Tortious Liability...

by Ari Purwadi

Submission date: 21-Nov-2019 11:35AM (UTC+1000)
Submission ID: 1218302925
File name: Tortious_Liability_of_Structural_Failures_A.pdf (306.13K)
Word count: 4712
Character count: 25713

International Journal of Civil Engineering and Technology (IJCIET)
Volume 9, Issue 4, April 2018, pp. 883–890, Article ID: IJCIET_09_04_099
Available online at http://www.iaeme.com/ijciet/issues.asp?JType=IJCIET&VType=9&IType=4
ISSN Print: 0976-6308 and ISSN Online: 0976-6316

TORTIOUS LIABILITY OF STRUCTURAL FAILURES: A LEGAL ANALYSIS ON INDONESIAN CONSTRUCTION SERVICES LAW

Ari Purwadi
Faculty of Law, Universitas Wijaya Kusuma Surabaya

ABSTRACT

Failure of building construction will result in liability based on unlawful acts. In building construction work is known the existence of professional responsibility, accountability according to law, and responsibility based on technical standard of construction. Legal liability may occur because of a breach of contract or contract due to unlawful acts by the contractor. Accountability based on broken promises can be used without waiting for work failures, but there have been deviations from the design of the agreed building details. While liability based on unlawful acts is used in case of a construction failure resulting in a loss to the employer after the delivery of the building. However, the difficulties encountered relate to the burden of proof, since employers will find it difficult to prove the existence of an element of error based on the technical standards of construction. Arrangement of the Construction Services Act 2017 for failure of buildings using the principle of liability based on errors and determinations of building failures shall be established by the expert assessor established by the Minister. This arrangement is more used buildings for public purposes. For private property to balance the proof of error, it is not possible to use the mechanism set forth in the law, it is necessary to accommodate the law by using the principle of always responsible presumption.

Keywords: liability, unlawful conduct, construction failure.

Cite this Article: Ari Purwadi, Tortious Liability of Structural Failures: A Legal Analysis on Indonesian Construction Services Law, International Journal of Civil Engineering and Technology, 9(4), 2018, pp. 883–890.
http://www.iaeme.com/IJCIET/issues.asp?JType=IJCIET&VType=9&IType=4

1. INTRODUCTION

Three-story office building located in Cendrawasih Permai complex, Ahmad Yani Street, Sungai Pinang Sub-District, Samarinda City, East Kalimantan collapsed on June 3, 2014 while still in the process of construction, caused 12 workers to die. This building has a width of 25 m and a length of 100 m with a construction cost of approximately 15 billion Indonesian rupiah. The bridge is a type of suspension (suspension bridge) has a total length of 710 m.

The collapse occurred on November 26, 2011 about ten years after it was inaugurated. This bridge building connects the building of the Library and Archive Board of DKI Jakarta Province. The collapse occurred on November 3, 2014. Examples of several building failures in Indonesia. Actually, there are many more examples of building failures that occurred in Indonesia. Generally, the news that aired in the mass media about the failure of buildings owned by the government or used for the public interest. Failure of buildings is also experienced in buildings owned by individuals, both private property and private legal entities. The increasing number of building failure events recently caused by both process errors and circumstances beyond human power include natural disasters.

The American Society of Civil Engineers (ASCE) Technical Council on Forensic Engineering has defined "failure" as "an unacceptable difference between expected and observed performance" (Dingess et al., 2012; Wardhana & Hadipriono, 2003). In the context of the construction industry, "failure" implies something greater than simply "flawed." Failure of buildings may range from failure of parts of building systems such as heating, ventilation and air conditioning systems, to complete structural failure resulting in building collapse. Likewise, defects can be small or large. Other terms often used interchangeably with defects in the construction industry include "deficiencies," "incompatibilities," "deviations," and "errors." It is fair to note that defects can be the cause of failure. Thus, in the case of causes, defects can at times be viewed as roots or technically as the cause of failure. However, not all failures are the result of defects. In the absence of defects, failure can be caused by other factors such as extreme natural forces such as earthquakes or tsunamis (Dingess et al., 2012). According to practice in US courts, the factors that can be considered to determine whether a condition is "flawed" will result in legal liability include: 1. standards applied to construction, such as building codes, industry standards, written contracts etc. ; 2. the degree of deviation from the applicable standards, and the resulting effects of such deviations; 3. the cause of the condition, whether it is due to the construction process (damaged design, poor workmanship, faulty materials, etc.) Or factors beyond the control of the contractor or design professional (such as poor maintenance on the part of the owner, weather phenomenon, etc.); and 4. whether the condition needs to be improved. Consideration of these factors will often involve expert testimony (Nikles et al., 2012).

