

The Measure of Malpractice—A Further Rebuttal to the “Threshold Approach”

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Introduction

The 2011 article, *The Measure of Malpractice—A Rebuttal to The “Threshold Approach” to Evaluating Errors in Design* (“2011 Article”),¹ offered a rebuttal to a theory that had been discussed by some attorneys and consultants representing design professionals in litigation. The author first encountered this theory when it was raised as a defense in an arbitration involving an owner’s malpractice claim against a mechanical engineer. The advocates of this view assert that because no design professional is perfect, the law should limit design malpractice claims—one type of imperfection—to cases in which the damages caused by design errors exceed a certain monetary minimum. This threshold is to be determined by examining the “typically expected range” of damages caused by design mistakes for projects of similar type and complexity. According to the theory’s proponents, certain types of projects (e.g., hospitals) routinely experience design errors that cause damages amounting to between five and 10% of the project budget, such that this range of cost overrun should be built into the applicable standard of care for design professionals, and, unless and until that expected range is exceeded, there should be no finding of negligence.

We have been unable to discover any published decisions or treatises supporting this theory, which appears to create major complications for owners, contractors and others who rely on professional design services. Due to the lack of accepted criteria, proponents of a “threshold approach” are free to define its limits as they see fit. In the arbitration referred to above, the theory’s proponents argued that (a) the claimant had the burden of proof in establishing the applicable percentage of allowable error, and (b) once the threshold had been exceeded (and the standard of

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¹Journal of the American College of Construction Lawyers, Vol. 5, No. 2, Summer 2011, at 1.

care thereby breached), the design professional would then be liable for all errors, even those falling below the threshold. Other proponents of this theory have disagreed with this all-or-nothing approach, arguing that liability should exist only for amounts above the threshold. Still others except from the analysis certain types of damages, such as third-party personal injury or property damage resulting from design mistakes. In essence, the “threshold approach” remains without any established legal foundation, open to a wide range of proposed boundaries and standards.

In response to the 2011 Article, David Mockbee and Jud R. Jones penned *The Measure of Malpractice—There is a Place for the Threshold Approach in Evaluating Design Errors and Omissions*,² in which they presented their version of the “Threshold Approach.” Since it contemplated an approach that differed significantly from what was considered in the 2011 Article, this reply is offered as a reply to Messrs. Mockbee and Jones. Before beginning that response, however, a short review of the earlier discussion is warranted.

The threshold approach as considered in the 2011 Article (the “Original Threshold Approach”) reimagines the traditional standard of care for design professionals, which is discussed below. Under the Original Threshold Approach, since errors are said to occur in every construction design, some level of mistake is to be anticipated and generally understood to be permissible, and the damages resulting from these expected errors should be borne by the project owner. The Original Threshold Approach posits that the allowance for permissible errors should be determined by a trier of fact, considering such factors as the location, uniqueness, and complexity of a given project. The simpler a project is, the less costly are the anticipated errors. More costly mistakes occur with greater frequency on complex projects, such that owners of more challenging projects should earmark a significant percentage of their budgets for addressing design errors. The Original Threshold Approach examined anticipated rates of design mistakes, identified a percentage of project budget associated with those expected problems, and attempted to tie the definition of professional negligence to that percentage. In other words, under the Original Threshold Approach, unless and until the cost of the design errors on a given project exceeds the anticipated cost of design errors for a project of the same complexity, the designer has not violated the standard of care; professional

²Journal of the American College of Construction Lawyers, Vol. 7, No. 1 Winter 2013, at 153 (hereinafter referred to as “Mockbee & Jones”).

negligence exists only when the cost of addressing design mistakes exceeds what is normal and foreseeable. Thus, the qualitative analysis of alleged violations of the standard of care and the inquiry of whether particular errors fall below that standard—a complicated, fact-intensive investigation—is ultimately reduced to a comparison between two numbers: the actual cost of design mistakes and the reasonably anticipated cost of such errors, viewed from the inception of the project. According to the Original Threshold Approach, where the actual cost exceeds the anticipated cost, professional negligence is established. Under that approach, the owner is generally responsible for all design mistake costs that fall below the anticipated threshold and cannot recover from the designer. And for each dollar beyond the threshold, the designer is responsible—liable—to the owner.

