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Closing the Gap

Kate Henderson

School of Engineering and Advanced Technology

Massey University,

email:k.j.henderson@massey.ac.nz

Phone:+64 9 414 0800 ext 41274

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Abstract

Pre- deregulation, architects were prohibited from advertising. Their scale of fees and the range of services were set by their institute. The client base depended on the architect's reputation. In 1986 the Government introduced the Commerce Act which 'outlawed' set fees for every profession. As a consequence of this Act architects and architectural designers competed between themselves for work on a project cost basis. Competition began to affect the amount of 'additional' services provided by the designer. One means to reduce the costs, was to reduce the amount of contract administration. This included on-site construction supervision. It became unusual for architects to supervise their projects. Many clients thought that the architect's contract administration was being carried out by the Territorial Authority building inspectors.

More recently, with the litigation that has accompanied leaky buildings architects [and others] are being joined in cases, even where they were not undertaking the contract administration. The courts have expressed a view that a professional person should administer the whole of the project, and to not do so is 'negligent'.

The current situation is that architects will become Licensed Building Practitioners and are expected to take liability for the work they do. After the enactment of the 1986 Act schools of architecture reduced the amount of contract administration study, generally offering the courses as options/electives. There now appears to be a gap in the capabilities of many designers to provide the full range of services expected.

Introduction

This paper is in the form of a review. The focus is on the development of regulation for 'safe, sanitary and efficient' buildings in New Zealand. The penultimate focus is on the Licensed Building Practitioner Scheme (LBP). Will this solve the malaise that hangs over the industry?

History

New Zealand has a proud history of being at the vanguard of innovative law when it comes to protecting its built environment and its people. The 'Raupo House Ordinance' 1842 was the first building legislation in New Zealand. It levied £20 on all new buildings using Raupo (*Typha angustifolia)* as a building material, which was regarded as being "non durable", a fire risk and as "such houses endangering valuable property." (Paperpast, n.d.) The next notable building legislation was the Municipal Corporations Act in 1876, which introduced the British system of local authority bylaws, giving Municipal Authorities wide powers to make local building bylaws. (Legislation Knowledge-basket, n.d.)

The first design standards for buildings were introduced following the destructive Napier Earthquake in 1931. In 1935 Standards New Zealand published a model building bylaw. This and other Standards formed a prescriptive Code for many aspects of building design and construction, including a Fire Code, Electrical and Plumbing Regulations. By the 1960's model bylaws had been adopted by most municipal authorities. The Standard NZS 1900 (that persisted through until the Building Act 1991) dealt with many of the issues seen in our modern Building Code.

By the end of the 1970's "building controls were administered under more than 60Acts, by more than 19 national government departments, over 300 municipal authorities" and other local and national associations. (DBH/lbp, 2010) Many of these building controls were at odds with each other, and each municipal authority had its own set of bylaws which often differed greatly from their neighbouring boroughs.

The next major step was when the Labour Government of 1984 -90 decided that government should get out of "business". Deregulation of the building industry can be traced back to July 1984 when the New Zealand Treasury published a document entitled *Economic Management* (New Zealand Treasury, 1984). A self- proclaimed 'comprehensive, independent and professional assessment of the state of the New Zealand economy'. It stands as the seminal statement for New Zealand economic reform, the scope and depth of which has drawn international attention ever since. In this political climate, and owing to the dissatisfaction in the industry arising from difficult compliance practices and the complexity of the Acts and bylaws in 1986 the national government established a Building Industry Commission (BIC). "The BIC's report to the Minister of Internal Affairs of January 1990 ("*Reform of Building Controls", Volumes I and II*) the basis on which the Building Act 1991 was designed and remains the key document in understanding the current regulatory system for the building sector". (DBH n.d.) At the same time Standards New Zealand was moved to onto a user-pays basis where funding now largely comes from selling copies of its standards. The purpose of the Building Act and its Regulations was "to provide a consistent approach to building control across the country, and also enable flexibility in the means of

Code compliance." (DBH/lbp, 2010) This performance-based Building Code was amongst the first of its kind in the world.

