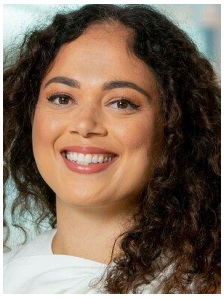
Collapse-Risk Buildings Present Liability Challenges

By **Theresa Mohammed, Jonathan Clarke and Villem Diederichs** (November 13, 2023)



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The U.K. government has recently taken a flurry of policy decisions to tackle the risk posed by dangerously deteriorated building structures.

These actions were prompted by the Singlewell Primary School incident on July 7, 2018, when a staffroom ceiling collapsed and the unfortunate incident on Nov. 15, 2021, at Rosemead Preparatory School when a classroom ceiling collapsed on 15 pupils and their teacher.

Most recently, in August, the Health and Safety Executive gave a formal warning emphasizing that "[reinforced autoclaved aerated concrete] is now life-expired. It is liable to collapse with little or no notice."

This is an ominous warning, but one not necessarily limited to just school buildings either, as the Harrow Crown Court was forced to shut down in August, and there are potential issues with hospitals and certain residential buildings.

In 2022, the Department of Education warned that one or more blocks in some schools were at risk of collapse, with the number of schools where reinforced autoclaved aerated concrete, or RAAC, may be present rising to 572 schools the following year.

However, this estimate could still be well shy of the true figure with approximately 8000 educational structures still to be reviewed.

Perhaps most alarming is that this figure does not take into account the myriad of other affected public and residential buildings, meaning that the overall number of RAAC affected structures could be significantly higher.

The article explores who may be liable for any necessary remediation costs, finding that while several actors could, in theory, be held responsible, filing legal claims may be challenging. This is primarily because the limitation period will have elapsed for recovering costs from parties originally involved in the installation of RAAC.

However, the Defective Premises Act 1972, or DPA, may provide some relief for certain structures.

What is RAAC?

RAAC was originally championed as a cheaper, quicker and lightweight alternative to traditional concrete products. This is due to its porous, bubbly texture that made it a popular and innovative construction material during the post-war era where large-scale remediation works, and rapid expansion of new buildings were prevalent.

As a result, RAAC's use was widespread between the 1950s and 1980s, continuing to be used up until the mid-1990s when a government entity, the Building Research Establishment, issued a damning warning over structures using the material being susceptible to cracking and at an increased risk of structural defects.

It was explained that the material's bubbly texture, which was originally seen as a positive, actually allowed water ingress and could cause various structural integrity issues.

Therefore, in certain situations, this issue could significantly decrease the material's already limited 30-year lifespan.

What types of buildings are at risk?

RAAC is usually found in the flat roofs and occasionally in the walls and floors of various types of public buildings, including schools, courtrooms, police stations, hospitals and medical centers.

It is also said to have been used in some residential buildings such as social and affordable housing.

In August, the Harrow Crown Court was forced to shut for the foreseeable future due to findings of deteriorating RAAC panels during unrelated improvement works on the structure. Thus, the consequences of the RAAC crisis go beyond the courtroom.

Despite the Ministry of Justice insisting that the closure would only be temporary and alternative sites were being determined to "minimise disruption."

There was worryingly no mention of the cost of this closure, and it could be argued that the social cost the RAAC crisis is inflicting goes beyond the monetary.

London Victims' Commissioner Claire Waxman said that the closure was "desperate news for the victims of crime" as a direct result of what HM Courts and Tribunals Service said was the "direct consequence of the derelict and crumbling estate many of our court buildings in this country have been left in after more than a decade of chronic underfunding."

Who may be liable for the costs?

In determining whether contractors, engineers, building owners or local councils may be held responsible for damages associated with RAAC an individual case analysis would be required.

However, there are a few common hurdles to filing these types of legal claims.

Identifying the original contractors and overcoming limitation statutes is challenging.

Firstly, the identification of contractors and engineering firms might be a difficult endeavor.

