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**PROTECTION OF REAL ESTATE DEVELOPERS AND USERS
AGAINST ECONOMIC LOSS ARISING FROM DEFECTS IN
CONSTRUCTION**

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Introduction : Scope of the Paper

This paper is concerned with the issue of who bears the ultimate cost of the building failure. This necessitates a clarification of certain terms, in order to ask the fundamental questions: who pays and for what? A terminology has evolved through the work of the International Council for Building Research (Conseil International de Bâtiment: CIB) Commission W87 (Knocke, 1993), 'Failure' of a building may refer to a defect in the building, or to damage resulting from a defect, or both. A defect is "a flaw which is innate to the building"; it involves a disconformity with design, specification, regulation or a contractual requirement as to any of these. It can also include inadequate provision for maintenance/operation. A defect, then, is a discrepancy or divergence from that which should have been provided. 'Damage' is defined in W87's work as "the material manifestation of a defect". This manifestation implies that someone has suffered loss as a result. Although a small minority of failures result in injury or death, the principal issue in all the rest is how the financial loss is to be allocated. The paper considers different models for allocation of loss between developers, the producers of the building and the end users, who may be purchasers or other occupiers. It is based in part upon research for a paper given to the Building Control Commission in Melbourne in April 1999.

THE TRADITIONAL COMMON LAW MODEL

In common countries, traditionally the provision for addressing the question of who pays has fallen chiefly to the legal system and specifically to the courts. The legal rules in question are contractual or tortious. These rules, developed through case law from reported decisions, are either used by the parties to any dispute to settle the question of allocation of economic loss.

While it is neither possible nor desirable in this paper to treat in detail the substantive legal rules of each of the common law jurisdictions, certain observations can be made about this type of model.

The essence of the basis of recovery by the party who has suffered loss lies in attaching 'blame' to one or more of the 'producers' of the building. 'Producers' can include (Knocke, 1993) architects, engineers, contractors, sub-contractors (including suppliers) and even building control authorities. This applies both to contract and tort. So far as professionals are concerned, it will make virtually no difference to the accusation made which route is taken. The breach of a contract for the supply of a professional service will consist of failing to use the reasonable care and skill required: breach of the tortious duty of care comprises failure to use reasonable care and skill.

What has to be proven against contractors will vary, in that actual negligence would have to be shown in tort, whereas breach of a building contract is simply a

question of fact with no moral obloquy attached. Nevertheless, the plaintiff still needs to show a deficiency of performance by the producer in order to succeed.

If the producer resists this fastening of blame, certain consequences follow from the litigation route, and to a large extent from arbitration. These can be considered as features of the common law fault-based model.

Recovery of loss through the rules of the law of tort

Between different jurisdictions, the actual rules relating to recoverability can vary extensively. The rules relating to recoverability of economic loss in tort against producers provide an excellent example. The 1960s and 1970s saw the expansion of the duty of care in tort in Australia against architects : Voli v Inglewood Shire Council (1963) and the U.K. : Gallagher v McDowell (1961) and building authorities Anns v London Borough of Merton (1978). In the mid to late 1980s, the English courts, influenced by the High Court of Australia decision of Shire of Sutherland v Heyman (1985), began to retreat from this position: Governors of the Peabody Donation Fund v Sir Lindsay Parkinson (1985), in the case of contractors D and F Estates v Church of England Commissioners (1988) and local authorities: Murphy v Brentwood District Council (1990). Murphy was followed in Malaysia in Kerajaan Malaysia v Cheah Foong Chiew (1993) in denying recovery in tort against engineers.

However, other major common law jurisdictions would not accept these restrictions on the rights of recovery against producers. A ringing denunciation of them by LaForest J in the Supreme Court of Canada in Winnipeg Condominium Corporation v Bird Construction Co (1995) was followed by the High Court of Australia in Allan Bryan v Judith Anne Maloney (1995) – both cases against contractors - and then by the Singapore Court of Appeal in RSP Architects Planners and Engineers v Ocean Front (1996) and by the Judicial Committee of the Privy Council in the New Zealand case of Invercargill City Council v Hamlin (1996).

