Design Professionals--Recognizing a Duty to Inform

Richard M. Shapiro
Design Professionals—Recognizing a Duty to Inform

By Richard M. Shapiro*

INTRODUCTION

A family retains an architect to design a house that will appear as spacious as possible given the confines of a limited construction budget. The architect suggests, and the owners accept, a design in which the living and dining rooms have high ceilings at the same level as the roof line in order to make the rooms appear larger. After the house is completed and occupied the family discovers that these rooms are always cold in winter because all the warm air rises to the ceiling and that this situation is only partially solved by having the heat on continuously.

The board of directors of a new fixed rail rapid transit system agrees with the recommendation of its consulting engineers that the rail cars for the system should be designed for light weight and relatively high speeds. After the system is in operation the board discovers that these two design features are the primary cause of the system’s poor reliability.

In both the cases of the family and the transit system, dissatisfaction does not stem from any negligence on the part of the architect or the engineers in producing detailed designs for the projects. Instead, dissatisfaction is the result of the client making a wrong decision concerning basic design strategy because of incomplete information concerning the risks of and viable alternatives to the design approach which was followed. The complaint of the design client under these circumstances thus begins: “If only we had known . . .”

This Note explores the possibility of extending to design professionals a duty to inform somewhat analogous to a physician’s duty to secure a patient’s informed consent. As will be seen, breach of this duty may be considered either a form of conventional negligence or a novel extension of negligence leading to a new cause of action. The distinction is not critical because the label does not affect the policy behind recognition of an action based upon a failure to inform.

The term “design professional” includes architects, engineers, and

others who offer their services for the design of habitable structures, industrial facilities and equipment, and a wide range of other projects.\textsuperscript{1} Given the relatively large commitments of time and money involved, complete and comprehensible information is important to the client who commissions even the most simple design. For larger projects such as transit systems, power plants, and high-rise buildings, such information is critical. Many projects are becoming increasingly complex, requiring coordination between many professionals and designed elements, as well as involving long spans of time and tremendous expenditures of money. In these projects, the information provided the client concerning alternative design approaches and the implications of these approaches in terms of time, cost and relative performance is of special importance. Design decisions entail the commitment of increasingly large quantities of labor and other resources and the costs of correcting any "bad results" stemming from a client's uninformed decision are equally great. If, after project completion, a client finds that the complete absence or inadequacy of the information provided by the designer has led to some form of otherwise avoidable bad result, the designer's failure to inform should support a cause of action.

Courts have never squarely addressed the issue of informed consent because the vast majority of design malpractice claims have been decided on the basis of conventional negligence or contract doctrines.\textsuperscript{2} There is, however, considerable legal support for this form of action. The proposed cause of action presents several problems of proof, but analysis and experience in other contexts has shown that these problems are manageable.\textsuperscript{3} In addition, public policy indicates that benefits resulting from a duty to inform outweigh any burdens the duty would impose upon design professionals.

\textbf{The Context}

The construction industry is in a state of change which is reflected

\textsuperscript{1} The most visible designer, the architect, has been defined as a person who "plans, sketches and presents the complete details for the erection, enlargement, or alteration of a building or other structure for the use of the contractor or builder when expert knowledge and skill are required in such preparation." McGill v. Carlos, 39 Ohio Op. 502, 505, 81 N.E.2d 726, 729 (1947).

The actual design activity consists of the production of drawings and written documents which define the scale and relationship of project components as well as the nature of the materials, and the structural, mechanical, electrical, and any other systems or aspects of the project. See American Institute of Architects, Handbook of Professional Practice, ch. 11, at 3, 7-8 (1969 ed.) [hereinafter cited as A.I.A. Handbook].

\textsuperscript{2} The vast majority of design malpractice claims have been decided on the basis of conventional negligence doctrine with only occasional reliance on contract. See note 18 infra.

\textsuperscript{3} See text accompanying notes 34-45 infra.
in the relationships between architects and engineers and their clients. The most apparent change is the general trend toward holding all professional service providers more accountable for the results of their efforts. This trend is reflected in the recent twenty percent per year increase in the number of malpractice suits against architects and engineers.4

Within the design professions there have been significant changes in the design and construction processes, particularly with respect to larger and more complex projects. The image of the architect as master builder, the sole source of all decisions including structural systems, erection techniques, and the design of doors and downspouts,5 has faded. The focus of design activities is shifting instead toward the definition of the broad performance goals of the contemplated project and the coordination of a multidisciplinary team effort to achieve these goals.

The architect or engineer in charge of a project has always been responsible for investigating, in addition to the client's stated needs, the context of the client's project, including functional, aesthetic and budgetary requirements.6 Additional factors relevant to a specific design include topography, seismic activity, and conditions imposed by public regulation. The product is a "program," that is, a verbal synthesis of needs and requirements, as well as a restatement of the problems to which the final design is intended to respond.7 The architect's traditional services have also included production of the contract documents consisting of "working drawings," detailed design drawings that describe the sizes and relative locations of all structural and spatial components, and "specifications," written statements of material quality and construction techniques.8 If the instructions in these documents are diligently implemented by the builder, the structure should func-

4. Goldberger, Architectural Malpractice Suits Reported Increasing 20% a Year, N.Y. Times, Feb. 12, 1978, at 1, col. 1. This article also reports a finding that almost 30% of insured architecture or engineering concerns were sued in 1976.

5. The famous 18th century English architect Robert Adam ran a firm with between 2,000 and 3,000 employees and controlled subsidiary businesses supplying brick, stone, and lumber. Huxtable, A Tastemaker Rescued from History, N.Y. Times, July 16, 1978, § D at 23, col. 3. Frank Lloyd Wright, though not a contractor, often had a member of his firm live at the construction site in order to give continuous supervision. See J. SERGEANT, FRANK LLOYD WRIGHT'S USONIAN HOUSES 112 (1976). For a suit against a designer-builder, see Edward Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351 (1912).


7. See authorities cited note 6 supra.

8. A.I.A. HANDBOOK, supra note 1, ch. 11, at 7-8 (1969 ed.). Working drawings and specifications are together known as the contract documents. Id, ch. 4, at 1 (1972 ed.).
tion or "perform" in a manner which responds to the problems stated in the program.

Although this relation between designer, builder, and client is reminiscent of the traditional master builder image of the architect, the nature of the services actually rendered necessarily has changed as the type of construction activities involving designers has become centered on larger and more complex projects. For example, it is increasingly difficult for the architect to stay fully informed of all aspects of construction because of continuing changes in materials and equipment technology, availability, and relative costs, and the compounding of these variables by geographic differences. Primarily in response to this problem, in addition to the traditional employment of other professionals for structural and mechanical equipment engineering as well as landscape design, architects or engineers in charge of project design now commonly employ special consultants for the design of such items as graphics, kitchens, and parking areas. The final working drawings and specifications produced by the architect will usually incorporate the information provided by these consultants. Instead of serving as the original source of all these details, therefore, the focus of the lead designer's role shifts toward defining the results required of the project and then orchestrating the multidisciplinary effort required to achieve those results. If one person in this process is to bear the responsibility for keeping the client informed of the work of this team, that person is logically the lead designer. When the implications of the choices made by the design consultants are beyond the knowledge of the lead designer, this information should be communicated to the client. Responsibility for directly informing the client of risks and alternatives may then shift to the consulting designer or engineer.

Among the important innovations in the form of designers' services is the use of performance specifications rather than detailed working drawings and specifications as the end product of the design process. This approach is typical of such recent large projects as the San Francisco Bay Area Rapid Transit System and the building programs for certain Veteran's Administration hospitals, and school and junior college districts. These performance specifications illustrate the importance of the architect or design engineer as the owner's agent and advisor, as well as the significance of a full disclosure of information concerning risks and alternatives. The designer's effort produces a set of more generalized descriptions of the results required from the completed structure and the general type of components to be used to achieve those results. The builder is still told what to build, particu-
larly in terms of overall configuration and dimensions, but is not pro-
vided with detailed descriptions of every component required. 
Detailed design is instead left to the builder or component supplier on
the basis that this participant in the construction process is in a better
position than the designer to choose materials and construction tech-
niques best suited to local conditions.11

Another important innovation in the design and construction
process is the use of a new professional, the “construction manager,” to
complement and sometimes supplement the services of the designer.
The construction manager often has a contracting background and is
typically selected on the basis of familiarity with the type of construc-
tion contemplated. Involved in the project from the commencement of
design, the construction manager provides guidance for the owner and
designer during the design phase in such matters as costs, material
availability, scheduling, construction techniques, and alternate sources
of materials and services. The construction manager may also coordi-
nate major contracts and perform on-site inspection of the work.12 The
trend toward employing this additional agent indicates the awareness
of owners that the designing architect or engineer either cannot, or will
not, provide all the information necessary to make informed decisions
about the construction process. The willingness of clients to spend the
extra fees for these services also shows the importance of this type of
information, particularly for major projects.13 It should be noted that

