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Abstract

This paper examines the liability of Approved Inspectors to their contracting parties and third parties under the Defective Premises Act 1972. It contends that Approved Inspectors owe a duty of care to a broader range of claimants, especially when providing design input for dwellings. This perspective contrasts with the ruling in *Heron's Court v Heronslea* (2019), which indicated that Approved Inspectors do not owe a duty of care under section 1(1) of the 1972 Act, a decision that may be misinterpreted as exempting them from liability. The paper distinguishes between two types of contracts for Approved Inspectors: Type-A contracts, which involve only statutory functions as per section 49(1)(b) of the Building Act 1984 and regulation 5 of the Building (Approved Inspectors etc.) Regulations 2010, and Type-B contracts, which include additional design and professional services. In both cases, the contract serves as a critical basis for claimants to establish a duty of care, potentially allowing for concurrent relief in tort and statute.

Keywords: approved inspectors, inspection, liability, contracts & law

Introduction

Approved Inspectors are unusual, yet versatile beasts. Essentially, their ‘approved inspector’ role deals with building control work in England and Wales to ensure that construction projects comply with the law’s building regulations. However, deep beneath the haystack lies another role that tends to be offered by those who hold themselves to be Approved Inspectors only. In fact, this other role is causative and has very little to do with the mere ticking of compliance checkboxes and more to do with the provision of additional design and professional services. The role of Approved Inspectors is a *mélange* of responsibilities and functions that are incapable of rendering as exclusively inspective. Legally, an Approved Inspector is someone approved by the relevant authority to inspect, certify, and notify about building plans under the Building Act 1984. (‘BA 1984’) [i]. However, this definition does not include the design services that Approved Inspectors may also provide. This raises the question of what liability an Approved Inspector has when they take on both their usual inspection duties and a professional design role. In *Lessees and Management Company of Herons Court v Heronslea Ltd and others* (2019) [ii], an Approved Inspector certified that the completed homes met the Building Regulations. However, the lessees contended that the Approved Inspector breached its duty under section 1 of the DPA 1972, as the homes were not compliant with the Building Regulations. The court held that Approved Inspectors do not have a statutory mandate to influence the design or construction of a dwelling. This ruling can be misinterpreted to also mean that Approved Inspectors are exempted from liability under the DPA 1972 because of not having the statutory authority aforementioned.

This paper aims to conduct a critical analysis of the liability of Approved Inspectors by investigating the distinctions between Type-A and Type-B contracts, assessing how these classifications impact the scope of liability for professional negligence, and the ramifications for both contracting parties and third-party claimants. Through this examination, the paper seeks to elucidate the legal responsibilities of Approved Inspectors and the potential repercussions of their actions within the regulatory framework of building legislation. To achieve this aim, the paper will first provide a historical overview of building control in England and Wales. The

paper will then cover the roles that Approved Inspectors may assume in construction projects. An analysis of the relevant case law will follow before concluding how and to whom Approved Inspectors are liable, and what the future holds for them.

Historical Legislative Overview

The history of building regulation as it stands today goes back a century and a half before the enactment of the BA 1984, when Parliament first intimated its intention to consolidate a national building regulatory framework. During that time, there was no unitary regulatory regime for the construction of new buildings or for the control of existing dangerous buildings. Sections 40–44 of the Metropolitan Buildings Act 1844 and section 75 of the Town Improvement Clauses Act 1847 conferred powers on the City of London and other specified towns to control dangerous buildings using any means necessary (i.e. securing them, shoring them up, repairing them, or even taking them down).

Key Milestones Leading Up to the BA 1984

The initial milestone in the development of a national building regulatory framework was marked by the enactment of the Public Health Acts ('PHA') of 1875 and 1936 [iii]. These legislative measures empowered local authorities to formulate bylaws governing the provision and construction of buildings within their jurisdictions (Winser and Sage, 2023). The building control exercised by local authorities bears similarities to that conducted by Approved Inspectors, with key distinctions: (i) local authorities operate on a non-profit basis, whereas Approved Inspectors function as privately owned enterprises; (ii) local authority building control is obtained through a regulated council application process, in contrast to the private contractual engagement of Approved Inspectors. Section 157 of the PHA 1875 facilitated the harmonization of these bylaws with preceding local improvement and building legislation. Notably, section 308 of the PHA 1875 introduced a compensatory provision for individuals who incurred losses due to a local authority's negligent execution of its statutory duties [iv]. This provision subsequently evolved into section 278 of the PHA 1936 and later manifested as the compensatory mechanism outlined in section 106 of the Building Act 1984 (BA 1984). The subsequent milestone was

