



association of  
consulting and  
engineering



third party  
disclaimers advisory  
advice issued by  
engineers





## introduction

The purpose of this advisory is to provide some general guidance to engineers on the use and importance of third party disclaimers in advice they issue, and to outline how they operate legally to minimise the exposure risk to third party claims relating to advice.

Besides owing a duty of care to a client in relation to advice provided, an engineer can owe a duty of care in relation to the same advice to a third party who receives and relies on it. Sometimes this is accepted by the engineer as part of an engagement or separately agreed. However, the duty can also arise unwittingly for an engineer due to the court's application of common law negligence principles.<sup>1</sup>

While the courts have developed conditions to limit the situations where the duty will arise, due to the nature of engineers' work it is relatively common for engineers to face the risk of a third party claim relating to their advice. This is because engineers' advice is often provided in relation to matters and in situations where foreseeably the advice may be communicated to persons other than the original or intended recipient. Common examples are reports concerning the condition of land or buildings. The third party claim is usually in the form of a negligent misstatement claim but can also be a Fair Trading Act claim alleging misrepresentations amounting to misleading conduct.

The main way engineers can generally protect themselves from such third party claims is by including a clearly worded disclaimer of liability in the advice they issue, stating the advice cannot to be relied on by any person other than the client, or for any purpose other than the client's particular brief, without the engineers' prior agreement.

This advisory outlines the civil liability framework relating to advice statements to third parties, what disclaimers are and how they work legally. It also explains why advice disclaimers are important to engineers' liability exposure risk, how to use them to maximise their effectiveness, and why contractual disclaimers in engagement contracts can be beneficial. Sample disclaimers have been provided to assist.

<sup>1</sup> The duty of care discussed in this advisory is different to the general duty which engineers may owe to third parties in relation to their work - for example, their duty owed to homeowners to exercise reasonable skill and care in their building work design. A third party disclaimer will not usually assist in a general duty situation.





## outline of liability law relating to statements to third parties

Third party claims against engineers are most often based on written statements in reports, correspondence and producer/compliance statements, although liability can also arise from oral statements.<sup>2</sup>

### Common Law – Negligent Misstatement

If an engineer provides a statement relating to their professional area of work which the engineer knew, or should reasonably have known, would likely be communicated to and relied on by a third party for a particular purpose, the engineer owes a duty to the third party to take reasonable care in making the statement. In these circumstances, the engineer is ordinarily liable for foreseeable loss caused to the third party by reasonably relying on the statement for that purpose. This duty to third parties is commonly known as the *Hedley Byrne duty*;<sup>3</sup> and the applicable cause of action is for negligent misstatement.

Whether the statement is a representation of professional opinion or of fact, it will be negligently issued if there were no or insufficient reasonable grounds for the representation.

An engineer's liability to a third party in relation to a statement can usually be prevented by adding a limitation on who can rely on the statement and for what purposes. These limitations are known as "disclaimers" because they state expressly or in effect that the engineer is disclaiming legal responsibility if an unauthorised person relies on the statement or it is used for an unauthorised purpose.

### Fair Trading Act

Liability to a third party for a statement can also arise for an engineer under section 9 of the Fair Trading Act 1986, which prohibits misleading conduct in trade.

If the statement is a representation of professional opinion, a breach of the Act occurs if there were no or insufficient reasonable grounds for the representation. If the statement is a representation of fact, a breach of the Act occurs if the representation was incorrect (even if due to no fault). In these circumstances, the engineer is ordinarily liable for foreseeable loss caused to the recipient by being misled and reasonably relying on the statement.

A disclaimer may prevent liability for misleading conduct if it makes clear to a reasonable person in the third party's position that the statement is not intended for them and they should not rely on it at all.

2 Claims based on oral statements are not common. This is considered mainly due to the evidential hurdles faced by claimants regarding the precise nature of the oral advice, and there is often also a major issue over the reasonableness of relying on oral advice.

3 Named after the 1963 leading UK case which identified its elements. These were later refined in the 1990 UK case of *Caparo Industries plc v Dickman*.

## third party disclaimers – how they work legally

### Negligent misstatement

A clear disclaimer included with an engineer's report, or other advice or information ("advice") can prevent a duty of care being owed to a third party recipient. This is not the same thing as excluding or limiting a duty of care otherwise existing, which is how contractual exclusions and limitations work. Rather, the existence and wording of a disclaimer is relevant to a court deciding whether in all the circumstances it is "*fair, just and reasonable*" that a duty of care should be owed to the third party in respect of the advice.