Defects and failures are usually handled with respect to the contractor's warranty obligations. The Black's Law Dictionary defines "warranty" as "a firm or implied promise that something made enabling the contract is guaranteed by one of the contracting parties." In addition, the Black's Law Dictionary defines "construction guarantees" as "warranties from sellers or new home building contractors that houses free from structural, electrical, plumbing, and other damage and are suitable for defined purposes" (Black's Law Dictionary, 1999). Defects and failures cannot be defined in a vacuum. They can only be defined with reference to applicable standards, contract terms and causes of defects and failures. What is apparent, however, is that whether based on express or implied warranties, the owner of the building is entitled to a building "defect free." Identification of causes of defects or failures usually requires expert testimony from forensic engineers After the roots or technical reasons for damage or failure are established, legal liability will be assessed on the basis of whether the design and construction consultants are conducted in accordance with the standards applicable to their profession (Dingess et al., 2012: 29). So, what about the arrangement of building failures established under Indonesian law and what is the legal liability principle used in Indonesia's legal contract system.

2. METHOD

This research is normative law research. Unusual in Indonesia, this legal research uses the approach of legislation and conceptual approach. The statute approach, which is done by reviewing all laws and regulations concerning the legal issues being addressed. While the conceptual approach, which is done by moving from the views of experts and doctrines, doctrine to find ideas that gave birth to legal concepts relevant to the issues encountered in order to obtain scientific clarity and justification (Marzuki, 2016).

3. DISCUSSION

The two main legal systems in the world today are civil law and common law. Continental Europe, Latin America, most of Africa and many Central and Asian countries are part of the civil law system, while the United States, along with Britain and other countries that once belonged to the United Kingdom belong to the common law system. It is said by Rene David and John E.C. Brierley that "through colonization by the European nation, the Romano-Germanic family has conquered vast territories where the legal systems are either belong or are related to this family. The phenomenon of voluntary 'reception' has been produced the same as the result of modernization, or the desire to westernise, has led to the penetration of Europen ide" (David & Brierley 1985 : 23). With the legal tradition of Indonesian life whose landlord is a civil law system from the Netherlands, the Indonesian legal system is strongly influenced by the civil law system. One feature of the civil law system is codified law. Therefore, the codified legal source for civil law in Indonesia is called Burgerlijke Wetboek Indonesia (BW Indonesia) as a result of the Dutch Burgerlijke Wetboek concordance.

Accountability in civil law regulated in BW Indonesia is done both on the basis of breach of contract and based on tort law. The form of accountability in civil law can be grouped into two, namely first, contractual and second responsibility, accountability of unlawful acts. The difference between contractual liability and liability for unlawful acts is whether or not in the legal relationship there is an agreement. If there is an agreement the responsibility is contractual responsibility. Whereas if there is no agreement but one party harms the other, the aggrieved party may sue the adverse party liable on the basis of unlawful acts (Rosa Agustina et.al., 2012: 4).

Unlawful acts set forth in BW Indonesia as stipulated in Section 1365 uses the concept of liability based on fault. Article 1365 BW Indonesia which reads "Article 1365 BW Indonesia does not define the meaning of unlawful conduct but specifies the elements or requirements that must be met to file a lawsuit compensation for unlawful acts. The element of error is used to state that a person is held liable for adverse consequences of another person for his wrongdoing. The burden of proof is on the aggrieved party (plaintiff) as stipulated in Article 1865 BW Indonesia, which reads: "Any one who claims to have any right or who refers to a fact is right, is prove the existence of such right, or such fact ". The provision governs the burden of proof to anyone should prove a right or a fact when he claims to have the right or fact to support that right. Djaja S. Meliala said that "if a person is to be held accountable for the act of violating the law (tortious liability) as intended by Article 1365 BW Indonesia, then the person shall be guilty. The mistake must be proven by the party demanding compensation or burden of proof is on the Plaintiff (Article 1865 BW Indonesia) "(Djaja S. Meliala, 2009: 112).