achieved with the PHA 1961, which revoked the bylaw-making powers of local authorities while permitting them to retain certain authorities to address dangerous buildings. The Building Regulations (Local Enactments) Order 1966 represented the first comprehensive set of nationwide building regulations. Following this, the Defective Premises Act 1972 (DPA 1972) was enacted to establish duties related to the provision of dwellings and to affirm liability for injuries or damages resulting from defects in premises. This legislative progression continued with the Health and Safety at Work etc. Act 1974, which established the Health and Safety Executive in conjunction with local authorities to enforce health and safety regulations. Ultimately, the BA 1984 was enacted as the current consolidating statute, thereby unifying the national building regulatory framework (Harper, 1978).

The Current Regulatory Regime

In 1985, Approved Inspectors were instituted under Margaret Thatcher's second government to create private-sector competition for local authority inspectors (Britton et al. 2021). In parallel, the Building (Inner London) Regulations 1985 [v] extended much of the newly enacted national regulatory scope to Inner London. In addition to the BA 1984, the Building Regulations 2010 [vi] forms a great part of the regulatory corpus by which project practitioners must abide. The Building Regulations 2010 is a statutory instrument that replaced the Building Regulations 2000 [vii], which had (in its day) replaced the Building Regulations 1985 [viii] (Gough, 1986). Currently, Approved Inspectors are governed by the Building (Approved Inspectors etc.) Regulations 2010 [ix], as amended by the Building (Approved Inspectors etc. and Review of Decisions) (England) Regulations 2023 [x]. Although Wales introduced its own regulations in 2013, such regulation remains substantively tantamount to that of England (Bailey, 2020). Under section 36 of the BA 1984, local authorities may enforce the removal or alteration of non-compliant building work. Approved Inspectors can refer any non-compliant building work back to the local authority for enforcement action. The 2023 Amendment, which came into force on 1 October 2023, underpins the new 'higher-risk building control' regime and implements Part 3 of the Building Safety Act 2022 ('BSA 2022'). Following April 2024, the Building Safety Regulator, under the Health and Safety Executive, commenced with the discontinuation of the

Construction Industry Council-Approved Inspectors Register ('CICAIR'), the previous body operating the register of council-Approved Inspectors. The new Building Safety Regulator rendered Approved Inspectors as 'Approvers', provided they successfully registered during the grace period in April 2024.

Legal Definition of Approved Inspectors

An Approved Inspector's principal role is to inspect, certify and notify. Each of these three statutory functions must be carried out at the relevant stage of the construction project [xi]. The importance of the DPA 1972, BA 1984 and the Building Regulations is to ensure that buildings are constructed in a manner that secures the health, safety, welfare and convenience of persons in or about the building and of third parties, such as neighbours, who may be affected by the building or matters connected with the building [xii]. Section 1 of the DPA 1972 provides that:

- (1) A person taking on work for or in connection with the provision of a dwelling... owes a duty – (a) if the dwelling is provided to the order of any person, to that person; and (b)... to every person who acquires an interest (whether legal or equitable) in the dwelling; to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed. ...
- (4) A person who – (a) in the course of a business which consists of or includes providing or arranging for the provision of dwellings or installations in dwellings; or (b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment; arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work.

Therefore, an Approved Inspector's statutory function is to ensure compliance with the building regulations under the BA 1984 with respect to: (i) the design and construction of buildings, (ii) the demolition of buildings and (iii) the provision of services, fittings and equipment in connection with buildings [xiii]. Having a good command of the Building

Regulations is a significant undertaking that can consume a good portion of an Approved Inspector's career, notwithstanding the fact that these regulations apply to an ever-expanding realm of building techniques. Lord Goff in *Worlock v Saws* suggested [xiv]: building inspectors are creatures of habit and the practices by which they carry out their inspections could well become obsolete in the event of new building techniques being devised. Despite the hands-on element of an Approved Inspector's work, the nature of its statutory role as far as the DPA 1972 is concerned is that of a third party, providing an assessment of regulatory compliance throughout the construction project lifecycle. In that light, the statutory function of an Approved Inspector does not positively contribute to the design and construction of a dwelling.