This leaves the legal rules on recoverability of loss in post-construction liability cases in a state of divergence.

In the UK, recovery against contractors in tort was dealt with by Lord Bridge in Murphy : “a builder, in the absence of any contractual duty or of a special relationship of proximity owes no duty of care in tort in respect of the quality of his work”.

Similarly, a building authority would not be held to owe a duty of care. “There may be cogent reasons for social policy for imposing liability on the authority. But the shoulders of a public authority are only ‘broad enough to bear the loss’ because they are financed by the public at large. It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as

sufficient for imposing on the public the burden of providing compensation for private financial losses.”

In Australia, the High Court had declined in the Shire of Sutherland case to follow the earlier UK decisions permitting recovery against building control authorities. Yet in Bryan v Maloney the High Court held that “It is difficult to see why, as a matter of principle, policy or common sense, a negligent builder should be liable for ordinary physical injury caused to any person or to other property by reason of the collapse of a building by reason of the inadequacy of the foundations but be not liable to the owner of the building for the cost of remedial work necessary to remedy that inadequacy and to avert such damage.”

Singapore, in following Australia, New Zealand and Canada did so only insofar as concerns the constructors, in this case architects, but also contractors. The position regarding building authorities in Singapore is quite different from those countries because of the provision of the Building Control Act that the Building Authority cannot be subject to any claim regarding the carrying out of its approval and inspection functions. Malaysia has a similar provision, although its courts, unlike Singapore's, followed Murphy, at least insofar as consultants were concerned.

The sharp divergence can be seen in the finding of the Australian High Court: “Their Lordships’ view (in Murphy) in that regard seems to us, however, to have rested upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than is acceptable under the law of this country.” LaForest J in the Canadian Supreme Court had been equally forthright: “The decision by the House of Lords in D and F Estates was the penultimate step in a path of reasoning followed by the Law Lords culminating in Murphy, where they overruled their earlier decision in Anns and re-established a broad bar against recovery for pure economic loss in tort. That is a path this court has chosen not to follow..... the law of Canada has now progressed to the point where it can be said that contractors (as well as sub-contractors, architects and engineers) which take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building”.

Lord Lloyd in Invercargill noted, apparently without irony, that “the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand were different the ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths”.

The reality for both plaintiffs and defendants in the construction sectors of all these jurisdictions is that they have suffered greatly from uncertainty as the common law ‘adapts itself’, and have had to engage in litigation, including appeals, in order to resolve the issue of financial responsibility. There are also

negative implications for cross-border construction activity if risk exposure is significantly different as between apparently similar jurisdictions.

Barriers to recovery of loss: limitation

The legal rules on post-construction liability may actually make it difficult for parties who have suffered loss to recover and uncertain for the producers. Limitation is an obvious example. The UK system contains great complexity.

- The basic limitation period is 6 years in simple contract.
- The period is 12 years when the contract is executed as a deed.
- The basic limitation period is 6 years in tort.
- The commencement of the limitation period is breach of contract in contract, but occurrence of damage in tort.
- The Latent Damage Act 1986 offers an alternative 3 year period for tort claims from when the damage is discoverable through reasonable inspection.
- This is subject to a 15 year long-stop from the last possible act of negligence.
- The Consumer Protection Act which deals with damage caused to consumers by manufactured products gives a 10 year period, deriving from a European Community Directive.

Unsurprisingly, there has been much difficulty with litigation in the UK construction sector on limitation issues, notably for example, in Pirelli v Oscar Faber (1983) and London Borough of Bromley v Rush and Tompkins (1985). In the first, the clients failed in their action against negligent engineers because the damage was only discovered some seven years after it took place, while in the second the court was confronted with the practical difficulties of the English law when it had to choose between four possible stages of concrete deterioration to decide when 'damage' occurred for limitation purposes.

The Royal Australian Institute of Architects (RAIA) considered in its paper 'Professional Liability in the Building Industry' (1988), that there were 6 possible approaches to the limitation period:

1. The limitation period running from the time of damage.
2. The limitation period running from practical completion.
3. The limitation period running from the time of damage with an overall limitation period from time of construction.
4. The limitation period running from discoverability of damage with an overall limitation period from time of construction.