The 2011 Article rejected the false convenience of the Original Threshold Approach and the idea that design errors should be evaluated based solely on quantity. It argued that professional negligence requires a case-by-case, qualitative analysis to determine whether the professional, in each separate instance with its particular facts, “exercise[d] the ordinary skill and competence of members of [his] profession.”³ Besides rejecting the idea that some level of negligence should be tolerated before it becomes actionable, the main thrust of the 2011 Article was that negligence for design professionals should not depend solely on the amount of damages that flow from the error(s). The dollar amount of damages can be influenced by factors out of the design professional’s control and completely disconnected from the mistake. And, as discussed in the 2011 Article,⁴ design error damages may exceed the anticipated threshold without negligence—without the design professional having acted without the “skill, prudence, and diligence as other members of the commonly possess and exercise.”⁵ For this reason, professional negligence must be established in each case by reviewing the performance of the designer and without considering the cost of the errors.

The 2011 Article also explored how the Original Threshold Approach would be applied in practice and determined it was procedurally untenable. The Original Threshold Approach added two elements to a plaintiff’s burden of proof, both requiring expert

³Gagne v. Bertran, 43 Cal. 2d 481, 489, 275 P.2d 15 (1954), *see also*, C.J.S. Architects § 16 (2004).

⁴2011 Article, at 22–23.

⁵Gagne v. Bertran, 43 Cal. 2d 481, 489, 275 P.2d 15 (1954). For a discussion of such a project *see* the 2011 Article at p. 22–23.

testimony: the threshold value to be surpassed in the individual case; and that it had been equaled or exceeded by changes made on the project. In addition to this evidence on quantum, the plaintiff must prove the existence of design errors through expert testimony, and, potentially through further expert testimony, establish that additional costs directly resulted from those mistakes. Instead of simplifying the professional negligence analysis, the Original Threshold Approach complicated it.

Rather than defend the Original Threshold Approach, Mockbee and Jones have conceived a modified threshold approach, which this article will refer to as “Threshold Approach 2.0.” As Mockbee and Jones imply at the beginning of their article, they neither completely support nor completely reject parts the Original Threshold Approach. As they explain, their “article [was] submitted in opposition to the suggested *total* rejection of the Threshold Approach under any circumstance.”⁶ Although they apparently acknowledge some of the failings of the Original Threshold Approach, Mockbee and Jones wish to preserve the threshold itself—*i.e.*, the part of this legal theory that shifts the costs for design malpractice from the design professionals and their insurers to the designers’ clients.

Unlike the Original Threshold Approach, Threshold Approach 2.0 does not modify the standard of care for design professionals. A finding of negligence—a breach of the currently defined standard of care—is required for liability under Threshold Approach 2.0, before the anticipated threshold is analyzed.⁷ The threshold is analyzed at the backend of the case, and applies to preclude or offset any damages that flow from the design errors. Like its predecessor, however, the Threshold Approach 2.0 has no place in the real world.

I. The Problem and its Solution

Ostensibly, the primary problem that both versions of the Threshold Approach attempt to solve—the purported unavailability of design errors—is exacerbated by increased economic pressure on project budgets and the introduction of new technologies and materials to the designer’s toolbox. Economic pressure on a project’s budget results in fewer back checks and peer reviews, increasing the likelihood that design mistakes will not be caught before construction. Moreover, the use of new technolo-

⁶Mockbee & Jones, p. 154, emphasis added.

⁷Mockbee & Jones, p. 168 (“A qualified expert must *first* find the A/E to have breached the standard of care before the A/E can be held liable.”).

gies and materials carries with it the risk that they will not function as expected and will require remediation.