The Construction Services Act 2017 has regulated contractor liability when a building failure occurs. To determine the responsible party begins with a report or complaint to the Minister about the existence of collapsed buildings. Ministers receiving reports or complaints

of building failures will establish the expert assessor responsible for analyzing the failure of the building. Assessment by expert assessors by following standards, materials quality standards, equipment quality standards, occupational safety and health standards, standards of implementation procedures, implementation quality standards, operating and maintenance standards, guidelines for social protection of labor, environmental management standards living, taking into account geographical conditions prone to earthquakes. From this provision, the concept used to determine the accountability of the building is based on the concept of liability based on fault, only to determine the error of the contractor assisted by the expert assessor established by the Minister. This is done because to determine the mistakes of the contractor must be proven in advance of the failure of the building based on the technical standards of construction and professional standards.

Basically, the failure of the building from the side of the causal factors can be grouped into: human, natural or environmental, and a combination of human and nature / nature. The cause of the failure of the building due to human, for example due to wrong design, wrong implementation process, overload, sabotage, fire. As for the cause of the failure of the building due to nature or environment, for example because of earthquake, landslide, wind taufan,, flood, land dislocation. While the cause of the failure of the building due to a combination of human and nature, such as misplaced location, against the principle of nature, less attention to the environment (Eddy Hermanto and Frida Kistiyani, 2006: 51). When it comes to construction work contracts stipulated in the Construction Services Act 2017 involving two parties, namely construction service providers and construction service users, in which each party has an obligation. The obligation of the construction provider is the result of the proper work of cost, quality, and time, the implementation of contractual agreement, meets the standards of Safety, Health, Safety and Sustainability (K4), while the obligation of the construction service user is to pay the work result. If it fulfilled the obligations as agreed in the construction work contract, it is stated there is a breach of contract. The breach of contract occurs when the obligation is not fulfilled because there is an element of error in the self that does not fulfill the obligation. However, it can happen that contractual obligations cannot be fulfilled due to an unexpected event or event, which occurs outside of the contractor's ability, after the contract has been made. This kind of thing is called a state of force (force majeure). A force majeure is the legal basis for forgiving the contractor's mistake when the contractor does not fulfill contractual obligations such as the cause of a building failure due to nature or the environment.

The Construction Services Act 2017 of Article 47 provides that the contents of the construction work contract shall at least describe, inter alia, breach of contract, contain provisions on liability in the event that one party does not perform the obligations as agreed; outside the will and ability of the parties to cause harm to either party; (a) building Failure, containing provisions concerning the obligations of the service provider and / or the service user for building failure and the period of liability for building failure; (b) Guarantees of risks arising and legal liability to others in the execution of construction works or the consequences of failure of buildings. Where the clause of the obligations of the service provider and / or the service user for building failure and the period of liability for buildings failure is stipulated in the construction work contract, then the clause is binding on the parties to the construction work contract (Wardhana & Hadipriono, 2003). Thus, if any party who does not perform the obligation can be prosecuted based on the breach of contract.

Failure of buildings is given meaning by the Construction Services Act 2017 as follows: "A state of collapse of buildings and / or non-functioning of buildings after the final delivery of the results of construction services". The scope of the failure of the building is the failure of