An Approved Inspector's statutory functions can be divided into three phases. The first phase begins with the Approved Inspector submitting an initial notice to the relevant local authority at the project's inception. Upon receiving acceptance of the initial notice by the local authority, construction can proceed. The second phase entails the Approved Inspector inspecting the works at major milestones and providing an inspection report. The report can either confirm that the construction project complies with the regulations or identifies what is not compliant. The final phase of an Approved Inspector's statutory function is certification, which is carried out upon being satisfied that the building work complies with the regulations. It is important here to appraise what 'building work' constitutes under the BA 1984 because anything that does not fall under the statutory meaning of this term will not be caught in the ambit of the Building Regulations. The Building Regulations define 'building work' as works that involve the construction, expansion, or substantial modification or alteration of a building [xv]. By deduction, minor work that does not tamper with a building's structure and ornamental modifications that do not alter with the building's safety (i.e. building coverings with respect to fire safety) could be regarded as being excluded under the regulatory scope of 'building work'. Insofar as an Approved Inspector's statutory functions are concerned, there is no statutory power to influence the design or construction of a dwelling, limiting their role to ensuring compliance against prescribed building regulations.

The Multiple Roles of Approved Inspectors

Approved Inspector Role

The primary role of an Approved Inspector is to ensure compliance with the Building Regulations. This statutory function does not attract liability under the DPA 1972 because it does not involve taking on work for or in connection with the provision of the dwelling [xvi]. The natural meaning of ‘work for or in connection with the provision of a dwelling’ is the substantive input into the bringing of a dwelling into existence, which in *Hérons Court v Heronslea* [xvii] was interpreted to be directed towards architects, builders, designers and engineers. Therefore, case law establishes that Approved Inspectors are not statutorily liable insofar as the performance of their statutory functions to ensure compliance with the Building Regulations (Rigney et al. 2023). Hamblen LJ highlighted that an Approved Inspector’s statutory inspective role is not engaged in the positive role of the provision or construction of the relevant building (as would be with a designer or architect) but performs the negative regulatory role of checking for compliance against prescribed criteria [xviii]. It is important to highlight that Hamblen LJ was limited in *Hérons Court* to the extent that an Approved Inspector would be liable for their principal building control role, or what this paper has called the ‘Approved Inspector role’. In this light, the principal role of the Approved Inspector does not attract liability under section 1 of the DPA 1972. Nevertheless, this does not mean that one cannot hold an Approved Inspector liable for negligent approval. A contracting counterparty such as a builder does have a direct contractual link with the Approved Inspector by which a duty of care would arise and be breached in the event of negligent misconduct. In such a situation, a negligent Approved Inspector, privy to a contract with a project practitioner, could also attract tortious and DPA 1972 liability. It would just be that section 1(1) would not apply, given that it is targeted at designers and not Approved Inspectors only carrying out building control work – this was the matter in *Hérons Court*. The question begs to be asked: what would happen if an Approved Inspector performed services that contribute to the provision of a dwelling?

Design Consultant Role

Often, Approved Inspectors will complement their primary inspector role with an additional design input professional role that renders them commercially distinguishable from local authority inspectors. Approved Inspectors will describe and title this professional role using terminology ranging from ‘design review’ to ‘plan review’ in their contractual letters of appointment (also referred to as ‘standard service agreements’). In essence, the Approved Inspector’s selling point to project practitioners is as follows: if, for example, the employer hands in their design plan promptly, the Approved Inspector will carry out a review and if they see any problems with the design that may contravene the Building Regulations, the Approved Inspector will have such discrepancies revised for the employer before commencing the building work. In parallel, this additional work that an Approved Inspector may carry out could be seen, under certain circumstances, to be an undertaking adding value to the overall process. Another common feature of the Approved Inspector’s letter of appointment is the Schedule of Services or Scope of Services, outlining the specific tasks that will be carried out. Some of these tasks will cover the ordinary statutory functions of an Approved Inspector. However, the letter of appointment will also stipulate something along the lines of the Approved Inspector hereby being appointed: ‘to carry out building regulations assessment services as detailed below [in the Scope of Works]’. Here, one can come across tasks such as a ‘plan check’, which extends beyond the default inspective role’s statutory limits and extends the role to include pre-submission design consultations. Such an appointment means that the Approved Inspector carries out the submission of building control plans for approval, in addition to performing a plethora of other consultations and services such as: fire engineering and safety, structural engineering, contacting the architect and ‘helping to find solutions’ – whatever the scope of this may mean. These are not merely functions of an inspective role. Evidently, there is substantive design input into the provision of the dwelling that is explicitly agreed between certain parties.