Architectural designers can chose to comply with the building code through approved documents including New Zealand Standards, which are prescriptive and are "deemed to comply" with the Code, or an alternative design that is measured by verification against prescribed outcomes. Introducing performance based building regulation in New Zealand has had mixed outcomes. With a National Building Code, there is improved consistency across the country in consenting building work. It has also led to a wider range of designs and materials being used.

Unfortunately, sometimes, poor design choices for the site; inadequate design rigor; dubious material choice; the evidence base used for alternative solutions; the building methods applied and the lack of effective site supervision resulted in buildings not being Code compliant. Other factors identified as contributing to the less than successful outcome of the introduction of performance based building regulation in New Zealand are the lack of specificity of the verification methods for alternative solutions. "The qualitative nature of the requirements leads to heavy reliance on expert interpretation." (DBH/lbp, 2010) This was often obtained through producer statements. Under the Building Act 1991 producer statements were accepted by municipal authorities as verification that work would be or had been carried out in accordance to the Code. The Department of Building and Housing (DBH) records that: "Reliance on producer statements led to alternative solutions not receiving the scrutiny by municipal authorities that was needed to ensure Code compliance" (DBH/lbp, 2010)

A particular series of alternative solutions resulted in widespread failures of timber framed buildings, particularly houses and apartments with face fixed claddings. When such claddings proved not to be weathertight untreated timbers intended to be used in dry situations became wet and rotted. Poor workmanship and cost cutting building practices also contributed to what became known as the 'leaky building crisis.' "There is clear evidence that some of the issues have been caused by lack of coordination between the various parties involved in the design and construction process" (DBH/lbp, 2010)

Litigation has accompanied leaky buildings. The Weathertight Homes Resolution Services Act 2006 was enacted with the adjudication functions of the Act transferred to the Weathertight Homes Tribunal (WTHT), supported by the Ministry of Justice. The blame for the leaky buildings cannot be pinned on any one group in the building sector. There are a wide range of professions listed for respondents named in the adjudications of the WTHT. Many of the cases of leaky buildings currently before the tribunal were designed and built during the decade straddling the year 2000. As at 30 September 2010 the Department of Building and Housing has received 6230 claims lodged for 8267 properties and completed assessments for 8371 properties. (DBH/ws-claims, 2010)

The Building Act 1991 was replaced by the Building Act 2004 as a direct response to the leaky building crisis. Additional controls have been introduced in the new Building Act 2004. These include practitioner licensing, accreditation of consent authorities and warrantee provisions. There is no mention of Producer Statements. The Department of Building and Housing established in November 2004 now replaces the Building Industry Authority (BIA) as the central regulator.

Practitioner licensing

The License Building Practitioner (LBP) scheme is a "licensing scheme to help ensure that people in the building industry are competent and accountable, so that homes and buildings are designed and built right the first time." (DBH/lbp, 2010) "The LBP scheme aims to improve building quality and consumer protection by setting national standards of competence for people carrying out certain design and building work, providing a register of LBP's and ensuring design and building practitioners are

accountable for their work." (DBH/lbp, 2010) The licensed building practitioner scheme will ensure that virtually everyone on a building site will soon have a recognised level of competence.

Licensing began on 1 November 2007. Licenses are currently available in 7 classes for trades' people from site supervision to designers. (See Table 1 and Table 2) Licensing was introduced "to lift practitioner performance and make practitioners more accountable for their work." (DBH/lbp, 2010) Whilst the LBP Scheme is currently operating as a voluntary 'quality mark', the Government has decided that from 1 March 2012 some building practitioners will need to be licensed to undertake restricted building work. (Restricted building work will be set out in future regulations). It will cover work that is critical to the integrity of a building, for example, its envelope and structure. Unlicensed building practitioners will from this date, have to engage a LBP to either carry out or supervise restricted work.