the building that has been submitted to the service user, so it is not included in the collapse of the building before the final handover of construction services. The party responsible for the failure of the building is the parties that bind themselves to the construction work contract, namely the service provider and the service user. However, in the Construction Services Act 2017, the contractor is liable in the event of a building failure caused by the construction of a construction service that does not comply with the safety, health, and sustainable standards (K4) stipulated under the Construction Services Act 2017. Whereas the service user shall be liable for the failure of the building that occurs after the expiry of the term of the service provider for the failure of the building as set forth in the construction work contract which is adjusted to the construction age plan. If the plan of construction age is more than 10 (ten) years, then the service provider shall only be responsible for building failure not later than 10 (ten) years since the date of the final delivery of construction service. According to the Construction Services Act 2017 has classified the types of construction businesses covering the business of construction consulting services, the business of construction works and the business of integrated construction works. In order to determine the cause of a failure of the building and the party responsible for the failure, the Construction Services Act 2017 appoints the expert assessor to perform the analysis function of the cause of the failure of the building. In fact, the mechanism for assessing the failure of buildings by the expert assessor established by the Minister is for the infrastructure constructed by using the state/local budget. This is done because to determine the element of error, which is ultimately followed up through criminal proceedings (corruption crime cases) when there is a financial loss state / region. Involvement to determine the existence of a building failure by an expert appraiser established by the Minister shall be made against buildings for the public interest.

For privately owned buildings - despite the billion dollar value - it is certainly not possible to use civil liability mechanisms in private under the Construction Services Act 2017, as a "lex specialis" arrangement in the field of construction services. The use of norms for the regulation of civil liability for the loss of private property using "lex generalis", namely the provisions in BW Indonesia that use the principle of liability based on fault (liability based on fault). The difficulties faced by the building owner / service user is to prove the existence of an element of error in the contractor / service provider, as it must prove the error based on the technically scientific engineering aspects. failure of buildings after more than 10 years from the date of final delivery of construction services cannot be an excuse not to hold civil liability accountable to the Service Provider. Service Users should still be given the opportunity to hold civil liability accountable for the failure of the building by using civil law instruments (BW Indonesia), despite difficulties in technically verifying scientific engineering.

According to Peter Mahmud Marzuki (2016), accountability (liability / aansprakelejikeheid) is a specific form of responsibility. Definition of accountability refers to the position of a person or legal entity who is deemed to have to pay some form of compensation or compensation after the existence of legal event or legal action. For example, a person or other legal entity for committing an offense (onrechtmatige daad) so as to cause harm to such person or other legal entity. The term of accountability lies within the scope of private law (Marzuki: 2016). Lawrence M. Fiedman (1984: 14) states that "the heart of tort law is the action for personal injury - a claim against a person or company for hurting my body in some way. Probably 95 percent of all tort claims are for personal injury". Furthermore, it is said that "a fundamental concept of tort law is 'negligence'. This means, roughly, carelessness. Basically, if somebody causes me harm I can sue him for damages only if he was negligent. He has to be at fault"(Fiedman 1984: 145). The concept of liability based on fault is a type of responsibility in which the plaintiff must prove that the defendant's

actions are wrong, either due to negligence or intent. The concept of liability based on errors is the opposite of the concept of absolute liability. Absolute accountability means responsibility for injury or damage to others without error, ie intent or omission. Legal responsibility does not require the offender to neglect his duty to take care of consciously or unconsciously. The term 'Gefährdungshaftung' is used in Germany, but no matching pair for this term of accountability exists in other jurisdictions. The French describe accountability without error as 'responsabilitédu fait des choses', while in common law it uses the term 'strict liability'.

This distinction is not only terminological but an expression of factual difference. All three concepts - Gefährdungshaftung, responsabilité du fait des choses and strict liability - share as their common feature that errors are not required. However, the concept is different in terms of the attribution element that should replace the error prerequisites. While the concept of responsabilité du fait des choses and strict liability does not address this directly, the concept of Gefährdungshaftung (literally, 'accountability for danger') makes the element of explicit attribution on its behalf: the defendant is accountable for having created or controlled the source of the hazard that led to the increase risk of damage to other parties. The scope of absolute liability in this case is mainly concerning the operation, and control over technical equipment or installation, but also the maintenance of animals. The French doctrine of guardianship is different because, in the dominant view, is not limited to dangerous objects but applies to any object. For this reason, the guardian's account would qualify as a guardian's accountability case without error but not as one of the absolute liability in the technical sense of the term, that is responsibility for the source of danger (Wagner, 2011).