11. In the pioneering California School Construction Systems Development Project
(SCSD), for example, the designer’s work consisted of developing specifications for the per-
formance of certain critical components of school buildings, including structure, ceiling,
lighting, and heating systems in terms of certain performance criteria. These criteria in-
cluded noise generation or control, span, weight, and compatibility with other components.
The critical components then served as building blocks for use by other designers in the
planning of individual schools. Responsibility for detailed design was allocated to any ma-
terial or component supplier who desired to be eligible as a qualified sub-contractor for the
construction of these buildings. In preparing the performance specifications for the SCSD
project, the designers made only those decisions which determined the general nature of
critical components with respect to characteristics such as weight, strength, sound ab-
sorbance or transmission, and the dimensions of a typical module or unit. See generally
EDUCATIONAL FACILITIES LABORATORIES, SCSD: THE PROJECT AND THE SCHOOLS (1967);
Arnold, Rabeneck & Brindle, Building Systems Design, 41 ARCHITECTURAL DESIGN 679,

12. See generally U.S. GENERAL SERVICES ADMINISTRATION, THE G.S.A. SYSTEM FOR
CONSTRUCTION MANAGEMENT (April, 1975); American Institute of Architects, General
A201/CM) (1975 ed.); Standard Form of Agreement Between Owner and Construction
Manager (AIA Doc. B801) (1973 ed.).

13. Recent examples of projects using this system include the San Francisco Bay Area
Rapid Transit System, the Port of New York Authority World Trade Center, several large
buildings constructed for the General Services Administration, and many power-plant
projects and materials processing facilities.
employment of a construction manager in no way absolves the design-
ing architect or engineer of responsibility for fully informing the client
of the risks and alternatives involved in those areas of professional
service for which the architect or engineer retains responsibility. In
fact, the architect may also perform the role of construction manager.14
Whatever the arrangement, most clients need and want all available
information concerning their project, subject to reasonable time and
cost constraints, and they naturally look to the designer to provide it.

Bases of the Proposed Cause of Action

The cause of action proposed in this Note would permit a design
professional's client to sue in tort for economic harm resulting from the
inadequate performance of the designed structure. The client would
allege that this harm arose from significant design decisions, that the
designer had a duty to inform the client of either the material risks
inherent in the decision or the availability of reasonable alternatives,
and that the damage would have been avoided or mitigated but for the
design professional's negligent failure to so inform.

In considering the practicality of the duty which flows from recog-
nition of a cause of action for failure to inform, two general areas must
be addressed: (1) public policy bases and implications, and (2) the
problems of proof presented. This section addresses the first area by
considering the availability and usefulness of existing legal remedies,
the factors which have led to the recognition of an analogous legal duty
in other contexts, and a number of more general considerations includ-
ing sociological models of professionalism, the likely impact of the duty
upon design practices including the costs associated with the proposed
duty, and the means available to allocate these costs. Each area of con-
sideration raises arguments both for and against legal recognition of
the proposed duty. It is submitted that, on balance, arguments in favor
of recognition weigh more heavily.

Present Judicial and Professional Standards of Practice

The duty to inform proposed in this Note both supplements and
overlaps ordinary negligence doctrine while approaching a standard
similar to that applied by the law of agency. The courts have ap-
proached recognition of a duty to inform as applied in limited contexts
but have never squarely examined the possibility of considering a fail-
ure to inform a legitimate claim of negligence. The legal status of the

14. Cf. American Institute of Architects, General Conditions of the Contract for Con-
Institute of Architects, Standard Form of Agreement Between Owner and Construction
Manager, (AIA Doc. B801) (1973 ed.).
proposed duty is reflected in, or perhaps, reflects, the attitude taken by the design professions in the past toward a responsibility of disclosure. The latest professional statement by architects on the subject, however, does contain a specific acknowledgement of the importance of communicating information concerning risks and alternatives to clients.

Typical malpractice complaints are based upon a standard of care requiring professionals to exercise that degree of care, skill, and judgment which is common to the profession. Among the first cases to make the analogy between the standard of care required of architects and that demanded of other professionals was Chapel v. Clark, which provided a classical statement of the applicable standard. This standard was recently endorsed and restated by the Minnesota Supreme Court in City of Mounds View v. Walljarvi:

Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.


17. 263 N.W.2d 420, 424 (Minn. 1978).


A corollary of this standard of care is that those who sell professional services are not liable for bad results in the absence of negligence because they are not warrantors of the results of the services provided. Former California Supreme Court Chief Justice Roger Traynor is often quoted to the effect that "the general rule is applicable that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct . . . . Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance." Gagne v. Bertran, 43 Cal. 2d 481, 487-89, 275 P.2d 15, 20-21 (1954). See generally Annot., 25 A.L.R. 2d 1085, 1092 (1952); see also Looker v. Gulf Coast Fair, 203 Ala. 42, 45, 81 So. 832, 835 (1919); Paxton v. County of Alameda, 119 Cal. App. 2d 393, 259 P.2d 934 (1953); Bayshore Development Co. v. Bonfoey, 75 Fla. 455, 463, 78 So. 507, 510 (1918); Chapel v. Clark, 117 Mich. 638, 640, 76 N.W. 62, 62 (1898); City of Mounds View v. Walljarvi, 263 N.W.2d 420, 423-24 (Minn. 1978).

The argument against the application of the doctrine of implied warranty to design professionals was also well stated in Audajje Lumber & Builders Supply, Inc. v. D.E. Britt Assoc., Inc., 168 So. 2d 333 (Fla. Dist. Ct. App. 1964): "An engineer, or any other so called professional, does not warrant his service or the tangible evidence of his skill to be merchantable or fit for an intended use. These are terms uniquely applicable to goods. Rather,
The proposed cause of action may be seen as a variation of typical claims for negligence in design or in preparation of plans and specifications. The primary distinction between an action for failure to inform and an ordinary negligence claim is that the duty to inform focuses on the nature of the communication between designer and client rather than on the quality of the contract documents themselves. Except for dicta in two cases, the courts do not appear to have recognized that the quality of the communication between designer and client can and should be in issue.

The one area in which designers commonly make express representations concerning the anticipated results of their work is maximum project costs, since costs can be stated in objective terms, dollars. As a result, courts have been willing to hold that failure to meet agreed-upon costs may constitute a breach of contract rather than negligence. In the preparation of design and specifications as the basis of construction, the engineer or architect warrants that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this warranty occurs if he was negligent. Accordingly, the elements of an action for negligence and for breach of the implied warranty are the same. The use of the term implied warranty in these circumstances merely introduces further confusion into an area of law where confusion abounds.” *Id.* at 335. See also *La Rossa v. Scientific Design Co.*, 402 F.2d 937, 942-43 (3rd Cir. 1968); *Gagne v. Bertran*, 43 Cal. 2d 481, 486-87, 275 P.2d 15, 19-20 (1954); *Allied Properties v. John A. Blume & Assoc.*, Eng’rs, 25 Cal. App. 3d 848, 855-56, 102 Cal. Rptr. 259, 264 (1972).


A primary motivation for the use of contract theory may be the longer statute of limitations available in those states which do not, or did not, have absolute limits on actions arising out of improvements to real estate. See note 92 infra.


