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This book examines the nature and extent of the liability of a designer in the construction industry, from the perspective of the consultant providing design services, and of the contractor engaged to design and construct. In doing so it explores how the courts and legislators have dealt with the processes and products of design, and the problems that have resulted when mistakes are made.

A recurring theme of the book is that of interfaces, as these are frequently areas of difficulty. For example there are often technical problems at the interfaces between different elements of a building, particularly if the design or construction of these is split between different tender packages. Where several consultants are involved, it can sometimes be difficult to determine where the role of one ends and another begins. Another grey area can arise in the consultant–contractor relationship when trying to determine the extent of the responsibility of one to point out the design errors of the other. Legally, also there are overlaps, including definitional (what is considered ‘design’ and what ‘workmanship’); and between areas of the law, i.e. contract and tort (e.g. where parallel duties in tort may arise) or tort and statutory law (e.g. the Defective Premises Act 1972).

To set the scene, the book first looks at the industry context, including the role of the designer, who may currently be a professional architect or engineer, or a general contractor, or a specialist company designing, supplying and installing components or systems (simple product liability is covered briefly, but a detailed discussion is beyond the scope of this work). The book then sets out the basic legal framework, i.e. liability under statute, under contract and under tort. It then examines the differing levels of liability normally implied for a consultant or a contractor, i.e. that of negligence, and ‘fitness for purpose’.

The core of the work discusses liability issues that might arise at different stages in the procurement process, including briefing (e.g. how relevant is the client’s level of expertise) detailed design; special or innovative design; inspection; and the duty to review the design during construction. It also considers particular issues that arise in relation to contractual networks, examining the potential for tortious liability between team members, the use of warranties, and the implications of collaborative working and BIM.

Having mapped out the liability in these varying situations, the book then looks more closely at measures for limiting liability, for example through caps and net contribution clauses. It examines the more commonly used standard forms of contract, appointment and warranty and contract, to determine how these affect the nature and extent of the parties’ obligations, particularly to what extent they seek to limit liability. There is also a chapter on PI insurance and its role in protecting the designer and its clients.
Finally, the book closes with two chapters outlining briefly the comparative position in key EU countries, and in selected jurisdictions outside the EU.

This is the fifth edition of the book of the same title by David Cornes. The fourth edition was published in 1994. There have been significant changes since then in all areas of the law relating to design liability, particularly in the law of tort. The full effects of *Murphy v Brentwood District Council* (1991) had at that time not yet been established, and in fact the last 18 years has witnessed many significant developments in the law of tort. In contract law there have been developments in the areas of letters of intent and contract formation, and there have been several new editions of key standard form contracts, for example 1998, 2005 and 2011 editions of JCT forms, the publication of NEC3 and PPC2000, and of a new suite of FIDIC forms.

The new edition draws to a certain extent on earlier editions, particularly on the very clear and authoritative sections introducing the fundamental principles of the law, for example of contract, tort, statute and insurance, which have been retained largely as they were in the fourth edition. However the majority of the book has been extensively re-written. The sections on dispute resolution have been removed, and some new sections have been added, including the chapters on liability in the EU and on other jurisdictions. Apart from the fourth edition, the sources of information used have been wide-ranging, including primary sources such as case law and legislation and secondary sources such as authoritative texts, research work and reports (all of which are referenced). With respect to case law, the emphasis has been in using cases that relate directly to the construction industry and design disputes, although others are also referred to where they are of fundamental legal importance. The material for the EU and other jurisdictions was drawn primarily from research studies, and cross checked by the author wherever possible with professionals working in the relevant country.

Sarah Lupton
This work explores the nature and extent of liability for design. Modern construction is a complex process, with many parties contributing to the design of buildings, including consultants, contractors and specialist manufacturers. When problems occur, questions arise as to who made the relevant decisions, whether they are liable for any resulting losses, and if so, to whom?

Many things will determine who is liable. The procurement route selected and the skills of those involved might provide an overall indication of the intended distribution of liability, but are by no means determinative. The next step is to examine the contract documents agreed between the parties. Often these will purport to precisely describe design duties, but sometimes will be unclear or incomplete.

External factors will also play a part. Legislation can affect the contractual provisions, operating to imply terms into an agreement, or to render terms void. It can also create a separate duty to third parties outside the contract. Designers can also become liable in tort to third parties. Consultants may therefore find themselves liable in ways they did not anticipate.