<table>
<tr><th colspan="3">Licensed Building Practitioner: Design license classes</th></tr>
<tr><td colspan="3">An architectural designer can apply to be licensed in Design.
There are three areas of practice for the Design license but the designer only needs to be assessed in one.
The designer needs sound knowledge of, and practical experience in designing the building categories that relate to the area of practice.

LBPs may then only undertake work they are competent to do, and recognise when other skills are required.

Registered Architects and Chartered Professional Engineers are treated as if they have a Design licence in area of Practice 3 because of their existing registration. They cannot be licensed in Design.</td></tr>
<tr><td>DESIGN</td><td>Area of responsibility
(see Table 3 for Building Categories)</td><td>Competency</td></tr>
<tr><td>Area of Practice 1</td><td>Design of Category 1 buildings,</td><td>• Understand and apply knowledge of the regulatory environment of the building construction industry;
• Manage the building design process;
• Establish design briefs and scope of work and prepare the preliminary design;
• Develop, design and produce construction drawings and documentation.</td></tr>
<tr><td>Area of Practice 2</td><td>Design Category 2 buildings,</td><td>• Understand and apply knowledge of the regulatory environment of the building construction industry;
• Manage the building design process;
• Establish design briefs and scope of work and prepare the preliminary design;
• Develop, design and produce construction drawings and documentation.</td></tr>
<tr><td>Area of Practice 3</td><td>Design Category 3 buildings.
An LBP with a Design licence in area of practice 3 may also design Category 1 and 2 buildings – It is not necessary to apply to be assessed in all areas of practice.</td><td>• Understand and apply knowledge of the regulatory environment of the building construction industry;
• Manage the building design process;
• Establish design briefs and scope of work and prepare the preliminary design;
• Develop, design and produce construction drawings and documentation;
• Apply design standards, identify and produce design solutions.</td></tr>
</table>

Table 1 Licensed Building Practitioner: Design License Classes

Source: Collated from www.dbh/govt.nz/lbp-license-class**.govt.nz**

Licensed Building Practitioner: site license classes		
A competent builder, site supervisor or construction manager, responsible for coordinating, overseeing or managing building work, can apply for a **Site License**. There are three areas of practice. Chartered Professional Engineers are treated as if they are licensed in **Site** are of practice 3 and **Design** area of practice 3 because of their existing registration. They do not need to be licensed in these classes.		
SITE	**Area of responsibility** (see Table 3 for Building Categories)	**Competency**
Area of Practice 1	Coordination and overseeing the construction or alteration of Category 1 buildings,	• Understand and apply knowledge of the regulatory environment of the building construction industry; • Apply technical knowledge of construction methods and practice; • Organise and manage building projects; • Manage personnel; • Provide technical supervision .
Area of Practice 2	Coordinating and overseeing the construction or alteration of Category 1, 2 and 3 buildings.	• Understand and apply knowledge of the regulatory environment of the building construction industry; • Apply technical knowledge of construction methods and practice; • Organise and manage building projects; • Manage personnel; • Provide technical supervision.
Area of Practice 3	Management for some or all of the construction or alteration of Category 1, 2 and 3 buildings.	• Understand and apply knowledge of the regulatory environment of the building construction industry; • Apply technical knowledge of construction methods and practice; • Manage personnel; • Provide technical supervision.
Other LBP classes: Bricklaying and Blocklaying; Carpentry; External Plastering; Foundations; Roofing		

Table 2 Licensed Building Practitioner: site license classes

Source: Collated from www.dbh/govt.nz/lbp-license-class**.govt.nz**

Of particular note is: Registered Architects and Chartered Professional Engineers cannot be licensed in Design or Site. Registered Architects are treated as if they have a Design licence in area of Practice 3 because of their existing professional registration. There is, however, 'a duty of care' incumbent on both these architects and engineers to engage only in the level of work that they are competent (according to the Design 3 and Site 3 rules). The automatic qualification will allow them to design buildings that are high-risk, historic or of high community importance. IPENZ believes that "there must be a strong obligation for LBPs to work within their individual competencies, whether or not they are licensed for a particular class of work." (Smart 2009) IPENZ makes this an ethical obligation on members who are technicians, technologists, or professional engineers.