This judicial attitude may well have made costs the one area of the design process in which the profession itself has recognized a duty to warn the client. According to the American Institute of Architects: "[I]t is extremely important that the variables inherent in any cost projections be completely understood by the Owner and that he appreciate the limitations that are inherent in any Statements or Estimates."21 As the "what" of cost estimates is easily understandable, clients are more apt to ask "why" and designers therefore have to be more willing and able to explain.22

Another legal doctrine which would appear to provide an even more attractive support for a designer's duty to inform than is provided by conventional negligence is the characterization of the designer as the client's "trusted agent."23 As an agent, the designer would be held to have a duty to make full disclosure of all facts material to the subject of the agency,24 the most material fact usually being cost.25 Although analysis of the designer-client relationship as one of agent and principal clearly incorporates the proposed duty to inform, the relative infrequency of the use of agency doctrine reflects the general rule that designers act as independent contractors in the preparation of plans and specifications,26 and are considered agents of the owner only when supervising the actual construction.27 The assumption that courts will

21. A.I.A. HANDBOOK, supra note 1, ch. 15, at 3.
22. Given legal recognition of a duty to inform extending beyond matters of cost, it is interesting to speculate about the means the profession might attempt to employ in order to contractually limit liability. Even if the profession assumed that all duties to inform could not be disclaimed on the basis that so strict a limit would be clearly against public policy, a future contract might attempt to limit the designer's duty to explore risks and alternatives. Notice of this type of limit on services may actually serve to benefit clients by reminding them that there are reasonable limits on a designer's efforts and that additional costs may be involved for more extensive explorations.
25. See note 24 supra. See also Zannoth v. Booth Radio Stations, 333 Mich. 233, 52 N.W.2d 678 (1952) (relying on architect's role as owner's agent and related duty to inform about costs, and on doctrine that an agreed-upon construction cost may be a condition precedent to recovery for the architect's fees). See generally Sweet & Sweet, Architectural Cost Predictions: A Legal and Institutional Analysis, 56 CALIF. L. REV. 996 (1968).
26. E.g., Looker v. Gulf Coast Fair, 203 Ala. 42, 81 So. 832 (1919); Burke v. Ireland, 166 N.Y. 305, 59 N.E. 914 (1901); Mackay v. Benjamin Franklin Realty & Holding Co., 288 Pa. 207, 135 A. 613 (1927).
continue to limit application of agency doctrine provides another rea-
son for recognition of the proposed duty as the basis for a cause of
action.\textsuperscript{28}

The absence of judicial consideration is reflected in, or perhaps
reflects, the profession’s past attitude towards the client’s right to be
informed and consulted during the design process. To the limited ex-
tent that the professional literature addressed the nature of the com-
munication between designer and client during the design phase, its
primary concern was with what the client tells the professional. The
previous \textit{Standard Form of Agreement Between Owner and Architect},\textsuperscript{29}
suggested for use by the American Institute of Architects, reflected an
almost paternalistic view of the relationship with the client. After con-
suming with the owner “to ascertain the requirements of the Project and
confirm[ing] such requirements to the Owner,” the architect was only
responsible for preparing and submitting, and the client for approving,
various design studies, cost estimates, and eventually, the contract
documents.\textsuperscript{30}

The latest edition of the Owner-Architect Agreement\textsuperscript{31} includes
changes reflecting a greater concern about the information given the
client. The architect is now given the duty, after reviewing the owner’s
program, “to ascertain the requirements of the Project . . . [and to]
review the understanding of such requirements with the Owner.”\textsuperscript{32}
The Architect is now charged with the essence of the proposed duty to
inform: “The Architect shall review with the Owner alternative ap-
proaches to design and construction of the Project.”\textsuperscript{33}

\textsuperscript{28} See text accompanying note 18 \textit{supra}.

\textsuperscript{29} American Institute of Architects, \textit{Standard Form of Agreement Between Owner
and Architect} (AIA Doc. B141) (1977 ed.).

\textsuperscript{30} \textit{Id.}, ¶¶ 1.1.1 to 1.1.9. The basic thrust of the commentary in the \textit{A.I.A. HANDBOOK,
supra} note 1, ch. 11 (1969 ed.), is that the architect should ensure that the client understands
\textit{what} he or she is getting, not \textit{why}. For example, as the “Owner’s professional advisor,” the
architect “advises the Owner on the best solution to his problem, in informing him of the
probable cost of the Work, in selecting systems and materials of construction, and in numer-
ous other ways. As the reading of Drawings and Specifications is almost always unfamiliar
to the Owner, the Architect should make every effort to ensure the Owner’s understanding

\textsuperscript{31} American Institute of Architects, \textit{Standard Form of Agreement Between Owner

\textsuperscript{32} \textit{Id.} ¶ 1.1.1.

\textsuperscript{33} \textit{Id.} ¶ 1.1.3. In the chapter of the \textit{A.I.A. Handbook}, entitled \textit{The Architect and Client},
the Institute suggests that “[w]hen the client is new to the building industry, the Architect
should take the time to review the building process with him in great detail. The specialized
language of the Architect and the builder must become familiar to him.” \textit{A.I.A. HANDBOOK,
supra} note 1, ch. 5, at 3 (1975 ed.).

The architect’s failure to so inform the client may also give the client a cause of action
for breach of contract. This Note focuses on negligence analysis, however, because of the
Analogies from Other Legal Contexts

Courts have recognized a duty to inform clients for at least two other professions, law and medicine. This duty to inform has been imposed on the basis of several factors which, although not strictly applicable to design professionals, do provide useful analogies.

In the medical profession the principal motivation for judicial recognition of the physician’s duty to inform a patient of the risks inherent in, and the alternatives to, a particular course of treatment is an interest in preserving an individual’s right to self-determination in situations where bodily integrity is at stake. Starting with the common law premise that any touching without consent amounted to a technical battery, courts have in the past twenty years come to the inevitable conclusion that any consent which is not also knowingly made is invalid. Thus, a patient who discovers that he or she gave consent to a treatment without at least being informed of the significant risks and alternatives available may state a negligence claim against the treating physician even without resulting harm.

Similar concerns with the right to individual self-determination have led to the recognition of the importance of an attorney’s information, or its absence, in situations where the client’s personal liberty may be affected. Because these clients are criminal defendants, their inter-


35. In an emergency it is usually held that consent is “implied” or unnecessary. See D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 9.05, at 255 (1977).

36. The development of this doctrine is traced in Meisel, The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent, 56 Neb. L. Rev. 51, 82-86 (1977) [hereinafter cited as Meisel].

37. It remains necessary to prove the existence of damage as well as causation. See text accompanying note 67 infra. Professor Goldstein argues that protection of human interests in personal dignity is sufficient grounds for strict liability for a physician's failure to inform, even in the absence of measurable damage, Goldstein, For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain, 84 Yale L.J. 683, 685-87 (1975) [hereinafter cited as Goldstein].

38. The clients in such circumstances are usually criminal defendants who have waived “fundamental” or “inherently personal” rights, Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1973), through plea bargaining or for other tactical reasons, see, e.g., Tollett v. Henderson, 411 U.S. 258 (1973) (failure to challenge discrimination in grand juror selection); Henry v. Mississippi, 379 U.S. 443 (1965) (failure to contemporaneously object to the introduction of illegal evidence); Fay v. Noia, 372 U.S. 391 (1963) (failure to exhaust state remedies before petitioning for federal relief); U.S. v. Gaines, 529 F.2d 1038 (7th Cir. 1976) (failure to warn of possible conflicts of interest of attorney representing co-defendants); Bonds v. Wain-
est in self-determination is supplemented by the constitutional require-
ment of due process. 39 The remedy for a failure to inform claim
against an attorney in such situations is an opportunity for the client to
withdraw the plea, and perhaps sue the counsel for malpractice. 40

The analogy between medical patients and criminal defendants on
one hand and design clients on the other is of only limited usefulness.
The primary motivation for recognizing the physician's and the attor-
ney's duty to inform does not apply to design professionals because of
the difference in importance of the interests involved, the risk of bodily
harm or deprivation of liberty as compared to economic loss. In addition,
there is not the same imbalance of power between professional and
client in the area of design. Designers are not, as one commentator
has characterized physicians and attorneys, persons "who, because of
their special skills, training and status, may be overbearing in their re-
lationships with generally less powerful, often highly vulnerable, per-
sons." 41 Other than a few nonprofit organizations, designers' clients
may very well be wealthier and more worldly than the professionals
they hire.

The absence of an imbalance of power in designer-client relation-
ship may therefore diminish the emotional imperative for judicial in-
tervention on the client's behalf. The design client's needs tend to be
highly individualized, however, even when the client is actually a com-
mittee of a large institution, or in situations, such as speculative de-
velopment, 42 where the final user is unknown. Although the client does
not put his or her bodily interests at risk when retaining a designer, it
should not be assumed that clients abdicate the right to final decisions
on significant design issues without express agreement. Designers
make at least as many decisions when rendering their services as do
physicians or attorneys when rendering theirs. These decisions are not
made in the charged atmosphere of an operating room or a court room


40. See Kaus & Mallen, The Misguiding Hand of Counsel—Reflections on "Criminal
15444 (Cal. App. 3rd Div., filed Mar. 13, 1978) (criminal defendant may not maintain action
against defense attorney for professional malpractice if in fact defendant committed the
crime of which he was convicted).

41. Goldstein, supra note 37, at 685. For a discussion of the duty to inform owed cli-
ents where only economic harm is involved, see Roach, The Suitability Obligations of Bro-

42. Speculative development can be defined as projects initiated and developed in the
hope of eventual sale to an as yet unknown final user.
with the result that there is more time for communication with the cli-
ent and for the possibility of a less hurried resolution of uncertainties.
As a result, there is no reason to arbitrarily limit the extensive and in-
tensive interchange of information between designer and client that is
otherwise necessary.