Setting the Scene in Contract and Tort

Contracts and Letters of Appointment

To unpack this further, one must appreciate the nature of the contracts Approved Inspectors tend to be appointed under. Usually, the basis of an Approved Inspector's relationship with a project practitioner (e.g. a contractor) is contractual (Britton, 2012). Oppositely, the basis of an Approved Inspector's relationship with third parties such as subsequent householders or property managers is not contractual unless otherwise stipulated in the contract. Nevertheless, Approved Inspectors must have no professional or financial interest in the work they supervise, unless such undertaking is minor work [xix]. Taking this into account, there are two categories of contract that classify Approved Inspector letters of appointment: Type-A and Type-B contracts.

Type A Contract – Liability to the other Party on Purely Contractual Principles

In Type-A contracts, if the contract only offers building control work in accordance with the statutory functions of Approved Inspectors, then the scope for liability for negligent approval under the DPA 1972 does not exist (as expounded in *Heron's Court*) because this only applies to the design work for which the Approved Inspector has no contractual oversight. This is particularly relevant to third-party claimants who suffer a loss as a result of the Approved Inspector's negligent approval or defective design work, especially where they have no direct contractual or tortious link because they would also have no statutory cause of action. Despite this dynamic, in contractual terms, a Type-A Approved Inspector would still owe a duty of care to their contracting counterparties. This duty of care would be limited in scope to not include design work but for ensuring regulatory compliance.

Type B Contract – Extension of Liability for Design and Related Professional Services

In Type-B contracts, if a contract confers upon the Approved Inspector the obligation to give advice, prepare plans or review design material in return of a fee, this will amount to a professional relationship between the Approved Inspector and the builder or the householder, by which the Approved Inspector would be liable for negligent misstatements or services. Under a

Type-A contract, there is no element to be distinguished within the Approved Inspector's role because it would be undertaking an inspective exercise to assess for compliance and fulfil its statutory regulatory role. Under a Type-B contract, a positive professional element may be distinguished from the regulatory rubber-stamping element assumed under a Type-A contract. There is no reason under English law to suggest why a court cannot distinguish between such elements regarding an Approved Inspector's service under its letter of appointment. For example, in *Storey v Charles Church Developments Ltd* [xx], the Court distinguished between a design-and-build contractor's professional element (i.e. its design input, in this case) and the workmanship element of its contractual obligation. Equivalently, it is possible for a professional, such as an employer's representative in a design-and-build contract (i.e. where design and construction risks are shifted to the contractor) to be held liable for the faulty design of a building it carries out. Such liability can be imposed where the contract between the employer and its representative stipulates an obligation to carry out an appraisal of the design, drawings and documentation available, and to highlight any element of the design deemed to be unsatisfactory or considered to present a problem at a later stage of the project (Furmston, 1990). The appraisal of design, drawing and documentation as well as the rest of the aforementioned functions fall within the scope of an Approved Inspector who offers design input – whatever form such involvement takes.

Comparative Takeaways

Consequently, there are four crucial takeaways here. First, the role of an Approved Inspector can be determined based on whether their contract is Type-A or Type-B. Second, it is possible as a matter of law to distinguish the elements that make up the inspective and consultative roles of an Approved Inspector. Third, there remains a contractual and tortious liability under a Type-A contract despite there being no statutory liability under the DPA 1972. Fourth, the nature of an Approved Inspector's role in a Type-B context, with respect to design, is tantamount to the role assumed by design professionals, meaning that there may be no reason as to why an Approved Inspector should not be liable for professional negligence where he breaches his contractual

design obligations, given that such breach would concurrently attract tortious negligence (as the subsequent case law section will demonstrate).

