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## Duties and Responsibilities

### 1 Introduction

There is no statutory duty of care for the historic environment. In an article<sup>1</sup> published in 2003, barrister Charles Mynors FTRPI, MRICS, IHBC noted the limited areas where the duties imposed by the law actually exist. There are:

- **Liability in negligence:** The general duty of care to all those likely to be affected by ones actions or inactions. Applied to buildings, a breach of such duty, if it leads to harm, may give rise to a claim of negligence.
- **Occupier's liability:** Duty under the Occupier's Liability Acts 1957 and 1984 places on the occupiers of all buildings the need to take reasonable steps to ensure the care of visitors including through repair. Visitors might include surveyors or others working for the owner but also those entering without authority.
- **Professional's and artisan's negligence:** The duty on professionals, contractors and craft workers working on a project to take reasonable skill and care to achieve the task for which they have been hired. Here, those who are engaged to carry out works to historic buildings should carry out the work agreed but also do so properly.
- **Liability under a contract:** Breach of the terms of a contract may lead to a successful claim for damages. Care should therefore be taken in drafting contracts for historic buildings as much as with the carrying out of the works themselves. Given the unpredictability of historic structures the specification should take account of all likely possibilities if it is to be effective.
- **Duty under statute:** Despite the provisions of the Planning Acts enabling Urgent Works Notices and Repairs Notices and encouragement through government guidance etc. there is no general duty on the owner to keep a historic building in good repair. 'Here... it would be surprising if the law were otherwise, since it is difficult to see how any such duty would be enforced where a person was unable or unwilling to comply'.
- **Need for special consent:** It is a responsibility of a professional running a building contract to know what consent is required, to seek advice and consult with authorities where there is doubt or need, and to obtain consents when they are needed. Failure might lead in a contractor or consultant being sued for negligence and there may be a prosecution of the contractor, consultant and owner in the case of unauthorised works. Professional bodies also place responsibilities on their members to behave responsibly.
- **Buying and selling historic buildings:** Those purchasing historic property and those acting for them should be diligent in taking full account of precisely what they

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<sup>1</sup> Charles Mynors 'Duty of Care' *The Building Conservation Directory 2003*. Republished in *Context* with an update September 2012. <http://www.buildingconservation.com/articles/dutyofcare/dutyofcare.htm>

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may be acquiring including its true condition, previous consents, status of works undertaken and any notices which have been served.

## 2 Buildings at Risk

All building owners are responsible for preventing their buildings falling into a dangerous condition.<sup>2</sup> Should a local authority become aware of a building that constitutes a danger to persons in or about the building, to the public generally or to adjacent buildings or places, then it has a duty to act under the terms of the Building (Scotland) Act 2003. The power is designed to alleviate danger and is not a pretext for total demolition. The provisions given to local authorities do not diminish the responsibility of owners to prevent their buildings becoming dangerous but are merely a 'safety net' that must be used to protect the public when it appears to a local authority that a building owner has failed in the duty to fulfil this responsibility.<sup>3</sup>

Apart from issues of public safety there is no statutory obligation upon the owner of a listed building or a building in a conservation area to keep their property in a good state of repair, although it is usually in their interest to do so. Despite the lack of an explicit duty there is an informal structure of checks and balances, moral obligations and public expectations found in published statements, charters, professional codes of conduct, guidance, opinions, provisions and regulations and in established practice and convention that affects behaviour around historic buildings, including those at risk. There is a social or moral expectation that owners will 'do the right thing' and there are statutory powers available to planning authorities (and Scottish Ministers) to take action where listed buildings have deteriorated. These powers allow them to carry out urgent works for the preservation of listed buildings, to serve Repairs Notices and to compulsorily acquire listed buildings in need of repair. However, although these powers are discretionary there is an implied and expected responsibility to act. The (now withdrawn) Memorandum of Guidance on Listed Buildings and Conservation Areas was clear in its view that local authorities have a duty to act in buildings at risk situations:

In Scottish Ministers' view, the powers available to planning authorities are adequate to ensure that listed buildings do not normally deteriorate to the stage where demolition is inevitable and it is their duty to use these powers should the need arise.<sup>4</sup>

...Scottish Ministers are concerned that on a number of occasions listed buildings are being demolished after a long period of neglect during which exercise of the repair powers available to planning authorities would have preserved them.<sup>5</sup>

and this is continued as an expectation in current policy:

Scottish ministers expect Historic Scotland and planning authorities to work together to try to improve mutual understanding, to find ways of increasing efficiency in administrative processes, and to remove impediments to the fuller use of the powers available both to designate and protect historic assets.<sup>6</sup>

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<sup>2</sup> Building Standards Division *The Scottish Building Standards Procedural Handbook* 3<sup>rd</sup> 2013 paragraph 10.1.1, p.69.

<sup>3</sup> Scottish Parliament Submission from the Scottish Government Built Environment Directorate to Local Government and Regeneration Committee 18 January 2012 p. 14 paragraph 1.4 Agenda item 3 LGR/s4/12/13

<sup>4</sup> Historic Scotland *Memorandum of Guidance on Listed Buildings and Conservation Areas* 1998 paragraph 3.14.