Category of buildings		
Category 1	Buildings are single Household dwellings with low or medium risk envelope design	• Specifically; • SH and • Risk score of 12 or less for any external elevation.
Category 2	Buildings are single household dwellings with high-risk envelope design, or other buildings with a building height of 10 m or less.	• Specifically; • SH, and • Risk score greater than 12 for any external elevation • or • Not SH, and • Building height less than 10 m.
Category 3	Buildings are10 m or greater in building height, except single household dwellings	• Specifically • Not SH use, and • Building height 10 m or greater.

Table 3 Licensed Building Practitioner: building category classes

Source: Collated from www.dbh/govt.nz/lbp-license-class**.govt.nz**

Source: www.dbh/govt.nz/lbp-license.govt.nz

The primary role of a Design LBP is to develop building designs and produce construction drawings and documentation. A design LBP may have other roles in the design and building process including: Contract observation and administration; liaising with technical experts and consultants on particular design issues; liaising with councils on building consent and resource management issues.

The primary role of a Site LBP is to coordinate and oversee the construction process. In a small business, the Site LBP may be the business owner or builder. In a larger company the Site LBP might be an employee, acting as a supervisor or construction manager.

Registered Architects (treated as Licensed Design) and Chartered Professional Engineers (treated as Licensed in Design and Site) will remain accountable to their professional bodies, whilst all other Design LBPs and Site LBPs are accountable to the Building Practitioners Board. There is an ongoing requirement for continued professional development (CPD) for all classes. The online register of all licensed building practitioners is setup to help potential employers, and customers find suitably licensed building industry professionals. Property owners can complain to the Building Practitioners Board if they feel that their work is substandard.

Trevor Sims, a construction manager at Canam Construction believes that the outcome of the new regime "will force builders to hire quality workers after a period in the 1990s when apprenticeships virtually disappeared and skill levels dropped" (NZ Herald, 2009). For the public, it is the most visible sign that the government is doing its utmost to prevent another leaky building fiasco - or did it have no choice? The Institution of Professional Engineers (IPENZ) appointed a task force to review the situation, and in 2003 the IPENZ chief executive Andrew Cleland reported that there was a "systemic failure of the Building Act" because developers were not willing to pay for either site supervision or more than "the absolute minimum required to achieve a Building Consent." (Cleland, 2003)

Litigation

This section reviews some actions (and outcomes) in Court brought against professionals with respect to the administration of building contracts in the building and construction industry as a result of leaky buildings, with a view to evaluating the utility of the new LBP scheme.

"There is anecdotal evidence to suggest that the engagement of professional persons to independently administer building contracts is decreasing and that architects, engineers may be willingly, although perhaps unwittingly, relinquishing supervision of contracts because of the limitless liability that can be extended to any act of negligence on their part" (Gatley 2002)

Nevertheless, the extent to which professionals in the construction industry in New Zealand are being exposed to claims for negligence appears to be increasing in the Courts, exposing those that have not exercised 'the duty of care' expected of them. The catch phrase, and at the heart of many of the cases brought before the Weathertight Homes Tribunal (WTHT) is "a duty of care." Should an architect, engineer, territorial authority, property developer, builder or roofer by virtue of their involvement in a construction project not carry out their role with an expected 'duty of care' they are being named as respondents.

Negligence

The "cause of action in negligence arises not when the work is done, but when damage occurs or is 'reasonable discoverable' – These two dates can be decades apart". (Rudd Watts & Stone, 2001). In *Thurton v. Kerslake and Partners* (2000) 3 NZL 406 the Court of Appeal judgement states that "Negligence is not simply being wrong. It is failing to use the skill and care to be expected from a reasonable engineer" (Cashin, 2001) "It has been held that in considering an allegation of negligence made against an architect it should be borne in mind that the builder is on site continuously, whereas and architect is not, none the less it may be negligent for the architect to fail to be on site during some important phase of the work" (*Florida Hotels Pty Ltd v Mayo*) 113CLR 588. The architect may depute some parts of his (or her) duty but this does not thereby avoid his own responsibility, by saying negligence was theirs. (*Armstrong v Jones* in Gatley, 2002)