If the disclaimer clearly states that a third party should not rely on the advice and that the engineer accepts no responsibility if the third party does so, this will generally be determinative in preventing a duty of care being owed to the third party, and provide a complete defence to a negligent misstatement claim. The rationale is that given the existence of the disclaimer, it would be unreasonable for the recipient to rely on the advice and unfair to hold the engineer responsible.

A duty of care would, however, be owed irrespective of a clear disclaimer if the engineer agreed, as part of a client engagement or separately, to the third party using or relying on the advice. The disclaimer would also be ineffective if the engineer by extrinsic conduct, such as repeating the substance of the advice in correspondence to others with no limits on use, assumed responsibility for the advice to the third party or to a class to which the third party belonged.

### Fair Trading Act

A clear disclaimer may also enable an engineer to defend a third party claim alleging the engineer's advice constituted a misrepresentation in breach of section 9 of the Fair Trading Act, which prohibits misleading conduct in trade.

This will be achieved if the wording and use of the disclaimer meant it was objectively unreasonable for the third party claimant to be misled by the advice in all the circumstances. It will also be achieved if for the same reasons it was objectively unreasonable for the third party claimant to have relied on the advice. Unreasonable reliance can result in the engineer's conduct in issuing advice containing a misrepresentation not being legally the cause of the third party's loss.

A disclaimer may therefore enable a successful defence of a section 9 claim if:

- a reasonable person in the third party's position would have been aware from the disclaimer that limits had been imposed on the use of the advice; and
- nothing the engineer had done or said indicated that those limits wouldn't apply to the third party.<sup>4</sup>

<sup>4</sup> There is case authority that if the disclaimer made it clear that the third party was not entitled to rely on the advice at all and there were no extrinsic representations, a reasonable person could not be misled into thinking that the advice gave them any enforceable assurance, nor could they have reasonably relied on the advice to establish legal causation entitling a recovery: *BC90315 v Redican Allwood Ltd* [2014] NZHC 1212, *Kos J* at [69], [77] and [79]-[81].

## third party disclaimers – why important

Without an appropriate third party disclaimer accompanying an engineer's advice, there is a much greater risk of an engineer being found liable to a third party for advice which the engineer never intended for anyone other than its client.

Compounding this risk is the additional liability exposure the engineer can face on being found liable to a third party. It is important to realise that the limitations of liability in an engineer's engagement contract in relation to providing the advice will not ordinarily be applicable to a third party.<sup>5</sup> The engineer therefore has a significantly greater liability exposure risk to unintended third party recipients which could potentially result in having liability for a claim beyond the level of the engineer's professional indemnity insurance cover.

<sup>5</sup> This is the position with an unknown, unintended recipient of the advice. If a third party asks for permission to use the advice, the engineer can require the recipient to accept limitations on the engineer's liability as a condition of use – see below.

## third party disclaimers – how to use to maximise effectiveness

For a disclaimer to be the most effective, it needs to be brought to the attention of a third party who obtains access to the advice and in such a way that it would be unreasonable for the third party to ignore it.

The best way to achieve this is to include the disclaimer in the advice and for the disclaimer to be prominent:

It should have a heading stating "disclaimer", "applicability", "note" or something which is in a size and form to draw the reader's attention to the disclaimer e.g. in bold, underlined, or in capital letters.

The disclaimer's wording should be in the same size print as the rest of the text (or if smaller, in bold or italicised but still a reasonably legible print size), and be in a prominent position (such as near the conclusions/recommendations section).



## sample third party disclaimer

The following is a sample third party disclaimer based on some wordings in current use. It is provided for example purposes only. Engineers should seek specific legal advice on the wording appropriate to their situation.

### **Disclaimer**

*This [<report/letter/document>] has been prepared for the sole use of our client, [<client's legal name>], for the particular brief and on the terms and conditions agreed with our client. It may not be used or relied on (in whole or part) by anyone else, or for any other purpose or in any other contexts, without our prior written agreement.*

In addition to a disclaimer, it is helpful to have a warning statement at the bottom of each page of the advice stating:

*"This [<report/letter/document>] may not be read or reproduced except in its entirety.*

*"Page [x] of [y]"*

The statement is designed to minimise the risk of a third party not seeing the disclaimer or other qualifications in the advice because only extracts have been read or copied.