Case Law Overview

In *Anns v Merton* (1978) [xxi], the Court ruled that it was possible for local authority inspectors to owe a duty of care to householders (whose role later became fulfillable by Approved Inspectors) for pure economic loss suffered because of its negligent approval in the provision of the dwelling. During that time, under the tort of negligence, only a ‘proximate relationship’ was required to impose a duty of care, provided that such imposition did not go against the public interest (Sinclair, 2018). The House of Lords in *Murphy v Brentwood* (1995) [xxii] held that local authority inspectors did not owe a duty of care for pure economic loss suffered as a result of failing to identify non-compliance with the Building Regulations (Mullen, 2019). This was a return to the rule established in *Donoghue v Stevenson* (1932) [xxiii] which required injury to be suffered by a person or damage to be caused to other property for tortious liability to arise, meaning that recovering economic loss arising outside of personal injury or damage to property fell in the orbit of contract law and was therefore, untenable. In *Herons Court* (2019), the Court of Appeal held that an Approved Inspector has no statutory power to influence the design or construction of a building in any way insofar as its statutory functions are concerned. The effect of this judgment was to establish that an Approved Inspector’s statutory functions did not engage the positive role in the provision or construction of a building; thereby, distinguishing between an Approved Inspector role and the positive professional role that may be assumed by a designer. The ruling also reinforced the Court’s analogous treatment of local authority and Approved Inspectors regarding whether a duty of care was owed under section 1 of the DPA 1972. In *Zagora v Zurich* (2019) [xxiv] the Technology and Construction Court held that an Approved Inspector may be liable in deceit (i.e. for fraudulent misrepresentation) for issuing a certificate containing statements which it knows to be untrue, or if an Approved Inspector is irresponsible in its knowing of whether such a statement is true or false (Winser and Sage, 2023). The Court viewed that such a claim was plausible in principle, despite the claim itself failing on the facts of that case. The judge found in *Zagora* that no claim could be made against the Approved

Inspector even on satisfying proof of negligence because only proof of fraud would suffice regarding such misleading statements (Britton et al. 2021).

The importance of *Zagora* is twofold. On the one hand, it shows that an Approved Inspector may be held liable in deceit for its statutory functions. On the other hand, it outlined how a claim in deceit ought to succeed. For that to happen, a claimant must establish three conditions. First, the Approved Inspector must have committed a fraudulent or reckless misrepresentation. Second, the Approved Inspector must have contemplated that, absent some form of unforeseen intervention, the claimant would have relied on this misrepresentation. Third, the claimant must have relied on the misrepresentation in a way that played a substantial role, in part or whole, in transacting for the dwelling concerned. In *Crest v Grafik* (2021) [xxv], the Approved Inspector submitted an application to strike out Crest's claim on a procedural basis, which concerned *inter alia* an allegation that the Approved Inspector had failed to identify cladding defects that were non-compliant with the Building Regulations' fire safety requirements. Although the case dealt with procedural matters which resulted in the dismissal of the strike-out application, the Court shared its view accepting that the Approved Inspector's poor performance in a professional negligence allegation may not alone equate to a breach of duty [xxvi]. The importance of this interpretation is that it is possible to hold an Approved Inspector liable for professional negligence where the claimant can evidently satisfy a full causative chain in which they significantly suffered a loss or harm. In summary, case law has only narrowed the scope for claiming against Approved Inspectors in a Type-A contract under the DPA 1972 (Mullen, 2019). Should there be room for the claim to succeed, (i.e. in deceit) the claimant must satisfy the strict liability outlined in *Zagora*. How this will be achieved remains to be determined.

Imposing Contractual and Tortious Liability

Misinterpretation of Herons Court

In *Herons Court*, it is crucial to understand what the Court of Appeal was actually saying. The Court was not focusing on the particular point of whether the Approved Inspector was liable under statute for contributing to the defective design work of a construction project. The case specifically focused on *DPA 1972 liability* in the carrying out of an Approved Inspector's

statutory functions as would be present in a Type-A situation. Therefore, it is incorrect to interpret that Approved Inspectors simply *cannot* be held liable for the negligent approval of defective material. More dangerously, one must not presume that every Approved Inspector's letter of appointment will only stipulate carrying out its statutory functions. The correct approach is to start properly by reading the contract. It may well be that a contract goes no further than obliging statutory building control work; however, there may also be additional design-related obligations beyond the exclusionary statutory functions. One may only know by reading the contract. On the one hand, if a letter of appointment only stipulates statutory functions, an Approved Inspector may still attract liability in tort and contract. On the other hand, in finding a contractual obligation to perform professional services (i.e. design consultations) under a letter of appointment, a concurrent duty of care in tort to the other contracting counterparties may transpire – this was the finding of the House of Lords in *Henderson v Merrett* [xxvii] (the case did not deal with Approved Inspectors), which resolved whether such a concurrency existed under English law (Murphy and Gardner, 2021). Although it has been argued that this ruling is controversial (Jackson, 2015), it does illustrate how the imposition of a duty of care on Approved Inspectors may unfold upon their breaching of a contractual obligation to perform professional design services from which a concurrent relief in tort would transpire. As for the ruling in *Herons Court*, it excludes the statutory cause of action with regard to the DPA 1972, but not the contractual and tortious causes of action – meaning that the absence of a statutory cause of action would only really matter where a claimant, for whatever reason, has no cause of action in contract or tort, such as a third-party subsequent householder who is negatively impacted as a result of an Approved Inspector's negligent certification.

