

PROXEMNITY

RISK EDUCATION



## Loss Control Through Claims Experience

### PARTIES

#### **Plaintiff**

The Hills, Norman and Marie

#### **Cross Claims**

Both defendants against each other

#### **Defendants**

Lucas Bering, *Architect*

Flood Brothers, *General Contractors*

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### CONTEXT

**The Hills had requested that Bering design a house for them that would also be suitable for a relative with a disability. The architect sloped paths to entrances and avoided steps.**

**The house required a septic field, but the site was steeply sloped from the rear down to the road. The architect located the septic field beside house, with landscaping berms around the house and with levels that effectively prevented natural run-off. The house was subject to frequent flooding.**

## PLEAS

**The Hills stated**, “We refuse to pay the balance of the money owed to the contractor, and the holdback, until the problem is solved.”

As against the architect, they stated “We hired an architect to look after the construction of our residence, and we have serious damages that speak for themselves as to liability. Our architect failed in his duty.”

At trial, the owners recounted harrowing experiences of working at midnight in mid-winter, digging trenches to redirect flood water.

**The architect Bering’s defence** was that he had only indicated the “general arrangement.” The contractor was responsible for the placing of the septic field. Levels and dimensions were to be verified by contractor, with discrepancies brought to the attention of the architect, etc. As the architect, he did as much as he was able, giving verbal directions to workers and shooting his own levels.

**The contractor Bert Flood claimed** that he had recommended to the architect that the house be placed a foot higher, but this suggestion had been rejected. This was confirmed in written evidence. He also claimed that the level of the septic field was determined by the local authority, also confirmed by evidence. He further claimed that the architect had interfered with the work and would not listen to reason.

## JUDGEMENT

The judge found that both defendants (the architect and the contractor) were jointly and severally liable. The owner had a right to expect the architect to ensure against major errors. The contractor had a duty to protect the owner against errors that were clearly demonstrable.

## CLAIMS CONTROL ANALYSIS

The architect should not have intervened in the location of the septic system but allowed a specialist to do it. He should also have insisted that a landscape architect or surveyor be engaged to advise on such a difficult site. His reliance on verbal evidence – “I told him to dig a swale in this

or that location” – proved to be worthless.

The judge did not buy into the idea that “review” is a lesser duty than “inspection.” He stated the architect’s duty by quoting from *Hudson’s Tenth Edition*, the construction law bible: “An architect must properly supervise the works and inspect them sufficiently frequently to ensure that the materials and workmanship conform to contractual requirements ...,” etc.

## POST SCRIPT

The contractor proved to be insolvent. The architect/Indemnity Plan paid the full cost of the new site drainage system.

## LESSONS TO BE LEARNED

There should be no half measures when it comes time to review the work in progress. Forget the fine print. If you are on the scene of the error and don’t correct it, it will be yours.

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*Names and places have been changed to protect the innocent, and partially innocent, also the guilty. Situations are slightly modified and fictionalized from Pro-Demnity’s actual claims files and imbued with our real experience in protecting and defending Ontario architectural practices over three decades.*

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