We cannot expect perfection from designers; imperfections are inevitable.⁸ Sophisticated owners indeed should include contingencies in their budgets to protect against potential problems. Such risks are foreseen because projects generally have at least some issues that require additional money to fix. But, the specific issues that will arise are unknown at the outset. Proponents of the Threshold Approach believe that owners therefore should allot a percentage of the budget to cover design errors, and adjust this percentage for the complexity and novelty of the project, the length of the design period, and the extent of design review.⁹

An owner's contingency fund represents a prudent business strategy and is intended to ensure that the cost of unforeseen problems does not threaten the viability of a project. However, this prudent planning should not absolve the source of those problems from liability for these additional costs, unless, of course, the owner voluntarily contracts to absorb them.

Although this article objects to a threshold being implied by law in every dispute over design errors, we have no objection to owners and design professionals negotiating such a contingency in their contract. Based on the designer's fee and the complexity of the contemplated project, these two parties could set the height of a threshold and build it into the project budget. The remedy would be a claim against the design professional to the extent that the budget was exceeded because of negligent acts and omissions. If the budgeted amount was not exceeded, the unspent balance could be returned to the owner, or split with the designer. The latter arrangement would encourage the design professional to exercise more care.

It seems questionable, however, whether such a contract provision would be negotiated with any frequency. A mechanism that serves to limit or preclude liability obviously would appeal to

⁸*See, e.g.,* City of Mounds View v. Walijarvi, 263 N.W.2d, 420, 424 (Minn. 1978): "The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that a structural design will interact with natural forces as anticipated. 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."

⁹Mockbee & Jones, p. 158.

design professionals and their insurers. What seems less clear is why any owner would agree to such a limitation. What would an owner get in exchange for accepting a threshold built into a contract? Why would any owner voluntarily agree to pay for avoidable costs created by a designer's performance below the standard of care? Would a designer have any incentive to expedite fixing a problem if it arises late on a project and the designer is still well below the allowable threshold? Should the designer's fee be reduced in proportion to the amount of the threshold? These are questions that Mockbee and Jones have not considered. The imposition of a threshold has no apparent benefit for the owner and instead is a fantasy of design professionals and their insurers.

II. The Current Standard of Care

Whether an owner establishes a contingency fund should not affect a designer's standard of care. The two items are not related. The budgeted amount should not set a negligence bar for design professionals; rather, it is just part of being a responsible owner—reasonably trying to anticipate and address potential problems that could threaten the viability of a project.

The fundamental flaw of Original Threshold Approach was that it essentially eliminated the standard of care, boiling it down to a comparison of two numbers: the anticipated cost of design errors versus their actual cost. This over simplification improperly departs from the longstanding law of negligence and its goals.

The tort of negligence has two apparent purposes. The first is to compensate those injured by the negligence of others.¹⁰ Second, it deters future negligent conduct by the prospect of awarding damages.¹¹ The standard of care defines the boundaries between acceptable behavior and negligence.

In the specific context of professional negligence, the standard of care ensures that those who purchase services that require specialized knowledge or expertise can expect a minimum level of

¹⁰*See, e.g.*, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 425 (Tex. 1984) (“An ideal tort system should impose responsibility on the parties according to their abilities to prevent the harm.”).

¹¹*See, e.g.*, *Temple Community Hospital v. Superior Court*, 20 Cal. 4th 464, 485, 84 Cal. Rptr. 2d 852, 976 P.2d 223 (1999) (“One principle underlying our tort system is that the circumstances in which it imposes liability and the extent of liability it imposes must be reasonably foreseeable, making it possible for those subject to it to shape their conduct to avoid causing injury and incurring the cost of liability.”).

quality. Professional negligence exists in part to ensure that designers prepare adequate designs and endeavor to meet in every project the bar set by their peers. Design professionals can control the quality of their work and the care they exercise in performing their services. Why should their clients bear the costs resulting from their negligence?

The standard of care recognizes that not all errors are the result of negligence. When undertaking a new project, the design professional is not guaranteeing a perfect result. The designer only promises a level of service that satisfies the standard of care.¹² This is because the service—the process of the design—is all that the designer controls. Errors may result from many factors other than the quality of the service rendered by the design professional. *Gagne v. Bertran* articulated the standard of care for professionals:¹³ “a duty to exercise the ordinary skill and competence of members of their profession.” The current standard of care requires a factual inquiry into the claimed mistakes.