The development of the principle of no fault liability is strongly influenced by the principle of *Res Ipsa Loquitur* (the things speak for itself), meaning the facts have talked themselves, no need to prove anymore. Principle *Res Ressa Loquitur* to be applicable, the defendant must have "exclusive control over the instruments of danger (and hence the likelihood of knowledge of responsibility for the cause of danger), then the loss will not occur if negligence does not occur (Stedman 2001).

Where statutory or judgmental legislation is not established, the distinction between accountability by errors and accountability is difficult to recognize and remains controversial in most cases. Based on practical results, the two concepts are more closely related than those suggested by their theoretical polarity. The safeguard standard, which is critical to determining accountability based on errors, depends on the magnitude of the hazard in question and the likelihood of occurrence. Therefore, the operation of a hazardous source, by itself, tends to increase the number of precautions that the operator must take to avoid liability. More serious is danger, accountability based on a closer error moving towards absolute accountability. In addition, absolute accountability leaves only the wrongdoing perpetrators of the act of violating the law but continues to measure the victim's behavior against the standard of protection based on the concept of negligence contribution. For this reason, scientists tend to highlight the similarities, not the differences between the two regimes of accountability and tend to speak, not from two different categories, but also the gray area between absolute accountability and accountability. Nevertheless, important conceptual and practical differences remain: accountability based on errors depends on evidence of error, ie, intent or negligence, so that the loss occurs, even though the defendant has been careful, is borne by the plaintiff (casum sentit dominus); based on absolute accountability, on the contrary, the person responsible for the danger is accountable for any damage (Wagner, 2011).

In the case of building failure, the use of the concept of strict liability is very beneficial for the service user / building owner, because there is no need to prove technical engineering scientific errors, it is quite a factual damage to the building that causes damage to the service user / owner. The use of the concept of strict liability in cases of building failure still leads to controversy related to the application of the principle of presumption of innocence principles. The principle of presumption of innocence is required to be proved beforehand in a new court to be found guilty. Basically, the legal protection of both the service provider and the service user / owner of the building is placed in an objective and balanced position. If using the concept of liability based on errors would be very difficult for the position of service user / building owner to be able to prove the error of the service provider. Therefore, in order to face difficulties in terms of proving such errors, the provider's liability shall be made by the principle of presumption by liability principle. The principle of the presumption of liability principle states that the defendant is always accountable, until he can prove his innocence. Thus, the burden of proof is on the defendant's side (Shidarta, 2009).

The use of the principle of presumption by liability principle is necessary because of the difficulty of proving technical failure-errors in technically scientific engineering. The difficulty in proving that there is a building failure requires complex and complex civil engineering knowledge. The use of the principle of presumption by liability principle will not incriminate the service provider because it is possible to use the principle of reversing the burden of proof. Thus, the service provider may use the principle of reversing the burden of proof if the service provider does not feel guilty or negligent in the event of a failure of the building, by presenting the argument that the service provider has performed the work properly and properly or has worked professionally. According to Hans Kelsen (1961), if an individual's actions have caused a harmful effect on another individual, he can essentially be free from civil sanctions by proving himself not to suspect or not wanting harmful consequences of his actions and has fulfilled the legal obligation to take action under normal circumstances, may avoid such harmful consequences.

The principle of presumption to always be accountable receive the reverse verification load (*omkering van bewijslast*). The rationale behind the theory of reversal of the burden of proof is that a person is guilty, until the person can prove otherwise. Such a thing is certainly considered contrary to the presumption of innocence principle. However, the principle of reverse evidentiary burden that will be used by the service provider in a building failure dispute is highly relevant. This is to provide legal protection between the service provider and the service user / owner of the house in a proportional and balanced manner. Proportional and balanced legal protection embodies distributive justice. Distributive justice refers to the existence of equality among human beings based on the principle of proportionality.

CONCLUSIONS

The difficulties encountered by service users / building owners are related to the burden of proof, because the employer will find it difficult to prove the element of error based on the technical standards of construction. Arrangement of the Construction Services Act 2017 for building failure using accountability principles based on errors and determinations of building failures shall be established by the expert assessor established by the Minister. This arrangement is more used buildings for public purposes. For private property to balance the proof of error, it is not possible to use the mechanism set forth in the law, it is necessary to accommodate the law by using the principle of always responsible presumption.

