**PETER CAILLARD**
**PARTNER**
**HKA**

# The Role of the Technical Expert in Assessing Standard of Care in Construction Disputes

Subject Matter specialists appointed as expert witnesses in dispute hearings are frequently called upon to provide opinion on whether the performance of one of the parties failed to meet the required "standard of care" as defined under the contractual agreements.

This may be a critical step towards identifying fault and determining awards but how do technical experts, most of whom are not legally trained, set about developing such opinion?

HKA's Peter Caillard shares his thoughts.

**Introduction**
Numerous scholarly articles exist on standard of care, but most focus on the legal interpretation of the words and their application in various jurisdictions rather than addressing how to determine whether any particular shortcoming in performance represents a breach.

An appointed technical expert may be provided with a Statement of Claim against a professional person or company listing a series of alleged failings in performance and requested to advise whether, in their expert opinion, these fell short of the standard as defined in the agreements.

Undoubtedly, the expert secured their commission based on their relevant subject knowledge in the matter in dispute. However, no textbook or scholarly article will tell the expert how to assess whether any given mistake is a breach. The expert is on their own and must fall back on their own experiences to form their opinion.

**Qualifications of the Testifying Expert**
Standard of care obligations will vary between different contracts and jurisdictions, but typically use wording similar to the following:

*The Service Provider shall carry out its obligations under this Agreement in conformity with the standard of care, skill and diligence normally provided by a reasonable and competent professional person in the performance of similar services at the time and place the Services are being provided.*

Anyone with reasonable technical knowledge can check a design against a code or standard and demonstrate compliance or otherwise. But determination of a breach of a standard of care requires an understanding that can only emanate from personal experience of similar practice; the "been there and done that" qualification. To pass opinion, assessors must understand the complexity of the work, the conditions under which it was undertaken, and the quality of end-product that might normally be expected. They must evaluate this by considering the level of information available at the time, the contractual context, the caveats expressed, the constraints upon delivery and the reasonable expectations of the recipient. In addition, the assessment must reflect the time and place at which the services were provided – expectations will vary between jurisdictions and over time. All these elements must be framed within the terms of the agreement between the parties and then benchmarked against the assessor's own knowledge and experiences of technical standards and industry practice.

For example, with an alleged design error: Would a competent designer have made such an error? Would a competent checker have identified and corrected it? When signing-off the outputs, did the final approver ensure that design and checking were competently executed, and that the designer and checker were appropriately qualified?

**The Expert's Assessment**

The expert will no doubt diligently undertake their forensic investigation drawing upon their years of knowledge and practice. In so doing perhaps they do indeed find aspects of the design, construction, or procedures that were not fully compliant with the contract. But do all mistakes constitute a breach? How and where does the assessing expert set the bar? Does any mistake of any magnitude which has any consequence represent a breach of that standard?

The answer to these questions is not straightforward. Given that typical standard of care definitions refer to the "reasonably competent practitioner" (or similar phrasing) a shortfall in performance, by itself, is insufficient evidence of a breach. The reasonably competent practitioner, indeed, no practitioner, can consistently deliver error-free services. The bar cannot be set at perfection.

> "Determination of a breach of a standard of care requires an understanding that can only emanate from personal experience of similar practice"

So, the expert must decide what level of mistake falls below the standard of the reasonable practitioner. To do this, through forensic investigation, they must typically ask themselves the following questions:

1. What went wrong?
2. Why it went wrong?
3. Who was responsible for what happened?
4. What were the consequences?
5. Were corrective actions timely and appropriate?
6. What other factors influenced this outcome?

And from this:

7. Could other reasonable and competent practitioners, in the same situation, have made the same error?

The "other factors" may be numerous, and experts will frequently find themselves in a situation where more than one party contributed to a failure.

Furthermore, the consequences of an error must be considered. If, say, the calculations for a bridge structure contain one small error, and the remaining 99.9% of the calculations are correct, yet that one error results in the collapse of the bridge with loss of life, together with huge disruption and financial consequences, it would hardly be reasonable to argue that there was no breach on the basis that the overwhelming proportion of the calculations were correct. A competent designer should have known that one such error could have catastrophic consequences. The appointed checker should have focused on those elements which would likely prove critical, and through their experience identified and focused on the critical over the trivial. And the approver, whose stamp permits issue of the final designs should have ensured that they had competent designers and checkers upon whom they could rely.

A bridge collapse is perhaps a rather extreme case (and hence somewhat clear cut) but frequently an expert's advice is required on the more run-of-the mill issues – and sometimes a large number of them. In such a situation, do multiple small errors accumulate to exceed a threshold whereby the assessor determines the breach on whether this threshold has been exceeded or not?

Such a metric sounds attractive as the more mistakes practitioners make, arguably the worse their performance, and therefore the more likely that they have performed below the standard of a "reasonably competent practitioner". But the difficulty comes when we consider the consequences. If the expert assesses that the standard of care has not been met, liability and costs may flow from the consequences of that failure. So, if the claimant lists, say, fifty issues for which they seek recompense, with how many does the assessor have to agree to conclude that the standard has not been met? All fifty? Ten? Just one?

It might sound fair to deliver an overall judgement – to ask oneself whether, taking the services provision as a whole, the service provider generally delivered a performance consistent with that of a reasonable and competent practitioner. But the practicality is that an overall view is often of little value to a court or arbitration. In many cases a claim comprises multiple issues. If the court is to identify fault and calculate an award, they need evidence on which issues represented a breach and which did not.

**The Expert's Report**

In preparing evidence, it is important that the expert sets out their considered opinion why a particular matter fell short of the required standard and avoids the assumption that, as they are the expert, it is unnecessary to justify how such opinion was reached. The author's report must explain how the opinions expressed were determined – the factors considered, the experience drawn upon, and why it is considered that the failings fell below the standard of the reasonable practitioner. Too many experts' reports set out to demonstrate failures but overlook the "reasonable practitioner" benchmark, leaping to the conclusion that, having proved an error, they've proved a breach. They haven't.

**Conclusions**

Courtroom judges and arbitrators have their own wealth of experience upon which to draw. They have legal opinion from both sides. What they seek from the subject matter expert is advice from the front line - the personal experience of the issues and processes forming the dispute against which comparisons of performance may be made. It is not legal opinion, and it's not compliance with a standard, it is simply the honest judgement of one's peers against reasonable and competent practice.

If you require any further information, please contact Peter Caillard at petercaillard@hka.com.