

How is design liability changing under NEC4, JCT and FIDIC 2017?

Why is it such a concern and why does it matter?

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Talk Summary

- The basics

- NEC4 – June 2017

- What are the key changes from NEC3?

- JCT 2016

- What are the key changes from JCT 2011?

- FIDIC 2017

- What are the key changes from FIDIC 1999?

- Why does it matter?

What is design liability?

- It is liability arising out of errors or omissions in the provision of professional design services.
- It determines the standard of care that must be applied by the designer.
- Different projects and forms of contract allocate design liability differently:
 - this could be the contractor under a D&B contract; or
 - may relate to an architect, engineer, or surveyor under a professional services contract.

Design Liability: Statute

- Section 13 of the *Sales of Goods and Services Act (1982)* - a designer must carry out the design services with 'reasonable care and skill'.
 - Service and process based standard – consultants.

- The *Sale of Goods Act 1979* implies a term that design and construction will be 'fit for its purpose'. Imposes a higher duty than 'reasonable care and skill'.
 - Product and performance based – contractors.



Design Liability: Common Law

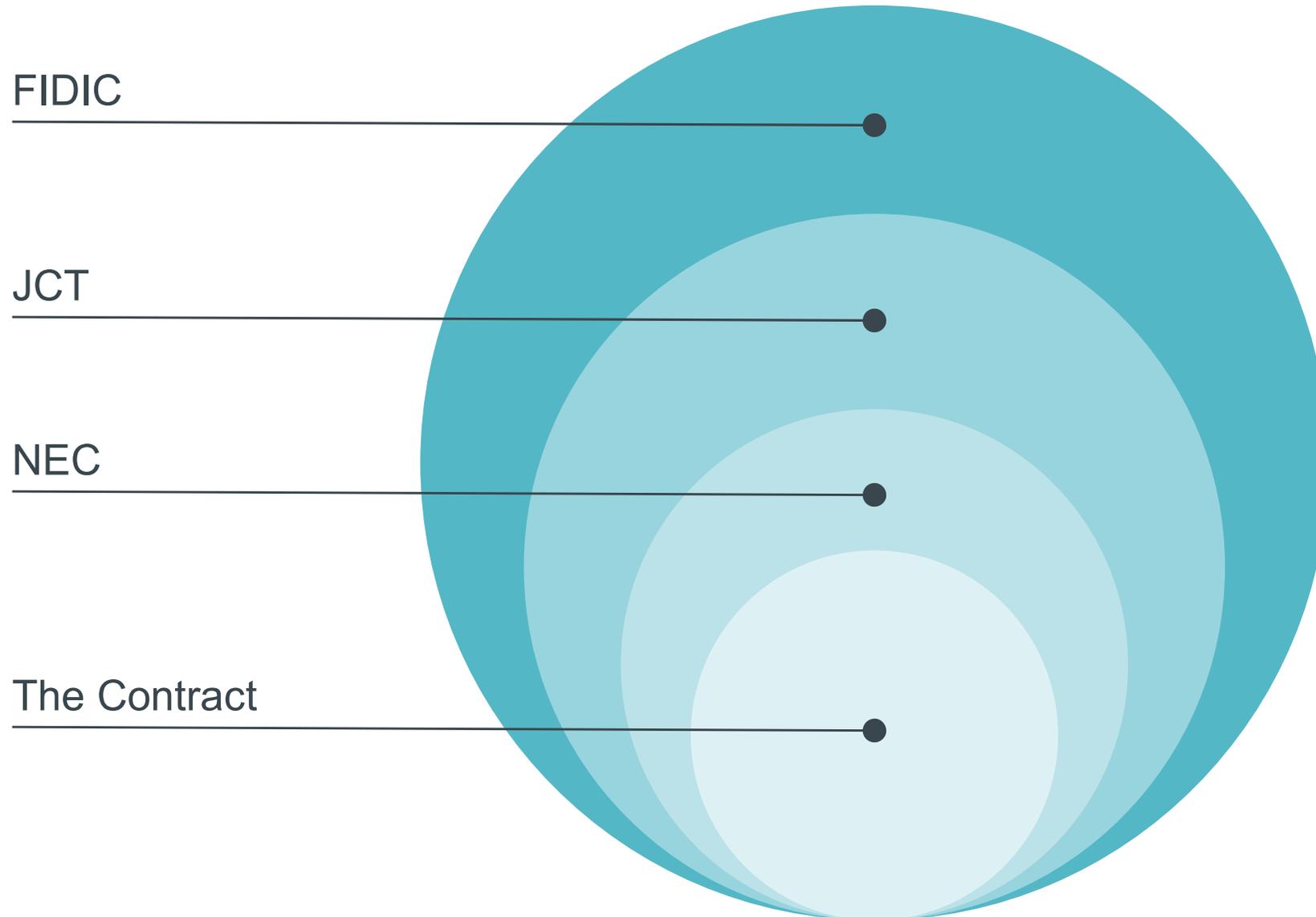
Test for negligence

- *Bolam v Friern Hospital Management Committee [1957] 2 All ER 118* established appropriate test for a professional's duty of care - applies to designers.
- Professional person is not guilty of negligence if he acted in accordance with a practice of a responsible body of professionals, even if there is a body which would take the contrary view.