There are no reliable bright line tests or qualitative thresholds. Because every situation differs, the specific facts must be assessed to determine whether the professional’s conduct should be deemed negligent and whether the designer should be held liable for any resulting losses. This approach creates incentives for the professional to act precisely and in a manner that the client would have chosen had it the knowledge and expertise of the professional. Thus, the designer should make choices and render services as the owner would do if the owner possessed the designer’s expertise. For instance, the owner may aim for a fully functional, high quality, and long-lasting project, or it may aspire to one that meets the code minimum and costs the least to complete. Lacking the specialized knowledge to make design choices that will achieve these disparate goals, the owner must be able to put trust in the design professional.

Where there are damages but no violation of the standard of care, the injured party must bear the loss. Where there are damages that result from a breach of the standard of care, however,

¹²See, e.g., *Annen v. Trump*, 913 S.W.2d 16, 19–20 (Mo. Ct. App. W.D. 1995): “An architect is not a guarantor or an insurer but as a member of a learned and skilled profession he is under a duty to exercise the ordinary, reasonable technical skill, ability and competence that is required of an architect in a similar situation; . . .” quoting *Chubb Group of Ins. Companies v. C.F. Murphy & Associates, Inc.*, 656 S.W.2d 766, 774 (Mo. Ct. App. W.D. 1983) (quoting *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472, 476–77 (8th Cir. 1968)).

¹³43 Cal. 2d 481, 489 (1954).

the loss is borne by the party causing injury, the tortfeasor, in this case the design professional. Insurance carriers are paid to assume the risk of loss on behalf of their policyholders, and designers typically carry professional liability coverage, a/k/a “errors and omissions” insurance. In most instances, the negligent design professional will bear the first layer of exposure (i.e., the deductible or retained layer), and the designer’s liability insurance carrier will bear the next layer (which hopefully exceeds the total amount of damages incurred). Under the Threshold Approach, because the owner is made liable for all costs below the threshold amount, the owner bears the costs of all non-negligent errors and the costs of negligent errors up to the threshold, thereby effectively inserting another layer to be exhausted before the insurance carrier pitches in. As a result, the injured party, the owner, ends up paying a deductible for another party’s insurance.

The Original Threshold Approach failed to recognize (or, because it was more concerned with avoiding any loss to liability insurance carriers, ignored) that the amount of damages can be influenced by factors beyond the control and unrelated to conduct of the designer. Recall the example of the John Hancock Building from the 2011 Article.¹⁴ The state-of-the-art design of that building satisfied every building code, and no one seriously challenged the fact that the designers had met their standard of care. Nonetheless, design errors increased the cost of the project by \$8 million. In such circumstances, a reasonably predicted threshold of design-related cost overruns may be exceeded by far, without any negligence of a designer.

Obviously, the Original Threshold Approach would prevent an owner from receiving compensation for losses caused solely by the design professional’s lack of care if the damages suffered were under the designated threshold, a notion that seems unfair. Another significant concern raised by the applying the Original Threshold Approach was less obvious: other than reputational concerns, what are the design professional’s incentives to provide a high quality service where a threshold is employed? Just as the absence of a threshold arguably incentivizes design professionals to be careful, if the threshold is high, they might not be as committed to getting a design right. The Original Threshold Approach weakened that incentive for the most part by making it less predictable when actionable negligence will be found. It would no longer be enough for a plaintiff to prove nominal dam-

¹⁴See 2011 Article at 22–23.

ages—a plaintiff's damages must exceed some undetermined threshold. Where the Threshold Approach applies, the design professional might no longer aim for an error-free design; the designer's state of mind might turn to merely avoiding errors egregious enough to surpass the threshold.¹⁵

III. Threshold Approach 2.0

Mockbee and Jones have revised the Original Threshold Approach so that the extant standard of care is left untouched.¹⁶ A finding of negligence—a breach of the currently defined standard of care—is required in Threshold Approach 2.0. Mockbee and Jones appear to believe that the standard of care should apply in every case, with an inquiry into whether the standard of care was breached before the threshold is analyzed.¹⁷ We agree on this point. Provided that at least a nominal amount of damages can be established, the amount of damages caused by an error is irrelevant to the question of whether actionable negligence occurred—*i.e.*, whether the work was below the standard of care.