Since RAAC was primarily used in buildings between the 1950s and 1990s, it is unlikely that the original parties who undertook the installment works of the RAAC panels are still legal entities capable of meeting any claims. This fact not only makes it impossible to identify a defendant, in many cases, but also means that many documents may have been lost.

Equally, the fact that the alleged misconduct goes as far back as 80 years in some cases proves a potentially insurmountable obstacle to recovering damages for loss caused by original contractors.

Under the Limitation Act 1980, the default position is that a claimant has six years to bring a claim for defective workmanship in the construction of a building. This limitation period of six years can be doubled to 12 years in cases where the original contract has been formalized into a deed.

In the construction industry, the date from which the limitation period is measured tends to be the date of practical completion, which precedes the date of full completion.

This shows that in most cases the Limitation Act bars recovery against those contractors and engineers who may have originally worked with RAAC.

The statutory protections available in the case of residential dwellings differ from the cases to be brought for public and commercial buildings due to the increased limitation period provided by the interplay of the Building Safety Act 2022, or BSA, and the DPA.

For claims that have been brought under Section 1 of the DPA, the BSA provides for a 30-year limitation period, which may be capable of reaching some of those alleged defects.

Insurance companies' limitation periods present difficulties.

In most instances, the insurance cover of the original contractors and engineers will have expired.

Generally, insurance cover for latent defects in buildings lasts between 10 and 12 years maximum from the date of practical completion.

Therefore, where losses may be recoverable under the DPA, it may be possible that insurance cover has already lapsed leaving contractors and engineers to stem the burden of damages alone.

Thus, even where the limitation period may allow for the recovery of losses, the expiry of insurance coverage can mean that claimants will only be able to recover a fraction of their owed losses.

Bringing claims against subsequent contractors could be a path forward.

There may be scope for the bringing of a claim in instances where building owners have made use of contractors to provide specific repair services to address damage to RAAC panels or damage caused by RAAC panels to other building structures.

Where this has taken place, the contractor or associated surveyors or consultants may have assumed responsibility for the structural integrity of the building at the time of repair allowing the claim to potentially fall within the period of limitations if brought soon.

Where do we go from here?

The above raises the question of how the costs of the RAAC crisis will be managed in the absence of available legal claims against industry participants.

While the government is expected to initially be paying for remedial works on public buildings, it is yet unknown what precise shape such remedial funding will take.

Additionally, the government is yet to provide any support to managing the potential risk resulting from privately owned buildings containing RAAC.

In traditional landlord and tenant relationships, it will be the lease that will allocate the parties' responsibility for remedial works with the building owner usually bearing the cost of repair to the structural and external elements of a building.

However, where a building owner is financially unable to appropriately secure their buildings, the risk to the public resulting from such a structure would benefit from government intervention.

One potential avenue for resolving these issues may be changes made to the application of the BSA and associated fund, which currently centers on fire safety-related issues. This could be extended to cover other relevant building safety issues as well such as RAAC.

This would allow current building owners to seek financial relief for any necessary remediation works and encourage any safety issues to be resolved quickly.

Further, extending the scope of the BSA to include RAAC would also introduce a "golden thread" system to contemporaneous documents, which would be helpful, as it would give an accurate snapshot of a structure and allow current owners or occupiers to more easily understand when the latest works or surveys on a building took place, and what the remaining life expectancy of materials are.

Alternatively, a new, separate government remediation fund could be set up with the specific aim of remedying RAAC-related issues in public and private buildings.

However, any such amendments would require sufficient political appetite and the allocation of further financial resources, making such a legislative amendment unlikely in the immediate future.

As Housing Secretary Michael Gove confirmed in October, there will be no further funding for RAAC related issues beyond public buildings.

Instead, housing associations and councils are expected to pay for maintenance and repairs related to RAAC through their rental income.

However, it seems an unjust outcome for all of this liability to fall solely on current building owners and occupiers.

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