A stronger analogy for the proposed cause of action may be drawn
from the limited number of legal malpractice cases in which the attor-
ney's failure to inform has allegedly resulted in economic harm, as
opposed to the loss of personal freedom. Although such claims might
have used agency law as a basis for an attorney's duty to give clients all
information material to the transaction which is the subject of the attor-
ney-client relationship, it seems such claims instead have been treated
as involving simple negligence. This is perhaps because the evidence
indicated that a reasonably prudent lawyer would not have recom-

mended or followed a course of action leading to the risks which even-
tually materialized.

The analogies of duties to inform applied in the medical and legal
contexts are attractive but not conclusive. Economic harm is not as
strong a basis for legal intervention as is a threat of avoidable bodily
injury. There is, however, some indication that courts may be per-
suaded that adequate disclosure is a reasonable expectation to impose
upon all professionals. The cases dealing with attorney disclosure to
business clients present one example, and the imposition of suitability

43. See, e.g., Baker v. Humphrey, 101 U.S. 494, 500, 502 (1879); Wittenbrock v. Parker,
102 Cal. 93, 101, 36 P. 374, 376 (1894); Selover v. Hedwall, 149 Minn. 302, 306, 184 N.W.
180, 181 (1921). This duty is now embodied in ABA CODE OF PROFESSIONAL RESPONSIBIL-

Although this approach is a strong basis for requiring attorneys to inform their clients
of the risks and alternatives to a particular transaction, this duty has only been recognized in
one reported case in which the court held: "[L]awyers are obligated to scrutinize any con-
tact which they advise their clients to execute, and are required to disclose the full import of
the instrument and the possible consequences that may arise upon execution of it." Ramp v.
St. Paul Fire & Marine Ins. Co., 263 La. 774, 786, 269 So.2d 239, 244 (1972); accord, Smith

The legal profession has long provided some recognition of the attorney's duty to in-
form. The prior Canons of Ethics imposed a duty upon the lawyer, after becoming fully
informed of all relevant information, to give a "candid opinion of the merits and probable
result of pending or contemplated litigation." ABA CANONS OF ETHICS, CANON 8 (adopted
August 22, 1908) (superseded). This has been replaced by ABA CODE OF PROFESSIONAL
RESPONSIBILITY, EC 7-8 (1969), which one commentator has paraphrased to read: "A law-
ner should use his best efforts to insure that his client makes decisions on a fully informed
basis. The lawyer should do this on his own initiative and his advice may go beyond purely
legal considerations. A lawyer should use his full experience, be complete and objective,
and discuss moral as well as legal factors in aiding his client's decision-making. A lawyer

44. See, e.g., Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).
45. See cases cited note 43 supra.
obligations on securities brokers presents another.\textsuperscript{46} It is highly likely, therefore, that a trend in the direction of requiring greater disclosure will continue, and this trend would encourage the imposition of the proposed duty.

\textbf{Policy Considerations}

In addition to the practical reasons for recognizing designers' legal duty to inform their clients and the analogies provided by the experience in legal and medical malpractice cases, analysis of two other areas of inquiry provides support for the proposed cause of action. The first is a broad consideration of the roles of professionals and their clients with a view towards enhancing the effectiveness of the service provided and the satisfaction of the consumer with this service. The second area of inquiry concerns the allocation of any benefits and burdens between designers and their clients which may result from the proposed use of the informed consent doctrine. The result of these inquiries indicates that the general principles underlying the proposed duty are sound and that the impact of a carefully defined cause of action will be equitable.

\textit{Models of Professionalism: Traditional vs. Participatory}

Professionals may be defined as those who use expertise based on knowledge and experience to render services to clients.\textsuperscript{47} Two polar views may be advanced concerning the appropriate relationship between professionals and their clients: dependent and participatory.\textsuperscript{48} In the traditional dependent relationship the client brings problems to a professional, who exercises broad responsibilities. The client then retires to await the professional's solution. In keeping with this paternalism, any solution the professional proposes is presumed to be in the client's best interest. As the client is only minimally involved in the problem-solving process, this presumption imposes a heavy burden on


\textsuperscript{47} According to the traditional definition, a profession is distinguished from a trade by a primary emphasis on the public good, rather than the pecuniary gain of the individual practitioner. \textit{See D. Rosenthal, Lawyer and Client: Who's in Charge?} 8 (1974) [hereinafter cited as \textit{Rosenthal}].

\textsuperscript{48} The participatory model was first proposed by two psychiatrists as one of three models of the doctor-patient relationship. Their first model is of an active physician and an entirely passive patient, as when anesthetized for surgery. The second model is of a guiding physician and a cooperating, but basically passive and dependent patient. This is equivalent to the traditional client-professional relationship. The third model is of interdependent and cooperating client and professional—the participatory approach. The original argument was that each model was particularly appropriate under certain circumstances. Szasz & Hollender, \textit{A Contribution to the Philosophy of Medicine: The Basic Models of the Doctor-Patient Relationship}, 97 \textit{Archives of Internal Med.} 591 (1956), \textit{cited in Rosenthal, supra} note 47, at 9-10.
the client who disapproves of the work when it is completed, and few clients have the knowledge and experience required to second-guess the professional’s work at this point in any event. The traditional model assumes a great disparity in the ability of professionals and clients to use information concerning the benefits, risks, and alternatives of various problem solutions. In fact, this disparity exists, if at all, only to the extent that training and experience provide unique decision-making capabilities. What professionals actually provide is the ability to define benefits, risks, and alternatives, not any special skills for choosing between them. In fact, in the context of design services, frequently only the client has the knowledge required to understand the implications of the proposed solutions for the desired result, although the professional must have the skill to know which questions to ask so as to focus attention on those implications.

The opposite of the traditional approach of dependency is one in which both client and professional share control over all of the meaningful decisions arising out of their relationship, that is, both participate in the decisions. The participatory model forms the basis for a style of professional practice which demands that the client be included at every stage in the problem-solving process. The duty to inform lies at the heart of this approach.

There are a number of advantages which justify what critics would see as the time consumption and confusion which might result under the participatory model. Since clients have to live with the results, there is a basic advantage to them in avoiding any unsatisfactory performance which may result from the withholding of information concerning risks and alternatives. Furthermore, the additional

49. One commentator has characterized this traditional approach as follows: “[P]rofessionals, in contrast to members of other occupations, claim and are often accorded complete autonomy in their work. Since they are presumed to be the only judges of how good their work is, no layman or other outsider can make any judgment of what they can do. If their activities are unsuccessful, only another professional can say whether this was due to incompetence or to the inevitable workings of nature or society by which even the most competent practitioner would have been stymied. This image of the professional justifies his demand for complete autonomy and his demand that the client give up his own judgment and responsibility, leaving everything in the hands of the professional.” H. Becker, The Nature of a Profession, in Education for the Professions 38-39 (1962), cited in Rosenthal supra note 47, at 8.

50. The branch of management science concerned with decision analysis differentiates between “good” and “bad” decisions not on the basis of satisfaction with the outcome, but on whether the decision is consistent with the choices, available information, and preferences of the decision maker. In the absence of the requisite information with which the proposed cause of action is concerned, it becomes impossible by definition to make “good” decisions. See generally Howard, Decision Analysis in Systems Engineering, in Systems Concepts: Lectures on Contemporary Approaches to Systems 56 (R. Miles ed. 1973).

51. Arguably there is also involved injury to what may be called a person’s “dignitary”
information provided through a participatory relationship encourages the client to provide more focused definitions of what is needed. In addition, the client’s continuous involvement assures the client’s ratification of the professional’s decisions and thereby eliminates many of the grounds for subsequent grievances if there are bad results. Active involvement also permits the client to make a timely evaluation of the services being rendered; if mistakes are being made they may be caught in time and corrected, even, perhaps, by withdrawing and selecting another professional. The basic goal of the participatory model is thus to enhance the client’s satisfaction with the results of the professional’s work. To the extent that the duty to inform is an integral part of the participatory model, the recognition of a duty to inform would further this goal of customer satisfaction.

**Burdens and Benefits**

The cause of action proposed in this Note would have certain effects on the balance of power and responsibility between designers and their clients. To the extent that a legal duty to inform results in additional burdens upon designers as potential defendants, upon the courts, and even upon clients through increased insurance costs reflected in fees, there must be equivalent benefits to all concerned.