Two of the purported goals of Mockbee and Jones appear to be reducing subjectivity and lessening the role of expert testimony.¹⁸ But each would appear to increase under the Threshold Approach 2.0.

In the absence of the Threshold Approach, the plaintiff in a professional negligence case must generally call an expert witness, both to prove the breach of the standard of care and probably to establish both causation and the amount of damages. Threshold Approach 2.0 adds a fourth topic for expert testimony: the establishment of the applicable threshold percentage. Fur-

¹⁵On the other hand, having a threshold might force the design professionals to address issues faster. To prevent the threshold from being breached, design professionals might respond and remediate errors quickly so that the costs resulting from such errors are minimized.

¹⁶For reasons that are not clear, they do, however imply that agreeing to have the normal standard of care apply is akin to “guaranteeing the design.” Mockbee & Jones, p. 157. Agreeing to have the traditional standard of care apply is not a guarantee of the design or its perfection. Designs can be defective without a breach of the standard of care.

¹⁷Notably, Mockbee and Jones make a change to the proof required to establish the breach of the standard of care, by requiring that the required expert testimony be given by “another licensed professional *actively practicing* in the same area of practice and locale . . .” (M&J, @ 155). Although any expert's credentials, or the staleness thereof, is a fair source of cross examination, this bar on testimony from practitioners who are no longer actively practicing their profession has no support in the law, and is an invention of Mockbee and Jones.

¹⁸Mockbee & Jones, p. 154.

ther, the establishment of this percentage, like the evaluation of whether the standard care was breached, requires subjectivity. By adding more subjective expert analysis, Threshold Approach 2.0 fails miserably at achieving Mockbee and Jones's goals.

The judge or jury must determine what percentage of the budget for a particular project represents the amount that changes driven by design errors and omissions must surpass before the design professional can be held liable for the damages stemming from a negligent design. To set the threshold, the judge or jury must consider expert testimony regarding factors such as the novelty and/or complexity of the design, the time available to prepare the design, the extent of design review allowed, and the project delivery system utilized. This novel element of a plaintiff's burden of proof only obstructs those attempting to recover the damages sustained due to a designer's malpractice.

Considering a design's novelty and complexity to set the threshold percentage requires our triers of fact—who are typically not schooled in design—to understand what makes one project more complex or novel than another. It is easy to appreciate that a state of the art energy facility is significantly more complex than a tilt up warehouse. But, how is that difference quantified? Predictably, the experts for both sides will differ, thus creating expensive and time-consuming confusion for the trier of fact.

In addition, even complex and novel projects have less complex or novel aspects. If multiple alleged mistakes on a single project stem from different design disciplines, with different degrees of complexity, it would follow that, under Threshold Approach 2.0, the trier of fact must determine the relative complexity of each design element. Consider, for example, a project like the Disney Concert Hall in Los Angeles. Some parts of that building are undeniably complex, such as the exterior skin and the acoustics. Other aspects, such as the plumbing design, may be very straightforward. If the owner hires Firm A to design the exterior skin, Firm B to design the acoustics, and Firm C to design the plumbing, and they all make mistakes that competent design professionals would not make, what does the jury do? Does the jury determine whether there is a different threshold for the simple plumbing design within this otherwise complex building design? Or, should the plumbing designer not be held responsible for his negligent conduct because taken as a whole the project is complex and its overall allowable threshold was higher than the cost of addressing design errors in all disciplines combined?

The finder of fact might also be required to consider the method of project delivery, making the task of setting a threshold even

more complicated. Whereas a mistake on a fast-track, design-build job might be fixed by the designer before the work is priced, a designer on a typical design-bid-build project might not have the same ability to immediately and quickly address design errors. Also, a contractor's pricing of design errors may well differ between design-build, where the designer and builder are on the same team, and design-bid-build, where the builder is subject to competitive bidding and is more inclined to price changes more aggressively.