<sup>5</sup> Historic Scotland *Memorandum of Guidance on Listed Buildings and Conservation Areas* 1998 paragraph 3.14.

<sup>6</sup> Historic Scotland *Scottish Historic Environment Policy* 2009 paragraph 1.37, p.14.

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Scottish ministers also look to the planning authorities to undertake their responsibilities for the historic environment in a pro-active and committed way. They should develop appropriate policy frameworks and procedures, and use all local mechanisms available to them for designation, management and control. They should also ensure that they have access to sufficient information and suitably qualified and experienced staff to meet their needs.<sup>7</sup>

Planning authorities are central to the effective management of Scotland's historic environment. Their key roles are to set a local policy framework which accords with national policy, and to implement this through their development management and related functions. To fulfil these roles effectively requires authorities to have access to appropriate specialist advice, be aware of current national policy and legislative provisions and to have systems in place to ensure these are adequately considered in decision making.<sup>8</sup>

Scottish Ministers expect local authorities to play a full role in achieving their objectives for the historic environment<sup>9</sup>

Local authorities have statutory responsibilities for administering the planning system and for protecting heritage assets in the exercise of these powers, in accordance with legislation and central government policy...<sup>10</sup>

There is therefore a clear public expectation that local authorities should act in the interest of buildings at risk in their areas.

One measure of the boundaries of planning authority duties and responsibilities is through examination of cases where local authorities have been referred to the ombudsman with the suggestion that there has been maladministration. The Local Government Ombudsman (England) has published guidance on listed building cases (Fact Sheet P9<sup>11</sup>) and on its web site that states:

- Councils have a duty to have special regard to the desirability, in the public interest, of preserving listed buildings or their settings or any features of special architectural or historic interest they possess;
- If you believe the council did something wrong when it determined a planning application affecting a listed building, you can complain to us; and
- We may consider complaints from local or national amenity/conservation groups and individuals who believe the historic or distinctive environment near their home has been lost or damaged, or threatened with damage or deterioration.

Although most listed building cases relate to the proper handling of applications for consent claims of maladministration might apply to other 'duties' too. In one example relating to a building at risk the Ombudsman in England reported:

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<sup>7</sup> Historic Scotland *Scottish Historic Environment Policy* 2009 paragraph 1.38. p. 14.

<sup>8</sup> Historic Scotland *A Joint Working Agreement Between Historic Scotland and Planning Authorities in Relation to Statutory Casework and Consultation* (Draft) 'The Role of Planning Authorities' paragraph 5, p. 5.

<sup>9</sup> Historic Scotland *Scottish Historic Environment Policy* 2011 paragraph 1.19, p.10.

<sup>10</sup> English Heritage *Pillars of the Community: The Transfer of Local Authority Heritage Assets* (Full Guidance) 2012, p. 9.

<sup>11</sup> LGO Fact Sheet P9: <http://www.lgo.org.uk/publications/fact-sheets/complaints-about-listed-buildings>

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Mr S complained about a council's failure to protect a Grade II listed wall from falling into disrepair and, in his view, becoming unsafe. The council had inspected the wall: it found it would benefit from repair but it was structurally stable. The council was aware of its powers in respect of dangerous buildings and structures and in respect of repairs notices but, because the wall was not, in its view, dangerous and it had no wish to acquire it compulsorily, it did not consider action appropriate. As the council inspected the wall and considered its options in an appropriate manner, there was no maladministration in the decision it reached, notwithstanding that Mr S did not agree about the safety of the wall.

The local authority was subsequently deemed to have acted responsibly by:

- Recording the complaint;
- Inspecting the listed building said to be dangerous;
- Being aware of its powers;
- Weighing up the condition of the heritage asset, its conservation needs and the consequences of doing nothing; and
- Reaching a conclusion in an appropriate manner.

Had it failed to follow all or any of the above it might have been found guilty of maladministration by failing in relation to implied duties and responsibilities. That the ombudsman's office has stated they are open to complaints where 'the historic or distinctive environment... has been lost or damaged, or threatened with damage or deterioration' suggests that listed buildings at risk issues of unauthorised works, criminal actions, deliberate neglect or long-term deterioration might also be of concern where those responsible for decision making fail to demonstrate 'special regard'.

A full analysis of Scottish cases relating to the historic environment has not been undertaken. Nevertheless a search of the service web site does offer some interesting examples. In a case of alleged unauthorised works to a listed building (Case 200600946), for example, the City of Edinburgh Council was criticised for failing to use its powers to enter and inspect a listed building and to undertake full investigations before concluding that action would not be pursued.

A strategic approach integrated into wider service planning and delivery as advocated throughout this Toolkit offers appropriate and responsible opportunities for responding to the duties and responsibilities associated with the buildings at risk challenge.

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The above guidance was prepared by The Architectural Heritage Fund for Historic Scotland and is published by the Buildings at Risk Register for Scotland as part of the Buildings at Risk Toolkit. <http://www.buildingsatrisk.org.uk/>

The text contains references to legislation and its interpretation that may contain inaccuracies or be out of date. Ensure you take appropriate professional advice before making decisions relating to property. Feedback, relevant case studies and suggested changes are welcomed.

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