5. The limitation period running from time of damage with a second period running from discoverability of damage with an overall limitation from time of construction.

6. The limitation period running from the time of damage with a second period running from discoverability of damage with an overall limitation from time of negligent act.

Of these, the first was the pre-reform model in Australia and the sixth the post-1986 U.K. model. (Lovegrove, 1991).

The RAI criteria were

- that the limitation period should be certain in commencement
- that it should be long enough for most defects to become apparent
- that it should not be too long so as to be uninsurable or difficult to document.

There are a number of other legal rules which can either prevent or limit recoverability by an injured plaintiff. For example, the decision in Ruxley Electronics v Forsyth (1995) showed how a plaintiff can be caught by the rules on measure of damages. The House of Lords refused to apply reinstatement cost to the case of a swimming pool built to a shallower depth than specified. Nor was diminution in value appropriate. The sum awarded was £2,500 for disappointed expectation.

The burden of proof and the role of the expert witness

Even where the rules are clear, the burden on the plaintiff in a litigation-based model is very great. Paradoxically, the burden on the defendant can also be heavy.

But it is the plaintiff who bears the burden of proof. In a case like Introvigne v Commonwealth of Australia (1980), this would mean the injured party endeavouring (unsuccessfully) to prove that an architect was under an obligation to design school buildings against the possibility of schoolboy abuse.

The consequence of the plaintiff's burden of proof in a litigation-based model is that the role of the expert witness is paramount.

As Butler-Sloss LJ held in Sansom v Metcalf-Hambleton (1998), "a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party), without evidence from those within the same profession as to the standard expected..... unless it is an obvious case, in

the absence of the relevant expert evidence the claim will not be proved". A structural engineer was held not to be competent to give evidence on the professional standards of a building surveyor.

The effects of the role of expert witnesses in determining liability, whether they appear for the plaintiff or the defendant, can often only be described as distasteful.

An editorial in the U.K. Bar's journal (Counsel, 1994) gives a flavour of the problem: "Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their fields. Today they are in practice hired guns: there is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients." Judges frequently deplore this phenomenon; in Cala Homes v Alfred McAlpine Homes (1995) Laddie J described an expert's report as "drafted as a partisan tract with the objective of selling the defendant's case to the court and ignoring virtually everything which could harm that objective." In Arab Bank v John D. Wood (1998) Wright J criticised "the tendency which I detected in all the expert witnesses who gave evidence before me to take upon their own shoulders the mantle of advocacy and themselves to seek to persuade the court to a desired result rather than offer dispassionate and disinterested assistance and advice to the court to enable it to arrive at a fair and balanced view of the conflicting contentions of the parties."

Views of the development industry of the liability/litigation based model

The construction sector generally, find the process of trying to establish fault through the legal system far from satisfactory. Lord Woolf (1996) was scathing about civil litigation generally "it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal : there is a lack of equality between the powerful, the wealthy and the under-resourced litigant. It is too uncertain : the difficulties of forecasting what litigation will cost and how long it will last induces the fear of the unknown ; and it is incomprehensible to many litigants." Similar opinions are reported from the US courts, which are described as being "overcrowded, the cases are more and more complex, and the costs both in monetary and organisational terms have become excessive." (Gaede, 1991). Nor does changing the forum automatically improve the perceptions of the development sector of the process. The UK's Joint Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industries (Latham, 1994) found "general dissatisfaction with arbitration as a method of dispute resolution". In the U.S., a study for the Forum for Construction of the American Bar Association found that "in many cases arbitration does not provide efficient, economical and expert justice." (Stipanowich, 1988).