In truth, each factor that proponents of the Threshold Approach would evaluate in setting the threshold precisely mirrors what the trier of fact would consider to determine whether the standard of care has been satisfied. Thus, to the extent the task of design is made more difficult by any of these factors, the designer will raise them in asserting that the standard of care was heightened, and that the heightened standard has been met.

In response to the assertion that the Threshold Approach has no support in the law, Mockbee and Jones write:

This limited application of the Threshold Approach is supported by the current use of the same approach in determining whether an omission is actionable as professional negligence. As discussed in more detail below in Section III, omissions have traditionally been subject to the analysis we now refer to as the Threshold Approach. If the cost to add the omitted item at the time the omission is discovered is no more than the cost would have been if included originally, then there is no damage and therefore no actionable negligence arising from the omission.¹⁹

However, this is not an example of the Threshold Approach. Neither is this a "Quantitative Analysis of A/E Liability."²⁰ Rather, it applies traditional negligence law. Mockbee & Jones's omission example is simply a case where damages are lacking, such that a necessary element of a claim of negligence cannot be proven.

In addition, Threshold Approach 2.0 increases fortuity in how cumulative claims are analyzed. Mockbee and Jones explain that under the Threshold Approach 2.0, "[w]here design error is claimed, the cumulative design performance by the A/E and his

¹⁹Mockbee & Jones, p. 155.

²⁰Mockbee & Jones, p. 163. Because some out of pocket expenses, or at least nominal damages, are required to sustain a cause of action for negligence, Mockbee and Jones assert that "[t]he Threshold Approach has been recognized by courts for years in A/E design omissions cases." *Id.*, p. 163. This is a misstatement of the law. As Mockbee and Jones concede, this is an element of traditional negligence law: the requirement of cognizable damages to sustain a claim.

or her consultants are [*sic*] analyzed at the time the claim arises, *i.e.*, if prior design errors totaled 5% of the construction cost, and the current claim tips the total past a Threshold Allowance of 5%, then the current errors fall within the negligence zone.”²¹ Where there is more than one designer, how is this a fair result? Assume the threshold for a \$1 million project is 10% (\$100,000) and the architect, structural engineer and mechanical engineer each have design issues each resulting in \$50,000 in additional construction costs. Under Threshold Approach 2.0, the threshold would excuse the cost of addressing the two design errors experienced first, and those professionals would escape liability, whereas all costs arising from later errors would be imposed upon the third professional (likely the mechanical engineer).²²

Because the Threshold Approach has been stitched together from whole cloth by the insurance defense bar, a lawyer representing the third professional above would argue that common sense requires that the threshold be allocated pro-rata among all designers, based on either the relative size of their design contracts, the relative complexity or novelty of their designs, or the relative size of the malpractice claims against them (depending, of course, on which of the three is most favorable to the client at the time). If one of the first two approaches is used, and one of the designers on the project satisfies the standard of care, is the “unused” threshold transferred to the less careful designers? And, if the third approach—allocating the threshold according to the claims asserted—is employed, it could easily frustrate the settlement of disputes until the total amount of negligence claims is liquidated, since prior to then, no designer would be able to anticipate its share of the applicable threshold. This uncertainty is further complicated because latent defects can emerge long after completion and occupancy. If the threshold has been fully allocated before a latent design defect is discovered, the design professionals whose work is implicated would be entirely out of luck, and they would be liable for all of the damages their negligence caused.

IV. Threshold Approach 2.0 Provides an Offset, Not a Threshold

Any threshold serves as an offset. As Mockbee and Jones explain, “the A/E who is found to have breached the standard of care should be allowed to deduct or offset the Threshold Allow-

²¹Mockbee & Jones at p.167.

