

Take the fifth: Liability for design mistakes Rachel Barnes, September 2009

In an increasingly litigious climate, this may be a good moment to consider whether a professional who realises that they have made a mistake has to own up. If the mistake can be rectified without serious loss to anyone, the question would hardly arise. But if it cannot be rectified, or only at some cost, the situation is not so simple. Whatever a professional person in this situation may want to do, what is their legal duty?

It used to be said that designers were under a continuing duty to review their designs up until practical completion. Thus, they would continue to incur liability for a mistake in their design if they did not put it right and practical completion was taken as being the latest date by which they could have done this. In reality this was a way of extending the commencement of the limitation period for bringing a claim. So if the mistake was made early and practical completion was not until two years later, time would not start to run until the end of that two-year period.

In recent cases, the law has moved away from this position; the approach now is to say that a duty to review the design (from which a duty to address any errors discovered would obviously follow) may be triggered by particular circumstances. Any such duty may be said to be part of a continuing duty, but it is more appropriate to see it as a new duty, giving rise, if breached, to a new cause of action, with its own claimable loss. That loss will not be the loss that the client suffers as a result of the design having to be rectified, but only any additional loss that is incurred as a result of the design not having been reviewed and the error not having been discovered when the duty to review arose. In some cases, where the building incorporating the defective design was more or less complete at that time, there may be little additional loss.

But what sort of circumstances might trigger this duty to review the design? Examples given in a case some years ago, in relation to an architect engaged on RIBA conditions to provide a full service, were, "if, before completion, the inadequacy of the foundations causes the building to show signs of distress, or if the architect reads an article that shows that the materials they have specified are not fit for their purpose, or if they learn from some other source that the design is dangerous".

The judge was assuming that these matters occurred while the architect was engaged on the project. Where the engagement has come to an end, the judge said only that a professional person "may" be under a duty in tort to advise their client of their earlier breach of contract. The examples he gave were serious – where the design is dangerous, not just defective. One can easily think of less serious, but still significant examples of negligence and the position about these is still not clear.

There is also a significant difference between a situation where distress to a building is occurring on site and one where an architect reading a journal in their office realises that they may have done something wrong months earlier. In the former situation, the balloon has gone up and the question of a duty is somewhat academic. Even if the negligent architect does not review their design, someone else probably will. In the latter situation, however, it will be up to the architect whether to disclose the error or not.

In a case in 1996, the judge was asked to decide whether each of the consultants on a project was under a duty to report on deficiencies in the work of the others, and also to report on their own deficiencies. The judge held that the project manager and the architect were under duties to report on others because of the nature of their services. However, he held that none of the consultants (including those with design responsibilities) were under a duty to report on their own.

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A duty to report on one's own deficiencies (unlike a duty to report on someone else's) would have to refer to deficiencies in work already done. It would be pointless to impose a duty on anyone to report on a deficiency that they can still correct without loss to anyone else. And anyone under such a duty would have to be aware of some such deficiency for the duty to be operative.

So is there some principle here similar to the privilege against self-incrimination? The judge said only that the authorities display a reluctance to import a duty of self-accusation except in very clear cases – possibly where there are serious health and safety implications. He considered the case against such a duty to be even stronger where the consultant had no responsibility for design. However, he also thought it clear beyond doubt in this case that no such duty attached to the structural engineer.

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