Partial services

There is current discussion in the building industry arena as to whether an architect, engineer or designer can undertake partial services, and by doing so contract out of being liable for ensuing negligence claims. The New Zealand Institute of Architects (NZIA) support this notion. However, the Courts apparently advocate, as in the case of *Rowlands v Collow* [1992 1 NZLR 178] that they do have to provide a comprehensive service. The *Rowlands v Collow* case exemplifies that the architect (or designer) always carries the responsibilities normally attributed to him (or her) and seemingly cannot indemnify themselves against claims of negligence even if the negligent act has been committed by others such as the project manager.

Courts have tended to discount exclusion clauses in contracts where a party may wish to add a waiver that would enable them to deny claim for negligence and there is a proposition that a party cannot 'contract out' of negligence. Kennedy-Grant (1999) believes that "liability may be excluded or limited by a clause in the contract".

The preparation of consent drawings

In contrast, the liability does not extending further when an architectural designer is contracted only to prepare consent drawings. There are examples re negligence in preparation of plans of a successful defence where the WTHT dismissed the claim against a designer (the fifteenth Respondent) who was solely contracted to prepare plans in order to obtain a building consent The Tribunal found that the

designer did not breach a duty of care to third parties by failing to provide adequate and appropriate detailing The approach to be adopted when considering whether a designer has breached his duty of care by failing to provide insufficient detail was set out in *Body Corporate 188529 v North Shore City Council* where Heath J held that if the building could be built by a reasonable builder who would have access to the manufacturers' specifications no greater detail would be required to achieve a workmanlike result.

Duty of care

As with negligence it appears that there is also a non-delegable 'duty of care' The rationale for the imposition of a non-delegable duty of care, is made clear in the following extract from Stephen Todd (ed) *The Law of Torts in New Zealand:3*

> "A person who participates in the construction of a large and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care" (Todd, 2001)

It is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.

The liability of a developer

The developer of a residential property owes a non- delegable duty of care to an intended homeowner to ensure the construction of a structurally sound house. In *Leuschke Group* [2007], Harrison J held that "a director of a corporate entity might assume a personal responsibility to third parties irrespective of whether he or she was acting as a director or pursuant to any other form of agency." Also, many of the relevant cases emphasise the fact and degree of control as critical factors in determining personal liability, not the fact that a person is a director of the company. See *Huang v Leung* [2010] NZWHT Auckland 16

In addition, personal involvement does not necessarily have to mean that physical work needs to have been undertaken by the director — that is just one potential manifestation of actual control over the building process. Personal involvement and the degree of control may also include the administering the construction of the building Therefore, the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the director has taken actual control over the process or any particular part. Direct personal involvement may lead to the existence of a duty of care and hence liability, should that duty of care be breached [2010 NZWHT Wellington 24]. Another example of the extended liability of the developer is *Cao v Tony Tay and Associates Ltd (in liq)* (2010) where Tay was named on the Building Consent application as being the contact person with Tay's status being stated as "design and build".

In the *Bruce Morris Trustees* [2010 NZWHT Wellington 24] the second claim was against the architect who undertook to design of two town houses. It was contended that because the architect made frequent visits to the construction site this was tantamount to supervision. WTHT found "that there were issues in the window design, changes in design were made and supervision should have included checking that the building was built as designed and that the contractors were being paid for work which was in conformity with the design. To say that the architect relied on contractors as experts is not enough." (NZWHT Wellington 24, 2010)

Training

"The education of architects prepares them to assist clients at all stages of a building project and to coordinate all the elements of the design and construction process." (RIBA 1991). Research undertaken by David Gatley in 2002 suggested that the involvement of New Zealand architects in independent administration of building contracts is declining, and thus "the training of architectural graduates (and designers) for administration of building contracts is at risk" (Gatley: 2002). "Training to become qualified was criticised as being limited by the experience and attitudes of senior architects resulting in 'gaping holes' compared to working needs". (Gatley, 2002) It is recommended that "students should be at least introduced to accountancy, contracts and job practice and management, when at Schools of Architecture". (Finnegan, R.E., De La Mare, R.F., & Wearne, S.H. 1992).