A simple model of design liability might be that the party that makes a design decision will bear liability if the decision is wrong. However, that simple model does not always arise. First, the parties might agree a different system, for example under a partnering or collaborative arrangement they might agree to share the risk of errors. Second, one party may be liable for the decisions of another, even when they thought they had delegated those decisions, for example a consultant will normally be liable for sub-consultants, and may be liable for design delegated to a specialist sub-contractor.

Therefore, even in simple procurement arrangements, the distribution of design liability can become quite difficult to pin down, and in modern complex procurement systems with many participating in the design process, the network of responsibility can become extremely intricate.

### 1.1 What is design?

In the author’s view the answer to this question is very simple: any decision that affects the final form or composition of the building is a design decision. This covers a wide...
spectrum, from strategic space planning choices down to the smallest level of detail, such as the choice of fixings, adhesives, size of pipes and type of circuit breaker. As Sir Hugh Casson once put it, ‘to design is to decide.’ A similar approach can be seen in this definition: ‘Design is . . . the coming-into-being of an object which could be other than it is’ and in Hudson’s Building and Engineering Contracts: ‘. . . the essential element of the function of design is choice.’ A more complex definition along the same lines was developed by the Design Council in relation to engineering education:

Conceptual design involves identifying needs or requirements, weighing up and analysing possible solutions (including those that are already known) and coming to a properly thought out decision as to which design or designs will be most promising. The next, and equally important, phase is to reduce the concept to a practical scheme design that will show whether a useful product is likely to emerge. The detailed design must then be completed. This may mean that a set of detailed drawings, specifications and other documents have to be produced so that manufacturing and quality targets, together with satisfactory service in the field, can be achieved. The designer’s task is not finished until it has been shown that the product can be manufactured, tested and maintained to cost targets, and that it performs properly at all points in the specified performance envelope, even when it is made from components at the extremes of the tolerances and degraded by reasonable wear.

In practice an alternative approach is sometimes taken, for example some would say that smaller levels of detail are ‘not really design’, but something else, perhaps ‘workmanship’, and the term ‘workmanship’ is commonly used to refer to finer details of construction. Often such details are worked out not by the consultant who is considered the primary ‘designer’ of a building, but often by manufacturers or craftsmen, through a process of preparing shop drawings. This approach is described in Building Contract Disputes: Practice and Precedents:

In the normal case of traditional contracts (i.e., where the design is not the responsibility of the contractor but that of the employer’s architect) then much importance can be attached to the question of whether a defect is a design defect or a defect of workmanship. It is impossible to lay down hard and fast rules as to whether any particular defect will be one or another, for the choice between a flat roof and a pitched roof will be a matter of design, but the choice between a screw and a nail may well be a matter of workmanship. As a rule of thumb, the

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3 (12th edn, 2010), para. 3–085.
shape, dimensions, choice of material and other matters apparent from the drawings are generally regarded as design matters and the things left over for the good sense of the contractor are generally regarded as matters of workmanship.

Another means by which smaller decisions are left to the contractor is through the use of performance specifications. As indicated in the Design Council definition, the result of the design process is usually communicated through detailed drawings, specifications and other documents. There are two types of specification, a prescriptive and a performance specification, and the distinction is significant. The former involves the precise and complete description of the materials and arrangement of these, whereas the latter specifies the performance required, together with provisions as to testing, assumed usage and maintenance, and leaves the means of achieving it up to the supplier or contractor. Therefore, when something is specified by performance, an element of design is always left to be completed.  

What people mean when they refer to ‘design’ can therefore vary. In practice this can sometimes cause confusion between parties, especially when agreeing the extent of respective parties’ duties. It would only be critical with respect to liability if a court was to use its definition of design to assign liability, for example if a court were to start by deciding who is responsible for design, and then look at the error in question and decide if it constitutes design. If, on the other hand, the court simply analyses the contractual framework to determine who was responsible for that particular decision, then whether or not it is considered ‘design’ is a moot point.

The borderline between design and ‘workmanship’, the effect of any delegation of a detailed design decision, and the court’s approach to these issues are recurring themes in this book. For clarity, the simple ‘to design is to decide’ definition is adopted throughout this book, and ‘workmanship’ is taken to be the manner in which the work is carried out, not what that work comprises, unless stated otherwise in the context of a particular discussion.

1.2 **Procurement routes**

Below is a brief outline of alternative procurement routes, included in order to highlight where in the process the design activity will occur. For a full explanation of the various advantages and problems, readers should consult one of the texts listed in the Bibliography.

1.2.1 **Traditional**

‘Traditional’ procurement, as the name suggests, is the oldest formalised system for undertaking a building project, and is still the most commonly used system in the UK

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