One of the more obvious burdens upon professionals which might result from the new duty could be given the general title “practicing for the lawyers.” It may be feared by some that the imposition of yet another basis for professional malpractice actions will lead to the design equivalent of “defensive medicine” with all the attendant additional costs and formalities. If the standard of disclosure is unclear, there may be a tendency to inundate the client with information in long, polysyllabic minicourses on building science. Such information is costly to assemble and present, particularly as the buildings and processing facilities designers work on become increasingly complex.

interest. This is violated any time decisions are made for the individual without including the subject in the process. Goldstein, supra note 37.

52. Cf. Schneyer, Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices, 1976 Wisc. L. Rev. 124, 130 n.24 (professionals tend to view active client choice in terms of the client’s freedom to withdraw from the client-professional relationship, rather than in terms of the client’s ability to make decisions within it).

53. A recent study of the handling of some 60 personal injury cases indicates a clear increase in client satisfaction as a result of having access to full information about the implications of the problems presented and because active client participation promoted more effective solutions. Rosenthal, supra note 47, at 169 & n.50.

54. See Cobbs v. Grant, 8 Cal. 3d 229, 244, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972).

55. Expense and confusion may be further compounded whenever the design is the product of a team, as is typically the case. This team may consist of architects and a range of engineers including structural, mechanical, civil, lighting, and acoustical specialists. The
Another argument against recognition of a cause of action for a designer's failure to inform is the resulting apocryphal "flood of litigation."56 It may well be difficult or expensive to prove negligence in the actual design in certain cases in which there are clearly bad results, and this difficulty will tempt plaintiffs to include a claim for failure to inform as a pro forma count in any negligence complaint against designers. The difficulties of proving causation and damages,57 however, may provide some deterrent to the litigation of marginal claims. More significantly, the deluge argument must be rejected if the purposes of tort law are to be upheld when genuine and serious injuries have been sustained.58

A third argument against imposing an additional basis for a designer's negligence liability is that experimentation and innovation will be discouraged because there may be no inexpensive way of determining the risks of a new technique before it is applied. If, however, any significant uncertainties are communicated to the client, the client would be free to approve or disapprove the proposed course of action or to authorize the additional expenditures of time and money necessary to analyze identified unknowns.

Finally, significant social and economic impacts of any tort action hinge on the availability of insurance as a risk-spreading mechanism. At the outset, it is reasonably certain that to the extent the recognition of a designer's duty to inform results in an increase in the number of actions filed against designers, the costs of malpractice insurance will be pushed even higher, assuming such insurance continues to be available at all.59 As it becomes increasingly expensive to practice design at least two forms of deterrence to the failure to inform will result. First,
when the proposed cause of action shifts losses from client to designer, some professionals, in the absence of insurance, will respond by choosing to engage in safer activities. If designers leave the field altogether, as have some physicians because of the soaring costs of malpractice insurance, a shortage of necessary service providers could result at the unlikely extreme. Even with some decrease, the majority of remaining practitioners may tend to be either judgment-proof or wealthy enough to self-insure. If malpractice insurance is mandatory, as it is now for work on most public and institutional projects, it may be extremely difficult for all but the wealthiest professionals to enter the practice of design for these facilities. One possible result, again at the extreme, would be an oligarchy among the remaining firms.

The apparent impact of this doomsday scenario may be reduced to less disastrous proportions if one remembers that insurance against damage resulting from a failure to inform is for the protection of the designer and the client, not third parties. Designers and clients are therefore in a position to bargain concerning the direct allocation of the cost of risk spreading. The availability of insurance also serves to put a price on the risks which would result from the proposed cause of action. Once identified, this cost may be borne directly by the professional through self-insurance, or the client may externalize the expense by requiring the designer to insure.

Balanced against burdens upon design professionals which may foreseeably result from recognition of the proposed cause of action are a number of benefits to both clients and designers. For example, it is impossible for a client to know whether additional time and money will be necessary to diminish or eliminate uncertainties in outcome without first being informed of those aspects of the proposed design solution which may lead to uncertain final results. The designer's explicit recognition of uncertainty also benefits clients by leading to introspection.

---

60. This is what Professor Calabresi calls general, or market, deterrence. See generally G. CALABRESI, THE COSTS OF ACCIDENTS 68-94 (1970).
62. In the second case, the client is more likely to face a design cost which directly reflects both the relative magnitude of risks inherent in the type, size and complexity of the client's particular project and the relative competency of the designer based on the professional's qualifications, past work, and claims experience.
63. In terms of scientific decision analysis it is possible to put a price on the next increment of information gathering and weigh the additional cost against the increased odds of a desirable outcome. See Howard, Decision Analysis in Systems Engineering, in SYSTEMS CONCEPTS: LECTURES ON CONTEMPORARY APPROACHES TO SYSTEMS (R. Miles ed. 1973); C. CHURCHMAN, THE SYSTEMS APPROACH (1968).
which will encourage the designer to work more carefully. Even the availability of insurance would be unlikely to weaken the impetus to use more care because practitioners will fear that any malpractice claims will increase deductibles and premiums, and might eventually result in uninsurability.

Both designer and client will benefit from a greater exchange of information to the extent that the quality of the final design is improved, because two heads are usually better than one in generating a wider range of appropriate solutions. In addition to enhancing client satisfaction, and therefore hopefully leading to the growth of client demand, involving the client in the process of evaluating risks and alternatives may prove a useful form of insurance against future malpractice claims. By encouraging the client to reject or ratify design decisions, the designer to some extent may insure that the result of a failure to achieve an expected outcome is not an automatic lawsuit. The more the client is informed, the greater will be his or her intellectual and emotional stake in the project with the result that, to a limited extent, the client can then be said to have assumed the disclosed risks. The designer's use of this reasoning as a defense is likely to have greater weight with the factfinder than a similar defense would have in a medical informed consent case. In a medical informed consent case, a jury may tend to discount this response because of the assumption that only another physician realistically could have comprehended the information provided. Injuries in design cases of the type under discussion are economic, not bodily, and the relationship between designer and client is not marked by emergency or coercion. Clients are therefore far more likely to be held to have assumed responsibility for proceeding after the risks have been reasonably disclosed.

Problems of Proof

An action for failure to inform calls for the application of conventional tort doctrines. The action sounds in negligence and therefore requires the plaintiff to establish a duty, a breach of the duty, a causal connection between breach and the harm suffered, and the measure of damages. The definition of the standard of disclosure required of a defendant designer necessarily describes the limits of breach. This definition should focus on the materiality of the information which is alleged not to have been communicated to the client, a standard which, it is submitted, should require evidence that but for or substantially be-

65. See text accompanying note 53 \textit{supra}.
66. See note 53 \textit{supra}.
67. \textit{Prosser}, \textit{supra} note 18, § 30, at 143.
cause of the absence of certain material information a reasonable client under the particular client's circumstances would have made decisions leading to measurably better results. Use of an objective, reasonable client standard provides a significant limit to the designer's liability, while also freeing plaintiffs from reliance on a standard of disclosure set by the profession. Once the client has met the requisite burden of proof, an appropriate rule of measurement must then be defined for use in proving damages. In addition, the proposed cause of action raises certain special considerations with respect to the application of a statute of limitations.

**Standard of Disclosure—The Reasonable Client**

There are two possible bases for a standard of disclosure as applied to design professionals. One basis is the profession itself, which defines adequate disclosure as that which a reasonable practitioner would have made under the circumstances.\(^6\) This standard is generally parallel to the standard of liability in medical negligence cases. As long as the source of the appropriate standard is the profession itself, its definition requires expert testimony.

The other possible basis, the one proposed here for use in designer failure-to-inform cases, is the factfinder's conception of the needs of a reasonable client under the particular client's circumstances. This standard is similar to the approach taken by a growing number of jurisdictions in medical informed consent cases\(^6\)\(^9\) and adopted by federal courts in interpreting the disclosure requirements of the Securities Exchange Regulations.\(^7\) A strictly subjective standard using the particular client as the only reference for appropriate disclosure would unfairly burden the defendant, because the client's bitter hindsight is easily subject to the distortion borne of dissatisfaction with the results of the designer's services.\(^7\) The proposed standard should therefore be

\(^6\) This is analogous to the standard applied in medical informed consent cases before Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972). See also Natanson v. Kline, 186 Kan. 393, 411, 350 P.2d 1093, 1107 (1960); Aiken v. Clary, 396 S.W.2d 668, 674 (Mo. 1965); cases cited in Meisel, supra note 36, at 94 n.118. The standard is "what is customary and usual in the profession." Meisel, supra note 36, at 93. See also Prosser, supra note 18, § 32, at 165; 1 D. Louisell & H. Williams, Medical Malpractice ¶ 8.04, at 200 (1977).


defined in terms of what a reasonable client in like circumstances would consider important or significant.72 Relevant client characteristics may include previous experience with design professionals and services of the same type; the client's access to special technical advice as, for example, in the case of large industrial firms with in-house engineering staffs; what the client knows or should know of trade or industry custom, particularly with respect to retaining independent consultants; the client's sophistication and expertise in the area; and any special information which should have put the client on notice and provided an opportunity to avoid harm.