The education process for architectural designers should provide graduates a level of competence in all aspects of the architectural process. It seems that the majority of teaching within the schools of architecture is amplifying 'composition of the visual elements' of design and other areas of the architectural process may be considered secondary. Any form of management teaching which may be present is relegated to the position of an add-on to the final year of the course when the final design project is viewed by teachers and students as the primary area of interest. The teaching of architectural practice and management in schools revolves primarily around the building contract and its application legislation affecting the design process.

A view expressed by engineering lecturers in the New Zealand Herald is that there is "pressure on lecturers to publish in international journals rather than research and teach about New Zealand conditions" (New Zealand Herald 2009) and that "engineering students are graduating without enough practical training or knowledge of how to design for New Zealand conditions". In addition, "a lot of senior of senior staff have left in the past few years who had a lot of design experience and are not being replaced" (New Zealand Herald: 2009) IPENZ has also expressed concerns about the performance – based research funding scheme (Cleland 2008)

Discussion

There is a surprising degree of consensus that what has gone wrong is bound up in a general shift over the past 25 years from regulation to market forces. (New Zealand Herald 2009) It appears to be a myth that the building industry was deregulated in 1991 – The new bureaucracy is of a similar size! The introduction on the Building Act 1991 certainly made the job of the designer easier, and encouraged the innovative use of material. It is unfathomable, though, why New Zealand did not pay heed to the 'leaky building problem' in Vancouver, Canada. Timely literature was available, and the materials and fixing methods that lead to their problem were similar.

So will the Building Act 2004 plug the Gap? With the demise of producer statements it is hoped that the Territorial Authorities (TA) will be more rigorous in consent checking. The Building Act 2004 also reinforces the TA's requirements for building control in particular building consents will only be issued on the design and detail in the drawings. (The WTHT heard that in addition to relying on Producer statements, an individual TA would also rely on a subjective evaluation of the experience of the designer or architectural firm – in the mistaken knowledge that any deficiencies in the details would be overseen by the architect.) Lastly, the introduction of the LBP scheme has features that will lift the level of competency in all areas of building. Time will tell if the need for economic efficiency still favours 'corner cutting'.

Comments made by Registered Architects during the pilot study undertaken by the author in June 2010 prior to this research indicated that some were only vaguely aware of the LBP scheme, and many thought that it did not involve them. When acquainted the fact that Registered Architects would automatically be regarded as both Design 3 and Site 3 they unanimously felt that they or their design

practice had the expertise, and that they were competent at this level. The majority of the architects interviewed studied and graduated after 1991. Many stated that they had not taken specific ‘Contract Administration’ papers at tertiary level. Despite this gap in their formal education they still felt that they had adequate ‘legal’ knowledge. The finding by the WTHT tends to suggest otherwise.

Despite changing attitudes of the Courts to liability in the tort of negligence for breach of duty of care, a distinction still remains in New Zealand against persons sued in a professional capacity – such as architects or engineers. The law in New Zealand has changed since the Court of Appeal decision in 1973 (*Fletcher Development and Construction Co Ltd v McLaren Maycroft*) [NZLR 101] *“*where liability for tort was denied between parties involving professional services. The New Zealand current position is that a professional person can be liable concurrently in contract and tort to the client and may also be liable in tort to third parties to whom a duty of care also exists.”(Gatley 2002)

My recommendation is that in-depth analyses is carried out on the findings of the WTHT and other Courts as to the responsibilities of Architects, Engineers and designers, and evaluate these findings against the graduate profile of the teaching institutions for these professionals and technicians with a view to establishing ‘best preparedness’ in their education. When all professionals carry out their ‘duty of care’ with diligence, then this is the time the ‘leaky building crisis’ gap may close.

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