Exceptions to the Bolam rule

- No logical basis for the body of opinion – *Bolitho v City & Hackney HA*.
- Cases in which in reality merely the personal opinion of the defendant's expert witness.
- Cases which in reality require no expertise

Design Liability



NEC

The Contractor: position under NEC3 Engineering and Construction Contract

- Secondary Option Clause X15 '*Limitation of the liability for the Contractor's liability for his design*' limited the Contractor's design liability to reasonable skill and care.

X15.1

“The Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information”

NEC

The Contractor: position under NEC4 Engineering and Construction Contract

- The structure of NEC4 is very similar to NEC3 with core clauses and optional clauses.
- Secondary Option Clause X15 has been substantially re-written under NEC4 and applies to the ECC, ECS and the new DBO design contracts.

Contractor's Design

■ NEC3:

“The Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information.”

! So reverse burden of proof

■ NEC4:

“The Contractor is not liable for a Defect which arose from its design unless it failed to carry out that design using the skill and care normally used by professionals designing works similar to the works.”



NEC

Contractual Interpretation in Scottish case: *SSE v HOCHTIEF (2018) Inner House of Court of Session*

- A £200 million dispute relating to hydro electric plant tunnel collapse.
- Dealt with the contractual interpretation of Option M in NEC2 - the equivalent of X15 in NEC3.
- The NEC2/3 reverse burden of proof for “reasonable skill and care” meant the employer could sit back and force the contractor to prove every aspect of design and construction of tunnel to show it was not liable for the collapse.
- Found the contractor: had discharged burden of proof; was not negligent; and did exercise reasonable skill and care in relation to design. However was still liable for the failure of implementation.
- Permission to appeal to UK Supreme Court has been granted.
- Would this occur with the new NEC4 X15 wording?

Summary: how has design liability changed under NEC4?

What has changed?

- ❑ The contractor's design liability is aligned with the standard expected from design professionals.
- ❑ Contractor's liability is no longer just linked to reasonable skill and care.
- ❑ The onus is on the employer to prove that the contractor did not exercise this standard.
- ❑ Also includes additional provisions relating to licensing, retention of design documents and the requirement to take out professional indemnity insurance.

What remains the same?

- Design liability remains absent from the core clauses but is instead provided for in the secondary options.
- Contractor still needs to check whether the obligations in the Scope impose a 'fitness for purpose obligation' on any elements of design carried out by the contractor regardless of whether or not X15 is used.
- Use of bespoke Z clause amendments are likely to continue.

JCT

The Contractor: position under JCT 2011 Design and Build Contract

- The standard of design liability was expressly stated at Clause 2.17.1.

Clause 2.17.1

“The Contractor shall in respect of any inadequacy in such design have the same liability to the Employer... as would an architect or, other appropriate professional designer... who... has supplied such design for or in connection with works to be carried out and completed by a building contractor who is not the supplier of the design”

JCT

The Contractor: position under JCT 2016 Design and Build Contract

- Design responsibility remains largely the same in the 2016 version. The contractor is not responsible for verifying the adequacy of any design contained in the Employers Requirements.
- The wording of Clause 2.17.1 was only altered to make it read more clearly, no substantive changes were made. Therefore the standard of design liability remains the same.
- As before, the design liability continues to be capped if agreed by the parties.
- The JCT Major Project Construction Contract guide, as before provides a “fitness for purpose” alternative clause to be used where suitable (e.g. PFI).
- JCT D&B 2016 now considers that there are circumstances where the employers consultants could be jointly liable with the contractor for design defects and net contribution clauses are now included in the Third Party Rights Schedule and standard form collateral warranties.

Summary: how has design liability changed under JCT?

- The position largely remains the same as before.
- Contractor's design liability is still linked to reasonable skill and care.
- Net contributions clauses are now included in the Third Party Rights Schedule and standard form collateral warranties as the employer's consultants can also be held jointly liable with the contractor for design defects.

FIDIC

The Contractor: position under FIDIC 1999

- The FIDIC suite of contracts are more typically used internationally.
 - Red Book – Conditions of Contract for Construction.
 - Yellow Book – Conditions of Contract for Construction for Plant & Design-Build.
 - Silver Book – Conditions of Contract for EPC/ Turnkey Projects.
- Unlike NEC, FIDIC includes a design requirement in its core clauses.
- Also unlike NEC, the 1999 Yellow Book imposed “fitness for purpose” - essentially requires a contractor to guarantee that the design will meet the employer’s requirements.
- Sub-Clause 4.1 of the Yellow Book 1999 read:

“When completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Contract.”