The deficiencies of fault-based litigation can be summarised as follows:

- Procedure. Difficulties with expert witnesses have already been referred to. Pleading a claim can be very difficult for a claimant not in full possession of all information about a defendant's performance. The Hong Kong case of Wharf Properties Ltd v Eric Cumine Associates (1991) ended with the Privy Council striking out as "hopelessly unparticularised" a global claim by clients against their architects. The clients had failed to relate individual breaches of duty by the architects to specific items of loss suffered. It is true that the Australian case of John Holland Construction v Kvaerner RJ Brown (1996) may have ameliorated claimants' problems in this respect and the UK is inclined to follow this approach: Bernhard's Rugby Landscapes v Stockley Park (1997).
- Delay and cost. UK research (Brooker and Lavers, 1997) revealed extreme levels of dissatisfaction with the liability-based model. Attitudes can be exemplified from the following responses: "Too much money is being siphoned off from the industry in legal fees which are wholly disproportionate to the amount in dispute." - "Any system is better than the existing systems of litigation and arbitration. These systems have been taken over by the lawyers! They control the process and the costs. The participants pay with time, money and time!" (Brooker and Lavers, 1998).

In many respects, the fault-based liability litigation model is as bad a provision for dealing with the allocation of loss as can be found..

From the point of view of the claimant, the prospect is of trying to prove the guilt or fault of the defendant, who may well have the advantages of expertise, professional status and financial strength or insurance. The claimant must establish a duty of care and in the absence of a contractual relationship, this will not extend to liability for repair cost or other economic loss. The claimant must plead the case with sufficient particularity to be allowed to proceed and must rely upon 'playing the expert witness game' to hope to discharge the burden of proof. The claimant must contend with the problems created by legal rules. The limitation rules might mean that the cause of action has been lost without being known, they are such that there is ample room for dispute. The loss must be of the type and amount claimable; this too will often be arguable. Finally, and perhaps most daunting of all, the claimant must, if resisted, be prepared to undergo the ordeals of civil litigation. The claimant must risk time, and often large amounts of money on the hazards of an uncertain outcome, perhaps in an area of the law which is 'subject to adaptation.' There is a real possibility of an adverse decision, based on something wholly outside the plaintiff's control or even expectation. Even if the plaintiff is successful in law, they may not 'win' in any meaningful sense. Delay resulting from congestion of the courts, or the appeal process, or the amount of irrecoverable costs incurred, or especially the inability or failure of the defendant to meet the judgment, may rob them of the benefit of compensation which should in theory be theirs.

Defendants under this model do not, however, regard themselves as privileged. They, too, feel that they suffer from the system. The whole essence of a liability based system is that their fault must be established. In litigation at least this will mean that a high proportion of the resources employed by the claimant in employing advocates and expert witnesses will have the aim of undermining, if not destroying, the reputation and credibility of the defendant. Since litigation is conducted publicly, the effect may be significantly to reduce the defendant's capacity to earn a living. The defendant too has to put at risk significant resources, some of which may be irrecoverable even in the event of 'success'. The limitation rules are sufficiently uncertain that the threat of being sued can continue for a long period or even indefinitely, in the case of the fraud exception.

ATTEMPTS AT REFORM OF TRADITIONAL SYSTEMS

Piecemeal attempts at improvement

Unsurprisingly, attempts have been made to ameliorate these problems. Some examples can be adduced. Some of the attempts made have been to improve the front-end of the development process to reduce defects rather than trying to allocate liability for them. Singapore is a good example of a substantial overhaul of a building control system. Following the collapse of the Hotel New World in 1986 and the findings of the public inquiry into it, the legislature undertook a strengthening process of building control (Lavers and Robinson, 1990). It incorporated elements of the German *Prüfingenieure* concept and of the Hong Kong 'authorised person' and 'registered contractor' requirements (McInnis, 1996) and sought to ensure through the 'accredited checker' and 'qualified person' appointments that designs and construction respectively were thoroughly checked within the design/construction team. In the U.K., the parties may try by private arrangement to provide more effective coverage of the post-construction defect/damage issue. Tenants, purchasers and funders have induced developers to overcome the duty of care/economic loss problem by obtaining from the producers (especially contractors and consultants) collateral warranties as to the quality of their work. The purpose of this device is to create a defined contractual relationship between the person whose building needs repairing and the producer responsible. This device has had mixed fortunes and is widely resented by the producer side of the industry (Lavers and Keeping, 1995). The National House Builders Council scheme which provides ten year cover of certain repair costs on the majority of U.K. residential properties has been generally regarded as successful. In October 1998, a similar scheme was established in South Africa (Housing Consumers Protection Measures Act, 1998). This scheme can be commended so far as it goes, but it is not a panacea. It only covers residential property, and has restricted coverage which has been the subject of litigation itself (*Kijowski v New Capital Properties*, 1987).