The use of an objective, reasonable client approach lessens the practical problem of plaintiffs being completely dependent upon self-serving standards of disclosure set by the profession itself.73 The role of the expert must therefore be clearly delineated. Professional custom should not be required to provide a definition of the needs of a reasonable client because this is not a subject which can only be evaluated through application of the designer's special skills and knowledge.74 Although expert testimony may be necessary to establish the existence of risks and alternatives to a particular design solution, the materiality of information about risks and alternatives to a reasonable client under the plaintiff's circumstances is an issue that should be resolved without reliance on expert testimony.

The proposed cause of action would appear not to provide a situation suitable for application of the doctrine of comparative negligence. The client's need for information should be determined by an objective standard and in the absence of information to the contrary, the designer should be entitled to rely on the client's reasonableness.75 Thus,

U.S. 1064 (1972); Cobbs v. Grant, 8 Cal. 3d 229, 245, 503 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972). It is not realistic to extend the arguments presented by Goldstein, supra note 37, concerning the need to use a subjective standard for the duty to inform because the relationship between designer and client is economic and the client's dignitary interests are not directly threatened by the state or someone, for example, a physician, with the appearance of greater power.

73. See note 68 supra.

One commentator has argued that it was just such factors causing deserving plaintiffs to be non-suited which encouraged both courts and plaintiffs to seek causes of action framed differently from conventional negligence as a means of expanding available avenues for seeking redress. See Meisel, supra note 36, at 63-65. To the extent that courts still required that the standard of disclosure be determined by reference to the profession itself, the effort was, and is, effectively sabotaged.

75. Because the relationship between designer and client is not an adversary economic
if a jury found that after the designer’s disclosure the client acted unreasonably in not comprehending the information conveyed or not seeking clarification of any information not understood, the designer would not be liable for an allegedly undesirable outcome. The jury would necessarily have found that the designer’s duty had been completely discharged. In other circumstances, however, the designer may be held fully liable for claims of clients who had made apparently foolish or irrational decisions. For example, if the Empress Dowager demanded a marble ship, the naval architect applying a reasonable person standard of disclosure might not be required to inform her of the risk of unseaworthiness if the architect could reasonably assume that the Empress was, in fact, rational and did not expect the ship to float. If, on the other hand, the architect could be charged with an awareness of the Empress’ misconceptions, absent disclosure, the moment the ship sank she would have a valid complaint for the architect’s failure to inform and would be entitled to a full recovery.

It should be noted that the proposed standard of disclosure stops short of requiring that the client actually comprehend communicated information concerning risks and alternatives. A duty to insure comprehension has been proposed as the ideal standard in the context of medical services in order to assure that the patient makes “good” decisions. This argument is not as convincing in the context of design because there is not the same disparity in apparent power between parties, as it would be between buyers and sellers in the market place, the client should not be required to exercise due diligence in actively seeking information other than that conveyed by the designer he or she has retained. Compare the analysis and review of recent judicial interpretations of the requirement of justifiable reliance implied by Securities Exchange Commission Rule 10b-5, in Dupuy v. Dupuy, 551 F.2d 1005, 1014-20 (5th Cir. 1977).

76. The requirement that the designer give information which would be desired by a reasonable client in the particular client’s position introduces an element of subjectivity needed to protect the particular client’s ability to make idiosyncratic decisions. See Capron, Informed Consent in Catastrophic Disease Research and Treatment, 123 U. PA. L. REV. 340, 410 (1974) [hereinafter cited as Capron].

77. If the client refuses to consider the professional’s advice and warnings there should not be liability. Cf. the recent New York informed consent statute providing:

> 4. It shall be a defense to any action for medical malpractice based upon an alleged failure to obtain . . . an informed consent that:

> ... 

> (b) the patient assured the medical practitioner he would undergo treatment . . . regardless of the risk involved, or the patient indicated to the medical practitioner that he did not want to be informed of the matters to which he would be entitled to be informed . . . .”


78. See note 50 supra. Some commentators have argued that, at least in the context of medical informed consent actions, the physician ideally has the duty to assure that the patient actually comprehends the information given. See, e.g., Capron, Informed Consent in Catastrophic Disease Research and Treatment, 123 U. PA. L. REV. 340, 410 (1974); Meisel, supra note 36, at 113-23. This was in response to Judge Robinson’s comment in Canterbury
tients and physicians, and design services are not rendered in an atmosphere of emergency. The information communicated should, however, provide a reasonable opportunity for comprehension. Certain blanket forms of disclosure therefore may be clearly noninformative. Examples include a physician’s warning that “you might die” or an architect’s statement that a house might be “hard to heat.”

The Materiality of Risks and Alternatives

Communication between designers and their clients often covers a wide range of subjects, usually takes place over periods ranging from several months to several years, and is marked by informality. Bad results may only appear after a project is completed, at a time which is usually at least a year and possibly as long as fifteen years after the design phase. During the designer-client relationship there may have been extensive discussions of design solutions which in the end were not employed or which did not lead to “bad results.” Similarly, there may have been little or no discussion concerning those design decisions which eventually became the basis for a lawsuit. These practical problems of proof are compounded by the legal task of defining, for each factual situation, what the client should have been told.

The reasonable client standard may also be applied to separate those risks and alternatives which should have been communicated from those which may be considered relatively trivial or unrelated, those which are common knowledge, or those of which the plaintiff, because of special circumstances, should have been aware. Expert testimony may well be required to determine the range of information.

v. Spence, 464 F.2d 772, 780 n.15 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972), limiting the duty of the physician to that of disclosing, not informing, the patient.

79. Goldstein, supra note 37, at 690-98.

80. There is little likelihood however, that design clients will require, or be willing to pay for, total disclosure of all known or discoverable risks. Such disclosure, if made, might be couched in terms so foreign that common experience would fail as a guide to comprehension.

In an experiment patients were informed in terms of probabilities about the risks of using a drug called “acetylsalicylic acid” after which disclosure, 21 of 66 subjects refused to take the drug as a headache remedy. After learning that this drug was actually aspirin, however, 20 of the 21 then said their future use of aspirin would be unaffected. Epstein & Lasagna, Obtaining Informed Consent: Form or Substance, 123 ARCH. INT. MED. 682, 684 (1969), cited in Schneyer, Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices, 1976 Wisc. L. Rev. 124, at 133-34.

81. The basic concepts for the San Francisco Bay Area Rapid Transit system were outlined in an engineer’s report in 1956. The system began operation in 1974, 18 years later. See generally McDonald & Smart, Inc., A History of the Key Decisions in the Development of Bay Area Rapid Transit (1975) (prepared for the Metropolitan Transportation Commission) (National Technical Information Service Doc.).

82. These special circumstances include noise next to railroad tracks, rust on metal buildings near the sea, or risks which the client, because of technical expertise equivalent or
available to the competent practitioner. When the factfinder then determines which information should have been considered material by the reasonable client, a judgment is also being made concerning the appropriate expectations of the reasonable practitioner with respect to the needs of that client. A reasonableness standard should therefore prevent the designer from being held responsible for an in-depth examination of such factors as the relative costs and feasibility of all alternatives. Such work can be very costly because often the only means of accurately evaluating alternative solutions is first to design them. Reasonable disclosure, moreover, has other limits. As stated by the Supreme Court of California in the context of medical informed consent: "[T]he patient's interest in information does not extend to a lengthy polysyllabic discourse on all possible complications. A mini-course in medical science is not required." 83

The standard of disclosure should also hold the designer accountable for any knowledge he or she actually or reasonably should have possessed concerning the particular client's needs. The standard of disclosure proposed in the liberal medical informed consent cases explicitly recognizes the likelihood of such knowledge. In the leading case of Canterbury v. Spence, 84 the court adopted a definition of materiality of the risks for which physicians would be held accountable in failure-to-disclose cases as those which a reasonable person "in what the physician knows or should know to be the patient's position, would be likely to attach significance to . . . in deciding whether or not to forego the proposed therapy." 85 The underlying assumption is that the patient is superior to that of the designer in the particular subject matter, should have been aware or had the means to discover.