Special Relationship

Lord Goff's rationale in *Henderson* helps the reader appreciate the importance of what the contract is saying in establishing a special relationship and a duty of care. He propounds that the law of tort is the general law out of which the parties can, if they wish, contract. When an Approved Inspector agrees to be legally bound by design obligations, it is assuming the position and responsibility of a design professional, creating a special relationship between it, the builder

and, potentially, a subsequent householder. Approved Inspectors consensually contract out of the tortious realm as a vital means to advertise themselves and distinguish their services from those of their local council competitors. Above all, Approved Inspectors want to be paid for the work they carry out. Rupert Jackson expounded on the special relationship principle in *Robinson v PE Jones* [xxviii]. He outlined that a special relationship transpires where a contracting party is paying the design service provider (i.e. a Type-B Approved Inspector) ‘to give advice or to prepare reports or plans upon which the claimant (contracting counterparty) would act’. Therefore, a special relationship, as described in *Robinson*, does arise between the Approved Inspector and the counterparty under a Type-B contract, owing to the nature of responsibilities that ought to be assumed by the Approved Inspector.

Assumption of Responsibility and Reliance

In *Pirelli v Oscar Faber* [xxix], the Court found that a design engineer owed a duty of care to a claimant who erected a chimney in reliance on the engineer’s advice, as included in the design scope. In *Murphy*, the Court harmonised the principles of assumption of responsibility and reliance, derived from *Hedley Byrne v Heller* [xxx], with the duty of care found in *Pirelli* and subsequently in *Barclays v Fairclough (No. 2)* [xxxii]. In *Murphy*, Lord Oliver said that there was no situation in which one could have derived a relationship of proximity that makes a builder liable for economic loss sustained by a derivative householder with whom no contractual or ‘other relationship’ existed [xxxii]. This ‘other relationship’ was realised in *Henderson*, in which the Court broadened the principle of liability for negligent misstatement (from *Hedley Byrne*) to include negligent professional services (Sinclair, 2018). In *Barclays* [xxxiii], the Court recognised that building services also required the exercise of special skills upon which potential claimants would rely. This caused the contractual obligation to perform construction design services with reasonable skill and care to attract the *Hedley Byrne* assumption of responsibility. Thus, a Type-B contract would place the Approved Inspector in *Hedley Byrne* territory because the Approved Inspector would be assuming responsibility for design work that a project practitioner or subsequent householder may rely upon. In that light, a Type-B Approved Inspector may be liable for economic loss caused by its negligent services.

Future Developments

Having demonstrated how Approved Inspectors could be held liable for their design work, how are things likely to unfold? Following the analysis in this paper, imposing liability on Approved Inspectors should be led by contract. It is easier to sue on contract because it can be seen clearly what the Approved Inspector has agreed to be legally bound to and because the limitation period starts from the date of the breach of contract. Overtime, it may well be that Approved Inspectors become impelled to acknowledge that they are taking responsibility for their design input, with their design liability becoming capped at a certain amount. This, in turn, would compel Approved Inspectors to take out professional indemnity insurance in favour of the parties they engage and others who may rely on their design services. Such insurance already exists in the realms of design and build contracting between the employer and the design-and-build contractor, over the latter's design element of its work (Sinclair, 2018). A natural result of applying this to Approved Inspectors would be higher insurance fees. As a result, it is not far-fetched that insurers would lead the way in holding Approved Inspectors liable for negligence, as these insurers would be the ones who have to pay if things go wrong. Indemnifying Approved Inspectors for their design input is a risky undertaking, prompting insurers to force Approved Inspectors to prepare very different contracts by which they would acknowledge the responsibility they are assuming with regard to design services. The outcome of such developments would either return Approved Inspectors back to performing their statutory functions only or to pursue the role of a designer at the cost of paying a much higher insurance fee, akin to that of an ordinary design professional.