The U.K. legislature has recently tried to make possible further improvement. The Contracts (Rights of Third Parties) Act 1999. This will allow parties to a contract e.g. developer and contractor, to agree that a third party e.g. a future purchaser or tenant, can receive a benefit under the contract e.g. a right to damages for breach by the contractor. Already, however, drafting problems have been identified, not least because the Act does not specifically address the question of property development.

Attempts have also been made in several jurisdictions to improve the dispute resolution process. In the U.K., the Arbitration Act 1996 and the Woolf reforms of litigation are meant to reduce, although hardly to eradicate, criticisms of the inherent weaknesses of litigation and arbitration.

In the United States, the American Arbitration Association – the prestigious Triple-A, has made great efforts to reform the arbitration system, producing a three-level approach for different categories of case : the Fast Track Rules, the Large Complex Track Rules and the Regular Track Rules (Stipanowich, 1997). Particular mention may be made of an innovatory mechanism in Norway, the Consumer Disputes Committee, a quasi-judicial body financed by the Government and comprising an eleven-member expert tribunal headed by lawyers. This has been especially successful in handling smaller claims involving consumers, as its name suggests, and its range of expertise from within the development industry gives it genuine credibility with developers and producers alike.

THE AUSTRALIAN REFORMS

Australia undoubtedly presents the best examples of system reform in a common law country, Nothing so radical and so holistic in concept has ever been undertaken in a major jurisdiction as the legislative reforms in the States of Victoria and New South Wales, now being followed to differing extents in other Australian states. At least 5 principal benefits can be identified even from this author's outline knowledge of the legislation, when compared with traditional liability/litigation based systems which the Australian States previously shared with the U.K.

a) Limitation. The ten year duration of liability could be regarded by producers as worse than the Limitation of Actions Act six year period. However, there is much solace in having a definitive start and end to the period of risk exposure of the producer and this certainty may be seen as a fair exchange for the additional four years. From the point of view of consumers, the extension is very welcome; the evidence before the Australian Uniform Building Regulations Co-ordinating Council (Lovegrove, 1991) was that this would increase the percentage of post-construction defects detected from some 80% (within 6 years of error) to some 98% (within 10 years of error).

b) Proportionate liability. The doctrine of joint and several liability is deeply embedded in the common law and it has caused difficulties in U.K. reform (see below). The Victorian and NSW legislatures have cut through the problem by enacting proportionate liability; so that the respective parties to the project only bear a maximum of financial liability based upon their contribution to the work. In the U.K., the objection has been two-fold: that this allocation of percentages is arbitrary or even impossible and that it leaves clients/plaintiffs less protected than before. The answers which can be made to these objections are that courts routinely allocate percentages of responsibility in contributory negligence cases and that the notional reduction of protection can be compensated for through greater certainty of recovery, including insurance protection.

c) Mandatory insurance. One of the most interesting innovations in the Australian reforms has been to require all 'building practitioners' to carry compulsory insurance cover. Mandatory insurance sometimes has negative connotations for practitioners. This author conducted simple attitude studies in Singapore and in Malaysia in 1996 and found resistance to the idea of compulsion. The U.K. Latham reforms (see below) have been partly stalled on this point. The French system's mandatory requirements are considered below.

d) Registration of building practitioners. To make possible the enforcement of mandatory insurance, all practitioners have to be registered. While many countries have long required architects and professional engineers to be registered, extending this to contractors is less common. Contractor registration does exist in some states of the US and also in Singapore, although the Australian States have gone further than the latter, where little use is actually made of the registration system. The idea of contractors being insured against post-construction defects would be novel in most, although not all, systems, (see France below).

e) Dispute resolution. As was emphasised earlier in this paper, this is one of the most heavily criticised aspects of the traditional liability/litigation based systems, by both consumers and producers. The jurisdictions of the Building Appeals Board and the Domestic Building Tribunal respectively represent a serious attempt to take construction disputes out of the court system and locate them where they can be resolved using non-confrontational techniques where possible (there is jurisdiction to use ADR), by tribunals with knowledge of construction (giving confidence to the parties and legitimacy to the decisions) and without excessive delay or cost. (Watts, 1998).