FIDIC

The Contractor: position under FIDIC 2017

- Contractual risk allocation has not been fundamentally altered but the new 2017 Yellow Book but has included a number of new clauses relating to design.
- Amended Sub-Clause 4.1 now reads:

“When completed, the Works (or Section or Part or major item of Plant, if any) shall be fit for the purpose(s) for which they are intended, as defined and described in the Employer's Requirements (or, where no purpose(s) are so defined and described, fit for their ordinary purpose(s))”.
- The obligation applies not only to the Works but also a Section, Part or major Plant and its purpose is defined in the Employers Requirements.
- It potentially therefore imposes a wider fitness for purpose requirement, but commentary is divided.

FIDIC

The Contractor: position under FIDIC 2017 continued

- The fitness for purpose requirements of Sub-Clause 4.1 are now backed by an indemnity in a new Sub-Clause at 17.4:
 - “The contractor shall also indemnify and hold harmless the Employer against all acts, errors or omissions by the Contractor in carrying out the Contractor's design obligations that result in the Works (or Section or Part or major item of Plant, if any), when completed, not being fit for the purpose(s) for which they are intended under Sub-Clause 4.1”.*
- This is capped by:
 - Sub-Clause 1.15 – the exclusions of liability for indirect & consequential loss.
 - Sub-Clause 1.15 – the overall cap on liability.
 - The level of liability limited dated in the Contract Data or if not set, an amount equivalent to the Accepted Contract Amount.

FIDIC

The Contractor: position under FIDIC 2017 continued

- Also different is that design obligations are now expressed to be backed by insurance at Sub-Clause 19.2.3. Contractors are required to:
 - take out PI cover; and
 - where stated in the Contract Data this insurance is required to indemnify the contractor against its liabilities for failure in carrying out designs to achieve the fitness purpose requirements.
 - For the reasons stated before, this could be problematic for contractors.
- A new Sub-Clause 5.1 imposes upon designers enhanced qualification requirements which was previously absent. They must be:
 - qualified, experienced and competent in the disciplines of design for which they are responsible; and
 - qualified and entitled to design the works.

Summary: how has design liability changed under FIDIC?

What has changed?

- Scope of fitness for purpose may extend to Parts, Sections and major Plant rather than just the Works.
- Contractor must indemnify the employer in relation to the fitness for purpose obligations.
- Contractor must take out PI insurance.
- Specific qualifications are required of designers.

What has stayed the same?

- There is still a fitness for purpose requirement in the core clauses.
- Although reference to this requirement has moved from the body of the Contract to the Employers Requirements it is still decided upfront.
- Risk allocation largely remains the same.

Summary: the key changes to design liability

NEC4

- Contractor's design liability in line with design professionals.
- Contractor's liability is no longer just linked to reasonable skill and care.
- The onus is on the employer to prove contractor failed to meet requirements.

JCT

- Position largely remains the same as before.
- Contractor's design liability is still linked to reasonable skill and care.
- Net contributions clauses are now included in third party rights schedule and collateral warranties as consultants can also be held jointly liable.

FIDIC 2017

- Scope of fitness for purpose requirement may not just be limited to the works.
- Contractor must indemnify the employer in relation to design obligations and must take out PI insurance.
- Specific qualifications are required of designers.

Design Liability: why does it matter?

An area for conflict

- Can be a complex area which is ripe for disputes.
- Each of the standard form contracts approach the area differently.
- There is a conceptual disconnect between the liabilities imposed on a D&B contractor and a traditional designer. A designer is seen as simply providing a professional service, whereas a D&B contractor as providing a complete product for a certain type of use.
- This can present design liability instances where a contractor has a liability in a circumstance where it has not been negligent. This impacts the insurance position:
 - From the contractor's perspective this can be a concern as without insurance coverage they have to pay out.
 - From the employer's perspective this is also a concern as without insurance the contractor may not be good for the money.

Back to Basics: the PI perspective

What are the risks?

- Most PI policies will cover the holder only in the event of a claim arising out of professional negligence i.e. *a failure to exercise reasonable skill and care*.
- However, most PI policies will expressly exclude a fitness for purpose risk. Some policies may even be completely invalidated if a consultant has agreed to any fitness for purpose obligations within an appointment.
- Therefore, a designer can be left uninsured against a contractual claim for breach of a fitness for purpose obligation.
- Where a defect arises and no allegations of negligence are made, the policy insurers may refuse to pay costs associated with the defence of a claim.

Case in Point:

MT Højgaard A/S (Respondent) v E.On Climate & Renewables UK Robin Rigg East Limited and another (Appellants)

[2017] UKSC 59



My final thought

Dame Judith Hackitt Report: Building a Safer Future, May 2018

*“The review repeatedly heard that common practices such as **design and build contracts** and value engineering can often result in uncontrolled, undocumented and poorly designed changes being made to the original design intent.”*

Questions?

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