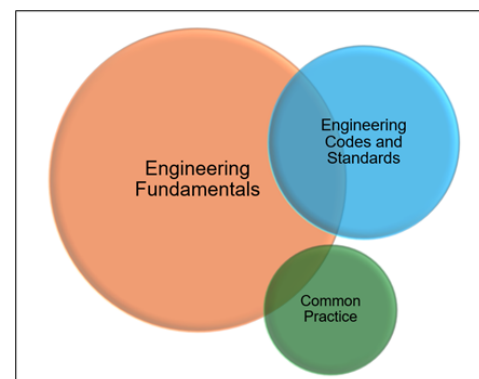


Figure 1 - General bases for the standard of care assessment in Engineering and Construction Disputes

Such analyses often require extensive time and resources; however, if clearly demonstrated in legal proceedings, they are typically not disputable, as physical principles are invariable. It should be noted that there have been prominent cases where causal connections were not properly established in the expert evidence, or the expert testimony was too complex for the court to understand. Therefore, the capability of the expert witness to concisely expand on the facts, establish causal connections, and bridge the gap between technical and legal evidence for a successful outcome is crucial.

2. Interpreting Engineering Codes and Standards in Construction Disputes

The second basis for technical arguments is the codes and standards applicable at the time of practice. Typically, the codes and standards are listed in the project contract, but often, it is up to the practitioners to identify all the relevant codes applicable to their practice. For instance, engineers and contractors should be aware of the requirements of the “design and construction of steel structures” standard (e.g., CSA S16) when designing and erecting steel structures in their jurisdictions, regardless of the contract wording. In addition, sometimes, there is no direct contract between the parties, and the overarching building code would be applicable to the practice. For example, an owner should be aware of the technical requirements prescribed in the applicable building code when undertaking excavations near the adjacent premises.

However, there are myriad reasons why relying solely on codes and standards in legal disputes does not always lead to a persuasive and convincing argument. Sometimes the codes are unclear about a specific subject, experts have different interpretations of the code’s intent, or there are overlapping standards. In some cases, the court even enforces stricter safety measures beyond the applicable building codes, highlighting that the codes are minimum requirements and may be insufficient to address the unique risks of certain projects (e.g., *PCL Constructors Canada Inc. v. City of Ottawa, 2014 ONSC 7480*). Hence, expert witnesses are often required to be innovative in presenting a concise, multi-layered argument based on the applicable standards while explaining the engineering principles behind the code clauses to educate the tribunals on the main context

rather than merely relying on the clauses of the codes and standards in the expert evidence.

3. When Guidelines Fill the Gaps

In some cases, there are no engineering principles or widely accepted standards applicable to a practice. For instance, it is undetermined how soon property owners should clear snow off their driveways or how much salt is required per square foot to avoid ice formation. In such cases, expert witnesses typically rely on bylaws, common practice, or industry guidelines to find a benchmark for their opinions. However, these benchmarks can be disputable since circumstances may vary from one case to another. Therefore, expert witnesses are advised to cautiously rely on guidelines or common practices and attempt to tie their arguments back to the reasonableness of the practice

TAKEAWAYS & HOW ENGINEERS CAN HELP

An expert’s role in standard of care assessment is crucial, particularly in cases where project specifications are unclear. Expert ability to elucidate complex engineering principles, establish causal connections, and bridge technical and legal evidence is vital for a successful outcome in legal proceedings. Given the challenges of the standard of care basis on which experts rely, they must present multi-layered arguments and, of course, impartially incorporate engineering principles and practical experiences to effectively educate the tribunals. In scenarios where no clear standards exist, experts must cautiously rely on common practice and the reasonableness of exercise while ensuring their arguments are persuasive and contextually relevant. Creativity in explaining and expanding on technical nuances can significantly bolster the credibility and impact of expert testimony.

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