Two caveats would have to be entered by an outside commentator without first-hand knowledge of the reformed Australian systems.

First, the effectiveness of the privatisation of building control cannot be assessed by its apparent improvement in speed of processing applications. Within the parameters of this paper, its success or otherwise will be decided by its ability to

produce a layer of checking of design and construction which will minimise post construction defects. This can only be reviewed over a long period.

Second, and related to the above, the liability positions of the building authorities will need to be considered. If the Building Control Commission is immune, will local authorities and/or building surveyors find an increased burden of claims? Again, the pattern will need to be judged after a longer period of operation, perhaps the first decade.

THE FRENCH INSURANCE-BASED MODELS

The French system has regulated liability in respect of loss arising from defective construction since 1804. The system was reformed by the Loi Spinetta of 1978.

'Producers' are defined by the Civil Code to include architects, contractors, developers and others contracting to provide services to the developer.

Producers under French law are automatically liable and their liability for damage can only be avoided if it arose from a cause beyond their control or unrelated to their work (Knocke, 1993). It does not depend on negligence or fault on their part. The limitation period for the producers is 10 years from the date of handover (la réception).

The 1978 Loi Spinetta imposes mandatory insurance at two levels.

a) The developer (client) must take out insurance of the building (assurance dommage-ouvrage) which covers the cost of repairing damage which affects access roads, drainage, foundations, load-bearing or enclosing elements or integrated items of equipment or which otherwise renders the building unfit for its intended use. The cover is financed by a single premium payable at the outset by the developer and lasts for 10 years. It is transferrable with the building.

The insured has 5 days to notify the insurer from becoming aware of the damage; the insurer then has 90 days to propose payment. Payment to the insured must be made within 30 days of his/her acceptance of the proposal.

b) All the producers must take out liability insurance (including contractors) to cover the ten year period. It is mandatory and non-cancellable, continuing to run even if the insured ceases to exist. A once-for-all premium is calculated, although payment may be in instalments.

The insurers require the use of 'technical inspectors' (contrôleurs techniques), who are experienced, government recognised consultants (but who cannot engage in general consultancy). They are employed by the client to comply with the insurers' requirements, for which a reduced premium may be payable. The insurers also use technical experts to assess the risk in a project to advise the

client and to set the premium. An agency (the Agence Qualité) collects information on claims experience and helps to disseminate it to insurers, to technical institutions and standards bodies.

If a valid claim is made against the dommage-ouvrage insurer, it must be met within the prescribed time limit. The dommage-ouvrage insurer then turns against the liability insurer(s) of the producer(s) responsible. The insurers have technical experts and ultimately an internal specialist tribunal to determine the allocation of percentages of responsibility as between the producers. The liability insurer can recover some of its losses through an excess (which cannot be above an amount fixed by government) and through loading the premiums of the producer responsible.

A sub-group of CIB Commission W87 was asked to prepare an outline of a model post-construction liability and insurance system. The result (Knocke, 1996) bore many similarities to the actual French system. The authors, in reaching this result, utilised key criteria:

“In case of post-construction disputes, owners wish to have easy access to justice: A condition for this is transparency, in this case reducing as much as can be done the grey areas governed solely by case law.”

“Designers, contractors and others with whom the client has a contract... wish that the rules of the game be clear.”

Their conclusion is that their heavily insurance-based system achieves this certainty and fairness.