Conclusion

In summary, this paper has thoroughly examined the liability of Approved Inspectors within the context of their contractual engagements in building control work. By classifying the contracts into Type-A and Type-B, this paper highlighted the extent to which Approved Inspectors can be exposed to further liability. Type-A contracts, which are confined to statutory functions, limit the potential for third-party claims, thereby shielding Approved Inspectors from broader liability. However, they remain accountable to their direct contractual counterparts for any shortcomings

in performance, particularly regarding their certifying duties. In contrast, Type-B contracts introduce a layer of complexity by incorporating professional design services, which can lead to liability for economic losses under specific conditions. This amplified exposure broadens the scope of potential claimants against Approved Inspectors, such as subsequent householders and lessees. The main distinction between an Approved Inspector's liability exposure under Type-A and Type-B contracts comes down to the statutory duties found under section 1 of the DPA 1972. Under a Type-A contract, no statutory liability would be owed to the wider group of potential claimants outlined above. Bearing this in mind, there is a specific scenario in which the classification of Type-A and Type-B contracts becomes crucial: when a potential claimant, lacking any contractual or tortious causes of action, claims against a Type-A Approved Inspector. In such a case, the absence of a statutory cause of action for third-party/noncontractual claimants further eliminates any avenues for legal recourse. Following the enactment of the Building Safety Act 2022, it is imperative for Approved Inspectors to navigate their contractual obligations with diligence. Future research should focus on the practical impacts of the 2022 Act on Approved Inspector liability. Conclusively, this paper recommends a contractual approach to Approved Inspector liability, emphasising the need for clarity in contracts to protect the interests of Approved Inspectors and the rights of those who rely on their professional services.

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Notes

- [i](#) Building Act 1984, ss. 49–51.
- [ii](#) *Lessees and Management Company of Herons Court v Heronslea Ltd and others* [2019] EWCA Civ 1423.
- [iii](#) *ibid*, at [11]–[13]; *Manolete Partners plc v Hastings Borough Council* [2014] EWCA Civ 562 at [48].
- [iv](#) *Hobbs v Winchester Corporation* [1910] 2 KB 471 stands as an example by which section 308 was interpreted.
- [v](#) (SI 1985/1936) as amended by (SI 1987/798) and (SI 2000/2532).
- [vi](#) (SI 2010/2214).
- [vii](#) (SI 2000/2531).
- [viii](#) (SI 1985/1065).
- [ix](#) (SI 2010/2215).
- [x](#) (SI 2023/906).
- [xi](#) *Butler & Young Ltd v Bedford Borough Council* [2003] EWHC 1289 (Admin).
- [xii](#) BA 1984, s. 1(1)(a).
- [xiii](#) BA 1984, s. 1(1A).
- [xiv](#) [1983] 1 EGLR 131; 22 BLR 26 at [134].
- [xv](#) (SI 2010/2214), reg. 3(1).
- [xvi](#) Defective Premises Act 1972, ss. 1–2.
- [xvii](#) *Lessees and Management Company of Herons Court v Heronslea Ltd and others* (2019) 186 ConLR 1 at 13.
- [xviii](#) *ibid*, at 14 per Hamblen LJ.
- [xix](#) (SI 2010/2215), reg. 9.
- [xx](#) (1995) 73 Con LR 1.
- [xxi](#) [1978] AC 728.
- [xxii](#) *Murphy v Brentwood District Council* [1991] 1 AC 398.
- [xxiii](#) [1932] AC 562.
- [xxiv](#) *Zagora Management Ltd and Others v Zurich Insurance PLC and Others* [2019] EWHC 140 (TCC).
- [xxv](#) *Crest Nicholson Operations Ltd v Grafik Architects Ltd* [2021] EWHC 2948 (TCC); 199 ConLR 74.
- [xxvi](#) *ibid*, at 78.

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[xxvii](#) *Henderson v Merrett Syndicated Ltd* [1995] 2 AC 45. (Cf. *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] AC 80 at 107 per Lord Scarman, with *Midland Bank Trust Co v Hett Stubbs and Kemp* [1979] Ch 384).

[xxviii](#) [2012] QB 44 at 63 per Jackson LJ.

[xxix](#) [1983] 2 AC 1.

[xxx](#) [1964] AC 465.

[xxxi](#) (1995) 76 BLR 1.

[xxxii](#) *Murphy* (n 22) at 489 per Lord Oliver.

[xxxiii](#) (1995) 76 BLR 1 at 24 per Bedlam LJ.