83. Cobbs v. Grant, 8 Cal. 3d 229, 244, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972); accord, ZeBarth v. Swedish Hosp. Med. Center, 81 Wash. 2d 12, 25, 499 P.2d 1, 9 (1972). 84. 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972). 85. Id. at 787 (quoting Waltz & Scheuneman, Informed Consent to Therapy, 64 Nw. U. L. REV. 628, 640 (1970)); accord, Wilkinson v. Vesey, 110 R.I. 606, 627, 295 A.2d 676, 689 (1972). Meisel, supra note 36, at 87, offers a more general description of the scope of information required by the informed consent cases of the past 15 years: (a) the nature of the ailment; (b) the nature of the proposed treatment; (c) the probability of success; (d) the risks inherent in the proposed treatment; and, (e) possible alternatives.

The court in Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972), suggested that some expert testimony on this question would be helpful because the physician can sense "on the basis of his medical training and experience . . . [what] the average, reasonable patient" would want to know. Id. at 787.

The United States Supreme Court has considered a standard of materiality in the context of the disclosure required by the Securities Exchange Regulations. The Court rejected a definition of "material" facts as those "which a reasonable shareholder might consider important," TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976), because the "might" formulation was "too suggestive of mere possibility, however unlikely." The definition adopted instead was that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in determining how to vote." Id. (em-
not anonymous but is, or should be, a person whose needs and wants are known to the treating physician. There is even more reason for a designer's client not to be treated as anonymous, because the designer-client relationship transpires in circumstances which do not have the air of emergency so common to the delivery of medical care. The burden imposed on designers by a client-centered standard therefore would not appear to be unduly harsh.\footnote{86}

Although no expert testimony may be required to determine the standard of care, the jury will still be required to weigh conflicting expert testimony concerning the existence of material alternatives and may thus be bound by the testimony of a single expert witness. This aspect of proof should therefore serve to limit a plaintiff's use of the claim for failure to inform to those cases where the available alternatives were sufficiently clear and material to elicit the necessary expert evidence.

**Damages**

The measure of damages is a critical element of the proposed cause of action. In addition to establishing the magnitude of the alleged harm, proof of damage establishes the fact of harm by showing that but for the failure to inform, the client would have experienced measurably better results from the defendant's services. It is submitted that the measure should limit client damages to those costs of implementing a reasonable alternative that would be incurred at the time this alternative is or should have been discovered which are in excess of the cost of implementing the alternative at the time of initial construction. In appropriate cases the plaintiff should also be allowed compensation.

*emphasis added*) This test is replaced in the proposed cause of action by the necessity of proving causation. *See also* Restatement (Second) of Torts § 538 (2)(a) (1976).

\footnote{86. Compare the approach taken by the courts in securities regulation cases where, for example, a corporation issuing a proxy statement cannot possibly be held responsible for knowing the range of individual investors' financial choices or investment goals. In securities cases, the courts begin with the premise that underlying objective facts exist. In determining whether these should have been disclosed, proof of a causal connection to a shareholder's injury is not required. It is not necessary to show that but for the absence of disclosure, the investor would, in the case of a proxy statement, have voted otherwise. Instead, as the Court held in TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976), all that is required is a showing that, under the circumstances as related to the investment, not the particular investor, the omitted facts would have been considered significant by the shareholder in shaping a decision on the matter; that is, "the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available."

As the designer's duty to inform is not statutory, such strict liability is inappropriate and therefore, as discussed previously, see text accompanying note 67 supra, liability requires proof of a causal connection between the failure to inform and a resulting injury.
for the loss of "comfort and enjoyment," if the property is for personal use, or for lost profits, if it is for business use, during the time the structure's use was impaired due to materialized risks which could otherwise have been avoided. Any additional operating or maintenance costs attributable to the structure's bad performance until the time of correction should also be included.

Two concerns arise in connection with the calculation of damages for a failure to inform. The first concern is the need for the plaintiff to show the existence, probable performance, costs, and reasonableness of the claimed alternatives. To this extent proving damages involves issues similar to those encountered when establishing the standard of disclosure. The alternatives serve as a benchmark from which to measure both the diminished performance of what, in fact, was received, thereby determining the amount of damage for the loss of beneficial use and enjoyment, and for determining the cost saving, if any, which would have resulted had the alternative been implemented during construction in place of the design actually chosen.

The problems involved in establishing this benchmark are substantial, but comparable to the problems encountered in the application of the informed consent doctrine to medical and legal services. For example, in actions against physicians for failure to secure informed consent, the benchmark is the patient's state of health and relative freedom from pain and suffering either before the risk of which the physician failed to warn materialized, or as it would have been if an alternative, and presumably less risky, procedure had been successfully performed.


88. The specific issue of the damages proximately resulting from a physician's failure to inform has rarely been addressed. One interesting case concerns a suit by parents for the "wrongful life" of a child born with severe defects because the physician giving prenatal care negligently failed to diagnose the mother's illness during pregnancy. Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975). The Texas Supreme Court held that damages were to be measured solely by the expenses reasonably necessary for the care and treatment of the child's impairment, allowing no recovery for pain and suffering or other costs that might have been avoided. Id. at 849.

Some commentators suggest that damages for a physician's failure to inform be calculated as "the difference between [the patient's] condition with no treatment and his condition after the undisclosed risk materialized." Waltz and Scheuneman, Informed Consent to Therapy, 64 Nw. U.L. Rev. 628, 649 (1970). They admit, however, that the possibility of alternative treatments makes the case "more difficult." They suggest that this would be the appropriate circumstance to use the measure of the loss resulting from the risk which materialized, whether or not the therapy was carefully performed. This measure was proposed in dictum in Natanson v. Kline, 186 Kan. 393, 411, 350 P.2d 1093, 1107 (1960).

In the securities regulation cases, the starting place for the measure of damages caused by misrepresentation will usually be the opportunities in terms of market value which, but for the defendant's action, the plaintiff would have enjoyed as a reasonable investor. In addition, courts may award prejudgment interest to the extent that a defendant's misrep-
Finding the benchmark of alternatives with better results is the one element of proof of the proposed cause of action which requires plaintiffs to present expert testimony. The experts' task will be similar to that which medical experts face in describing the probable outcome of a patient's illness if a reasonable patient under the particular circumstances had not consented to the treatment given. The only difference is that the designer begins by working with a clean slate, not a preexisting defective structure, and therefore the evidence required need only establish the existence and relative costs of the reasonable reduced-risk alternatives which were available in the appropriate market at the time the negligence occurred.

The second concern arising in connection with the calculation of damages is the question of whether tort recovery theory not limited as suggested in this Note would award too much. The issue is best seen in the context of the example in which high ceilings in the living rooms of a house lead to higher heating bills and less than optimal comfort. Leaving aside the possibility that the client unjustifiably relied on the designer and should have known these problems commonly accompany this design approach, there are several possible measures of the harm suffered. The conventional tort recovery would be measured by the cost of making the plaintiff whole, perhaps the cost of larger heating systems, more insulation, or the discounted present value of future excess heating costs.

This measure seems unfair because the client is unjustly enriched. Absent negligence in the actual construction, the client did in fact receive what was bargained for, a house with open ceilings which make certain rooms appear more spacious. The client did not originally pay the additional costs of a larger heating system or more insulation required to secure both the feeling of spaciousness and a comfortable room on a winter day. Strict application of the out-of-pocket rule in
this type of situation, however, would therefore lead to the conclusion that there had been no actual damage.

Yet the client has been harmed. But for the designer’s failure to inform, the client, as a reasonable person, would have chosen to avoid, or at least mitigate, the bad results. The direct result of the designer’s negligence, therefore, is to deprive the client of reasonable alternatives and thus to interfere with the client’s beneficial use and enjoyment of the property until the problem is corrected. In the example above, damages therefore should include any additional costs necessary to keep the house warm. There is, however, some authority for limiting the costs of correction, even in a tort action, so that if the costs are no greater, after adjusting for inflation, than they would have been at the time the house was first constructed, the costs of correction should not be chargeable to the designer’s failure to inform. Under the proposed measure the designer is still liable for what in a contract action would be the consequential damage of lost profits or comfort and enjoyment, as well as any additional operating and maintenance costs which would otherwise have been avoided. In the case of business property it is important to remember that the designer did not guarantee any level of profit. Damages should therefore only be those profits which the defendant’s negligence actually prevented the plaintiff from realizing and which were otherwise reasonably certain to have accrued from an alternative course of action.

The proposed measure thus combines tort and contract concepts. It is designed to complement a duty to inform as distinguished from a duty which would have the professional insure the quality of the final results.