## agreeing to a third party's use of the advice

If an engineer is requested to agree to a third party using the advice, the engineer should ascertain the purpose for which the advice is intended to be used. If that purpose is an appropriate and acceptable one, the engineer should consider whether charging an additional fee is appropriate given the additional risk it will be assuming. The engineer should also consider what conditions of use are necessary – including limitations of liability and whether the other terms and conditions of the original engagement agreement for the advice should apply. At a minimum, the engineer's consent should be conditional on the third party agreeing in writing to accept the same limitations of liability as applied to the original engagement, and to use the advice only for the third party's agreed particular purpose.



## disclaimer clause in engagement contract

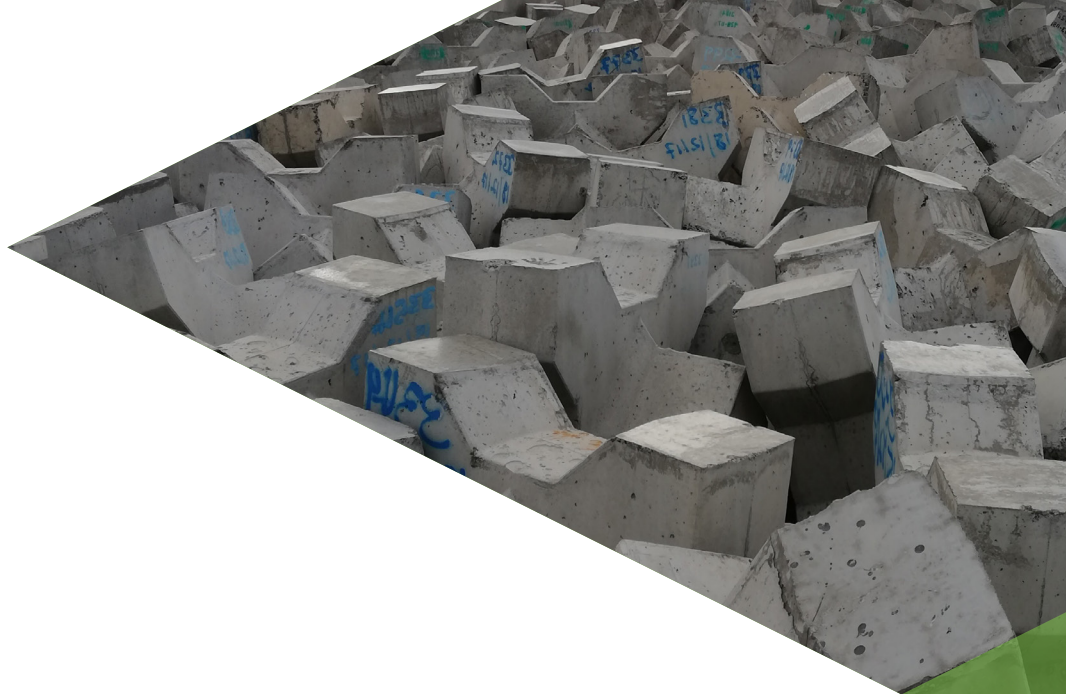
There is value in an engineer having a disclaimer clause in its engagement contract in addition to including a liability disclaimer statement in all advice issued. While such a clause is only binding on the client, it has relevance to the engineer's liability position regarding a negligent misstatement claim in relation to an unauthorised third party using the advice. The way it works legally against third parties is that the existence of the clause, even if unknown to the third party, is a relevant factor for the court's consideration in deciding whether it is "*fair, just and reasonable*" in all the circumstances to impose a duty of care on the engineer in relation to the third party's use of the advice.

There is also scope via a contractual disclaimer clause of reducing the engineer's risk of third party liability by including in it the client's express agreement not to disclose the advice to a third party without the engineer's prior written consent.

But having a disclaimer clause in the engagement contract should not be viewed as a substitute for a liability disclaimer statement in all advice issued. For the reasons explained earlier, it is the latter which potentially provides much greater protection by bringing the limits on use to the attention of a third party who obtains access to the advice.

The following is a sample contractual disclaimer clause which could be added as a variation to the Short Form Model Conditions of Engagement. It is provided as an example only and engineers should seek specific legal advice on the wording appropriate to their situation.

*All reports, advice, drawings and other deliverables of any kind provided by the consultant ("advice") are, unless agreed otherwise in writing by the consultant, prepared exclusively for the client's use for the purposes stated in the scope of services in relation to the project. Unless the consultant's prior written consent has been obtained, the client shall not use or rely on the advice (in whole or part) for any other purpose or disclose any of the advice to a third party. The consultant shall have no liability if any of the advice is used or relied on by the client for any unauthorised purpose or by any unauthorised third party.*



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