The French system has attracted interest outside the borders of France. The Belgian system resembles it somewhat anyway. Spain's ongoing reforms are said to have been influenced by it. The Victoria and New South Wales reform packages bear certain similarities although there are major differences. There is only one level of insurance in Australia, funded by the producers. It is still necessary to prove fault by one or more producers to recover. The claimant will still have to be prepared to pursue its claim at least before a tribunal. The Australian reforms have adopted similar limitation provisions, both in commencement point and duration. The concept of contractors as insured producers is similar.

Given the attractions, what would be the attitude of the U.K.? Sir Michael Latham (Latham, 1994) had tasked his Working Groups with producing reform proposals in a whole range of areas. Working Group 10 on Liability law and latent defects insurance has now reported (Construction Industry Board, 1997). It had representatives from all sides of industry including insurers.

Its recommendations can be summarised in the following points:

- “The proposals for legislation should be viewed as an integrated package”
- “The proposal for the abolition of joint and several liability and its replacement by proportionate liability was supported Parties should not be able to contract out of the proposed proportionate liability regime.”
- “There should be a single ten-year limitation period applying to all actions relating to liability for defects, whether founded on breach of contract or in tort.”
- The limitation period should commence on the date on which works were complete.
- “The recommendations..... should apply equally to those who supply goods and materials to the construction industry but do not install them.” (the suppliers dissented).
- “although all the members of WG10 agreed that first party material damage insurance was a better mechanism for dealing with latent defects than the existing system of fault-based restitution, and agreed that priority should be given to the development of an insurance product which the construction industry (and particularly its clients) would find attractive, they disagreed as to whether a statutory requirement was the best way to achieve this aim.”

The internal dissensions within Working Group 10 were such that the liability and insurance provisions were not included in the Housing Grants Construction and Regeneration Act 1996, the UK legal system’s first construction industry specific statute.

In 1997, Anthony Baldry MP and Anthony Speaight QC formed the Forum for Construction Law Reform, a lobby group comprising mainly Working Group 10 members with the aim of driving the package through in statutory form. Money was contributed by both the client and producer sides of the industry and John Cartwright of Oxford University was given the task of drafting legislative proposals which were to be construction industry specific. The government was known to be broadly sympathetic to the implementation of the Latham reforms and the Forum was regarded as having a good chance of success. However, at its April 1999 meeting a disagreement arose over the incorporation of the Contracts (Rights of Third Parties) Act 1999 into the reform package with some representatives wishing to press ahead but others insisting on delay to assess the situation following the introduction of that legislation. The Latham liability package can therefore be regarded as at best stalled, as some cynics predicted. This leaves the 1999 Act as the leading edge in current liability reform.

THE POSSIBILITY OF SYSTEM HARMONISATION

In 1988, and for perhaps the next 5 years, it appeared likely, probable even, that the European Commission would succeed in implementing a European Community (EC) Directive on Liability, either including construction or construction-specific. Claude Mathurin (Mathurin, 1988) studied the systems of 12 member states to report upon the possibilities for harmonisation: “une réflexion sur les souhaits et les possibilités d’harmonisation du cadre dans lequel les différents participants à la construction exercent leur activité.”

At the W87 meeting in Las Palmas in 1991, it was reported (Lloyd-Schut,1991) that “The Commission has started on the drafting of a proposal for a Directive to harmonise rules on post construction liability guarantees and insurance not merely intended to lay down a minimum of protection, but also to harmonise and therefore replace national laws on liability”.

The proposals at that time closely resembled the French model : “a form of two-level insurance with the developer having a blanket first-level insurance to cover the entire project. This policy should preferably be no-fault. Claims would then be made against the blanket policy and the insurers under this may go against the second level insurers by subrogation.”

The Directive was due to be implemented in 1995. It never was. By 1994, the main supporters, France, Spain, Portugal, Italy and Belgium had run into serious opposition from the northern European members, Britain, Germany and Denmark. The proposal tailed off into ‘further studies by pan-European professional groups (GAIPEC) and in theory is simmering still at this stage. It appears that it is one thing to recognise that “common principles can make the market place more uniform” (Odams de Zylva, 1997) but another for nations to abandon deeply entrenched principles. In 1991, the Commission, which really favoured the 10 year period received from Napoleon, was despairingly proposing a 5 year limitation period supported by no-one, because Germany in particular regarded 10 years as quite excessive given their Qualität im Bau (quality in building). The prospects for harmonisation in Australia, while the political dynamics cannot be underestimated, are perhaps more realistic.