Limitation of Actions

The outcome of many malpractice cases hinges on the peculiarities of the applicable statute of limitations and its judicial interpretation. Questions of commencement and expiration are especially critical in architecture and engineering cases because of the longevity of both the construction process and the expected period of satisfactory project performance, as well as the complexity of the forces which may interact to bring about bad results. Damage may occur many years after a project is completed, but long before failure is expected. Clients may then

---

90. See note 87 supra.


decision to build, the defendant did not insure against the costs of building foundations; fill was a physical attribute of the land and the costs of adequate foundations were inevitable. Thus, compensable damage could only result to the extent that the defendant’s false report induced the plaintiff to pay more for the lots than they were worth. If the lots were worth what the plaintiff paid, there was no damage. See also Kellog v. Pizza Oven, Inc., 157 Colo. 295, 402 P.2d 633 (1965).
take even longer to connect their injury to the designer’s negligence or to the possibility that harm could have been avoided by adequate disclosure. In an ordinary bodily injury or property damage case, in comparison, the negligent act, the sustaining of damage, and the discovery of the injury are practically simultaneous. In design cases these events may be separated by many years, and the client may not question the information originally received unless, or until, the extent of damage requires remedial action and consultation with another professional.

Characterization of Claim and the Applicable Period

The outcome of a statute of limitations defense has often been determined by the plaintiff’s pleading. In some states the statutory period for contract actions is significantly longer than for torts,91 and plaintiffs have met with varying success by “theory shopping” in the phrasing of their complaints.92 In response to this problem, and to heavy lobbying by the design profession and the construction industry, most states have now enacted statutes which specifically limit the time during which an action may be brought against designers, including architects and engineers, building contractors, and in some cases, material-suppliers, for personal or economic injuries resulting from defects in improvements to real estate.93 The problem of the characterization of a claim for fail-

92. For example, in Skidmore, Owings & Merrill v. Connecticut Gen. Life Ins. Co., 25 Conn. Supp. 76, 197 A.2d 83 (1963), the owner sought damages resulting from the architect’s negligent specification for the coolant to be used in the heating and air conditioning system. As a result of the error the plumbing corroded. The statute of limitations for torts was one year from date of injury or three years from the date of the negligent act, and there was a six-year limitation period for breach of contract. The court suggested that the longer period should apply and indicated that the basis for the complaint was the architect’s breach of the contractual duty to design, supervise and inspect.

In contrast, in Bales for Food, Inc. v. Poole, 246 Or. 253, 424 P.2d 892 (1967), the owner alleged that the building was incorrectly located by the engineer, making the parking lot too small. The complaint alleged a breach of the engineer’s contract for professional services, governed by a six-year statute, rather than negligence, which was subject to a two-year limit. The court reluctantly relied upon an analogy with medical malpractice cases in holding that the failure to exercise due care is a tort. Id. at 256, 424 P.2d at 893. In 1971 the legislature responded with Or. Rev. Stat. § 12.135 (1977), requiring that actions for architects’ and engineers’ malpractice be commenced within two years from the date of injury and not more than 10 years from the date of substantial completion.

The malpractice of failure to inform would easily be subject to the same uncertainty of characterization as the negligence in the examples above. Several New York lower courts have solved the analogous question for medical informed consent actions by choosing to apply the statute for malpractice and personal injury rather than the limit governing actions for assault and battery. See Abril v. Syntex Labs., Inc., 81 Misc. 2d 112, 364 N.Y.S.2d 281 (1975); Bruse v. Brickner, 78 Misc. 2d 999, 359 N.Y.S.2d 207 (1974).
93. See Comment, Limitation of Action Statutes for Architects and Builders—Blueprints...
ure to inform has thus been solved by legislation.

Commencement of the Statutory Period

Most designer-builder limitation statutes have also resolved the issue of the commencement of the statutory period. The typical maximum period limit begins to run at the time of substantial completion of the real property improvements which are the source of the claim. Some statutes also provide for a shorter period which begins to run when "the claim arises," "when a cause of action accrues," at the time of injury or damage, or at the time of discovery of damage.

From the client's viewpoint the best protection of potential rights of action for a designer's failure to inform is a rule which tolls the statute until the discovery of a defect coupled with knowledge that, but for the failure to inform, the damage could reasonably have been avoided. The approach would involve proof of two questions of fact: the time

**for Non-action,** 18 Cath. U.L. Rev. 361, 361 n.1 (1969), reporting that as of 1969 some 30 states had passed such statutes. The number is now 46, including the District of Columbia; only Arizona, Iowa, New York, Vermont and West Virginia do not have such statutes. To give additional protection to third parties, most statutes limit their coverage to those engaged in the planning or construction of a structure, specifically exempting owners or those in possession and control of the premises after completion. *E.g.*, Cal. Civ. Proc. Code § 337.1 (West 1972); Or. Rev. Stat. § 12.135 (1977). The distinction is based upon the doctrine that the latter group has a continuing duty to third persons to use reasonable care to keep the premises safe.


94. *E.g.*, Del. Code Ann. tit. 10, § 8127 (1974) specifies the earliest of, *inter alia,* substantial completion, completion according to the contract, commencement of the statute as provided for in the contract, date of payment in full for the particular phase of the work in issue, or the date of the owner's acceptance of the work.


when the damage should have been discovered and the time when the existence of information concerning risks and alternatives which would have lead to a different, and better, design decision should have been discovered. Patent defects present no problem, because the reasonable client is put on notice the first time a roof leaks or it appears to be impossible to maintain the temperature of a room at a comfortable level. Some allowance should be made, however, for latent defects, for example, structural dry rot resulting from a hidden leak in a roof or wall. It may be necessary to allow a longer, although not indeterminate, period for claims for deficiencies which could not have been discovered by reasonable inspection.99

The time of discovery of the defect which has caused economic damage is also the logical point to charge the plaintiff with knowledge of the existence of information concerning risks and alternatives not communicated during the design phase, which form the basis of the complaint for failure to inform. Discovery of damage should cause the reasonable client to inquire not only about solutions to the problem but also about the possibility that it could have been prevented. Time of discovery is a far more favorable standard than one based upon the time at which the negligence occurs.100

The logical way to control the period of liability in actions for failure to inform will be to combine the substantial completion and time of discovery rules. Time of completion will mark the beginning of the absolute limitation period. If damage is discovered at any time within that period the discovery will begin the running of a shorter period on the basis that the reasonable client has been put on notice of a need to search the design process for any negligence, including the possibility of the designer's failure to inform.

Conclusion

Recognition of the cause of action proposed in this Note is both necessary and practical. It is supported by a number of policy rationales including the changing role of the design professional and the in-

---


creased use of performance specifications, the increasing complexity of the structures designed, and a growing concern with the accountability of service providers in general. Even the architectural profession has come to recognize a responsibility for adequate disclosure to clients. Certain benefits to both clients and designers should help offset the burden which may be imposed upon designers as a result of recognition of expanded grounds for liability. Such benefits include the self-scrutiny encouraged by the duty to inform as well as the increased satisfaction of clients who, because of being continually informed, will have ratified the significant decisions made in the course of design.

The legal doctrines which have provided the basis for recognition of professional negligence resulting from a failure to inform of risks and alternatives in the context of medical treatment provide useful analogies for application to design. Additional, although limited, support also comes from the attorney’s analogous duties in the field of criminal law. Because design is a service, not a product, the designer’s conduct must be judged in accordance with the standard of reasonable care imposed by basic tort doctrine. Thus, the only doctrinal advancement involved is the focus of the proposed cause of action on the nature of the communication between designer and client during the design process in addition to the conventional concerns with malpractice in the formulation of the plans and specifications which are the typical products of that process. The law of agency provides further support for the proposed duty if it is recognized that in design, as well as in the supervision of the construction phase of services, the designer functions like an agent whose decisions may bind the client as principal. The designer must therefore keep the client fully informed.

The proposed cause of action involves a number of manageable problems of proof which can be defined to assure that plaintiffs will not be stymied by dependence upon standards of disclosure set by the profession. It is also necessary to assure that, as potential defendants, design professionals are not burdened by strict liability for any and all of their particular client’s complaints with the finished product. The result should be an objective standard of requisite disclosure for use in determining negligence. Proof of causation would then require a showing of the availability of alternatives leading to quantifiably better outcomes or less risk. Finally, the measure of damages must be adjusted to assure only restitution and to prevent any unjust enrichment.

Recognition of the proposed cause of action is not intended to provide just one more weapon in the arsenal of plaintiff’s attorneys. It is meant, instead, to focus attention on a critical phase of the design process which, when performed properly, may avoid many of the harms which are the basis for conventional malpractice suits. Seen in this light, recognition of the proposed duty is not an unreasonable extension
of tort law, but long overdue.

101. As Prosser once commented, tort law must have the flexibility to recognize such new claims: "[T]he progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action where none had been recognized before . . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to recovery." PROSSER, supra note 18, § 1, at 3 (footnote omitted).