REFERENCES

[1] Agustina, Rosa, et.al., 2012, *Hukum Perikatan* (*Law of Obligations*), Denpasar: Pustaka Larasan.

[2] Black's Law Dictionary 7th ed. 1999.

[3] *Burgerlijke Wetboek* Indonesia.

[4] David, Rene dan John E.C. Brierley, 1985, *Major Legal Systems In The World Today*, Stevens & Sons, London.

[5] Dingess, Foster, Luciana, Davidson & Chleboski Llp, 2012, *The Law Of Construction Defects And Failures*, PNC Center, Pittsburgh, Pennsylvania.

[6] Kelsen, Hans, 1961, *General Theory of Law and State*, Russell & Russel, New York.

[7] Lawrence M. Fiedman, 1984, *American Law*, Penguin Books Canada, Markham, Ontario.

[8] Hermanto, Eddy dan Frida Kistiyani, 2006, "Kegagalan Bangunan Dari Sisi Industri Konstruksi", *Media Komunikasi Teknik Sipil*, Volume 14, No. 1, Edisi XXXIV 2006, Semarang: Fakultas Teknik Universitas Diponegoro.

[9] Marzuki, Peter Mahmud, 2008, *Pengantar Ilmu Hukum*, Kencana, Jakarta.

[10] Marzuki, Peter Mahmud, 2016, Penelitian Hukum, Kencana Prenada Media Group, Jakarta.

[11] Meliala, Djaja S., 2009, *Perkembangan Hukum Perdata Tentang Benda Dan Hukum Perikatan*, Nuansa Aulia, Bandung.

[12] Nikles, Roland, Stephen H. Reisman, Suzanne M. McSorely, Richard J. Tyler, eds., 2012, *Construction Defects*, American Bar Association.

[13] Shidarta, 2009, *Hukum Perlindungan Konsumen Indonesia*, Grasindo, Jakarta.

[14] Stedman, Barry, 2001, *Torts, Negligence, And Strict Liability*, available at http://homepages.uc.edu/~stedmabn/Chapter15.

[15] Construction Services Act 2017 (Act No. 2 of 2017).

[16] Wagner, Gerhard, 2011, *Strict Liability in European Private Law*, publication at: https://www.researchgate.net/publication/228224891.

[17] Wardhana, K., & Hadipriono, F. C. (2003). Study of recent building failures in the United States. *Journal of performance of constructed facilities*, *17*(3), 151-158.

Tortious Liability...

ORIGINALITY REPORT

24%	20%	1%	10%
SIMILARITY INDEX	INTERNET SOURCES	PUBLICATIONS	STUDENT PAPERS

PRIMARY SOURCES

1	www.dfllegal.com Internet Source	6%
2	www.researchgate.net Internet Source	6%
3	Submitted to Universitas Diponegoro Student Paper	2%
4	erepository.uwks.ac.id Internet Source	2%
5	www.iaeme.com Internet Source	2%
6	Submitted to University of Melbourne Student Paper	1%
7	Submitted to American Intercontinental University Online Student Paper	1%
8	dullbonline.wordpress.com Internet Source	1%
9	Submitted to Universitas Hasanuddin	

	Student Paper	1%
10	Submitted to Erasmus University Rotterdam Student Paper	1%
11	"Selected Cases from the Supreme People's Court of the People's Republic of China", Springer Science and Business Media LLC, 2020 Publication	<1%
12	Submitted to Griffth University Student Paper	<1%
13	Submitted to University of East London Student Paper	<1%
14	A. Gardini. "Development of quality assurance in Italy.", BMJ, 1992 Publication	<1%
15	portal.research.lu.se Internet Source	<1%
16	Ginevra Le Moli, Parthan S Vishvanathan, Anjali Aeri. "Whither the Proof? The Progressive Reversal of the Burden of Proof in Environmental Cases before International Courts and Tribunals", Journal of International Dispute Settlement, 2017 Publication	<1%

17	Submitted to Dublin City University Student Paper	<1%
18	Submitted to Symbiosis International University Student Paper	<1%

Exclude quotes	Off	Exclude matches	Off
Exclude bibliography	On		