

Responsibility, liability, and professional indemnity insurance—security v. design quality?

This report of the Council debate on Thursday 26 March 1987 has been prepared by Raylen Flett FR. It is published on being to readers' attention the thought of Council members on these important, topical issues. The President has made proposals to Council on the action to be taken as a result of the debate, a resolution report of which will be placed in the Library in due course.

The Editor welcomes readers' views on the topics debated.

Introduction

The current situation as regards professional engineers' responsibility, professional liability, and the options available for PI insurance, were discussed at a recent meeting of the Institution's Council, also attended by some invited guests. Some new factors, such as the impact of the Latest Damage Act 1986, were also considered.

The discussion was introduced by the President, Professor Hapgood, who summarised the main problems. Peter Blackburn, of Bore Hapgood, and Jim Armstrong (Vice-President), of BOP, identified some problems faced by professional practices and John Ward, of Steele & Company, gave a solicitor's view, based on his firm's long experience of PI claims.

Different alternatives for insurance cover were described. Mr Alan Kington, of Christian & Armour, summarised the principal points of the present system of insurance, held by most firms. Mr Brian Shaw described the options for single project insurance, and Mr Brian Glass, of London Remuneration Owners Mutual Insurance Ltd., told of the experience from other industries of mutual funds, which are becoming more prevalent also in construction.

Professor Donald Bishop, Chairman of the Building & Civil Engineering BOP's Insurance Feasibility Committee, described the findings of his survey and some of the tentative conclusions reached, which give new matter for discussion prior to being put forward formally.

David Cowen, an eminent former lawyer, summarised the discussion, accepting that his views might be coloured by the fact that the lawyers were only just going home.

The meeting generated a very lively discussion, with extremely important issues debated. Some of these are summarised below.

Professional duties and some current problems

The basic yardstick by which competence or negligence may be judged is usually the need to exercise the reasonable skill and care to be expected from a competent engineer. This is also the requirement in the ACEE Preamble of Agreement which are widely used by consulting engineers to define their responsibilities.

The view of the lawyers at the meeting was that, for small firms, engineers must take responsibility, but that they may be too ready to accept added responsibilities from clients through added contract clauses.

The hazards of litigation are considerable and, in the view of most engineers, they are increasing. Design teams involving more companies with a wider choice of methods, materials, and components. Greater size is necessary to keep up with such changes and also to keep abreast of the increasing number of people involved in the process, all of them generating information and papers. All these factors have added to the risk of an error and possible litigation. This extra effort required of designers is in total conflict with the aims of many clients, and particularly public clients, in seeking for low competition and therefore a reduction of design input and even realism for price. If there is a defect, someone is guilty!

Extended responsibilities

Considerable pressure is often exerted on engineers by their clients, or their clients' lawyers, to extend their responsibilities. This provision of special contractual requirements from public and private clients and their lawyers is costly to legal fees and the time required to have them expertly assessed.

Typically, clients increasingly ask for a duty of care to third parties or other third parties. Such contracts can be extremely long, following American trends, and often aim to extend the engineer's responsibilities—for example, by asking for letters of opinion. A standard shorter contract agreed by clients and engineering bodies would be of great benefit to both factors and consultants, even if not to lawyers.

The law of contribution

The law of contribution is an area of special hazard. It means that where there is a shared responsibility for a defect, one perhaps quite a small share, the service is a court case may find that he has to pay for 50% of the claim when other, perhaps more negligent, parties have agreed to trade or are unavailable. Lawyers see little chance of changing this law, as any change would probably be seen by the courts as no longer being even-handed between the client and his professional advisers or contractors. Politically lobbying on this issue may then be a waste of energy.

The Latest Damage Act

The 1986 Latest Damage Act is a new factor. It does not affect contractual claims, limiting itself to negligence and claims in tort. It contains a long-stop whereby such claims cannot be brought after 11 years. The risk may be that the long-stop will be seen as the reason for actions. Greater claims in contribution whereby a party found negligent

can not other parties, claims could actually extend to rather longer periods. Such claims would start after the initial settlement, i.e. 11 years plus 1 year, plus the time taken to reach a finding. It would therefore be necessary for consultants to keep records for perhaps 20 years. This may be thought to go against one intention of the new Act—to avoid stale claims. The Latest Damage Act also specifically includes willful misconduct from the long-stop. In the past, willful misconduct has been claimed by actions for matters clearly not intended to be fraudulent, such as concealment of reinforcement in concrete. The first action since the new Act is due to be judged in the near future, and may give guidance how courts will in future interpret such concealment.

Limiting liability

Most consultations will work as partnerships. Limitation may be limited to less, at least slightly, by forming a limited company. There are, however, problems in this. If clients believe that they run greater risks, they will probably ask for indemnities or performance bonds as they already do from contractors. Partnerships may also offer tax benefits. Each firm must therefore explore its own situation.

There may be opportunities to limit liability through the contract between client and consultant.

For off-site supervision it may be possible for designers to obtain an indemnity from the contractor responsible for the works, but this is of value only while the contractor is operating. The client may also wish to be sure that his chances of redress are not reduced.

It is, however, essential to avoid drawing up a contract which, if not even-handed, would then be treated by the courts as null and void. It may therefore be easier to define responsibilities and prescribe them than actually to exclude them in a contract.

Questions are the duties of designers of calculations and designs were inconclusive, but evidently firms will need to ensure that personal liability by their employees is covered within a firm's insurance policy where individually signed certificates are issued.

Continuing duty to warn

The recent Ashfordwood judgement was seen as a particular new hazard, as it seems to extend the need for consultants to warn a client for old projects about any hazard since discovered. In practice, this could mean a total review of every job ever designed, to cost new research findings or other information indicates them to be at risk.

The case highlighted some difficulties. Does a policy cover death or injury due to negligent design? Is some other policy covering risk to third parties? If not, there is a risk that the Courts, wishing to

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