COMPARATIVE STUDY OF SYSTEMS

The Commission on Post-Construction Liability and insurance has just published (Lavers, 1999) a 19-country study of examples of post-construction defect cases. It offers some highly revealing insights into both successes and acute difficulties experienced in the countries in question. The shortcomings of the English system have been dwelt on at some length in this paper.

Some views have been offered on the Australian reforms. It might seem that the French model has been given disproportionate support. It is not without

criticisms. The cost of the insurance is regarded as a stumbling block, at least in Britain, and the French insurers are known to have been hard pressed by the growth of a 'claims culture', an expectation deriving from the very efficiency of the system. At least one French insurer suffered financial problems and had to be supported by the French government to avoid a crisis. Supporters of the French model would argue that this is merely a matter of getting the commercial judgments right. The hypothetical scenario posed in the W87 case studies book related to aesthetic damage (unsightly appearance caused by use of sub-standard materials) and this was said to fall outside the liability and thus outside the insurance provisions of the French legislation. Sweden, Australia and Switzerland were the main respondents holding out the prospect of an insurance-backed solution to post-construction defects (although again probably not aesthetic ones). In Norway, since 1997 a German insurer has been offering a kind of defects liability insurance covering a ten-year period. The insurers here would seek recourse against the producer responsible, who might not be insured.

BUILD insurance (Building Users Insurance Against Latent Defects) has been available in the UK for nearly a decade, but has had a low take-up. The product is not seen as sufficiently comprehensive to be attractive, it is perceived as expensive and the recession which afflicted the U.K. in the first half of the 1990s militated against the addition of any non-mandatory costs to the developer.

Latent defects insurance would not be normally carried in Denmark, in Germany, nor in the United States. The architect would be the only party normally insured in a project in Canada (Quebec). Japan has a Registration Organisation of Warranted Houses, which bears some resemblance to the NHBC. China and, perhaps more surprisingly given the stringent nature of the liability regimes, Hong Kong and Singapore, have only the most rudimentary insurance provisions; post-construction liability is most unlikely to be covered.

The three South American countries studied revealed surprisingly low levels of provision. In Uruguay, even professional liability insurance is not well established. In Argentina, insurers have begun tentatively offering cover, but premiums are high, renewal uncertain and cover limited to modest amounts. While Chile has little better provision generally, an interesting recent development has been a developer offering three-year insurance-backed guarantees to its purchasers.

SUMMARY OF CONCLUSIONS

Every developed nation has to have mechanisms for dealing with the consequences of building failure. Developers and other investors will be inhibited if these mechanisms are inadequate or likely to lead to commercially unacceptable outcomes. There is also a public interest in protecting consumers i.e. users of buildings whether owners, tenants or other categories against various forms of harm.

The traditional common law model can be characterised as fault-based and litigation prone. Its deficiencies have been explored in this paper; it is nevertheless in operation throughout most of the English speaking world. Australia has been the first jurisdiction, or rather set of jurisdictions, to attempt wholesale reform through what Kim Lovegrove, in his paper to CIB Commission W87 at its 1997 Plenary Session in Paris described as “a holistic system, a legislative regulatory package that is complemented by expertise, accountability and responsible allocation of risk.”

There are alternatives. The French system, codified and heavily insurance-based, repays careful study. It has had an influence on the Australian reforms and informed the ‘Model System’ advanced by Jens Knocke of CIB W87.

Yet the single greatest conclusion of this research and this paper can best be summarised by reference to the author’s preface to the Model System: “no national system can be regarded as entirely satisfactory. It is true that not all are equally good or bad; some are so downright archaic as to be incapable of modernisation and in these cases demolition and re-building will be the only sensible approach. Nevertheless, none of the countries studied can say categorically ‘we have all the answers’. The requirements of the stakeholders in property are only ever likely to increase. Consequently, we are all still looking to improve, and the comparative study of different systems is a vital part of that process.

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