²²*Id.*

ance from the recoverable damages.”²³ Mockbee and Jones clarify that the budgeted amount is not a threshold to bringing an action for negligence. It is not that the Threshold Approach 2.0 provides a bar to suit when damages are discovered, *i.e.*, there must be damages of a certain amount before a plaintiff can bring suit. Rather, the so-called Threshold Allowance functions as an offset, on the back end of the lawsuit. It limits damages by applying a deduction after negligence and damages are proved. Mockbee and Jones thus have effectively removed the ordinary concept of a “threshold” from their version of the theory.

V. The Threshold Approach 2.0 Ignores Third Party Claims

According to Mockbee & Jones, the Threshold Approach applies only in actions brought against a designer by its client or a contractor or subcontractor on a project and ignores cases involving third parties injured by the designer’s malpractice: “[i]n the case of personal injury or death, the question is not how much more the project cost to complete, but whether the A/E breached the standard of care in designing a component in such a manner that personal injury or death resulted from the design. Admittedly, the quantitative Threshold Approach simply doesn’t apply in that instance as the focal point there is ‘safety,’ not costs.” In other words, in first party situations, where the parties can negotiate a threshold into their contract, but have chosen not to, the Threshold Approach applies to insulate the designer from liability, but in the third party context, where no opportunity to address the issue exists, it does not. Also, Mockbee and Jones assert that the Threshold Approach applies when contractors, who are not in privity with the designer and thus cannot control the factors considered in setting the threshold, sue for additional construction costs incurred due to the designer’s negligence.

We agree that the Threshold Approach has no place in third party personal injury tort claims. However, we disagree that it is the “‘safety,’ not costs” distinction that justifies that result. Stated simply, the Threshold Approach has no proper place in any claims. Why should design professional liability be the only instance where different definitions of negligence exist for first party and third party claims?

More importantly, first party plaintiffs and defendants may negotiate a liability threshold as part of their bargain. A designer could offer to provide its services at one price without a threshold, at a lower price if a modest threshold is adopted, and a still

²³Mockbee and Jones, p. 154.

lower price if a large threshold is agreed-upon. Such a threshold makes sense—the parties have made the owner’s assumption of the first layer of negligence liability a part of their bargain. An owner who has not engaged in that negotiation, however, should assume that the designer will bear the cost of its own negligence from dollar one.

Mockbee and Jones’s declaration that their Threshold Approach 2.0 does not provide a layer of insulation for designers against liability to third party claimants, but applies only to construction-related costs,²⁴ creates an interesting anomaly, which we can use their hypothetical project to demonstrate. Mockbee and Jones hypothesize a \$1 million project with a 5% threshold, such that designers would be liable only if the amount of damages caused by their malpractice exceeds \$50,000.²⁵ Using this example, if a design error causes \$40,000 in additional construction costs and \$40,000 in personal injury damages, Threshold Approach 2.0 would result in the designer being liable for the personal injury claim, but it would assign no liability for the below-threshold construction costs emanating from the same act. No logic justifies this disparity.

Returning to the schoolhouse example in the 2011 Article, consider the situation where a design professional fails to allow for snow load in designing a roof structure of a schoolhouse in a region where it regularly snows during the winter—a clear violation of the standard of care. If the error is discovered during peer review and corrected before bid, the damages would be limited to the cost of re-design. On the other hand, if the mistake is discovered during construction, and the roof trusses must be revised or scrapped, the additional cost resulting from the error may be substantial. The different quantity of damages would stem from the fortuity of when the problem was discovered, and not solely from the nature of the mistake itself. And, if the error is discovered after the roof collapses on a school day under the snow load, the damages could be astronomical. Under the Threshold Approach, this single mistake would not constitute negligence in the first scenario, may or may not exceed the threshold in the second scenario, but would definitely constitute negligence in the third scenario due to the scale of damages. How can the circumstances of when an error is discovered determine whether that mistake violates the standard of care? Under the Threshold Approach, however, such disparate results can easily occur.

²⁴Mockbee & Jones, p. 155, 164–65.

²⁵Id. at p. 171.

And, of course, if the school house scenario is compounded by other errors, which cause damages and consume the threshold before the roof design error is discovered, then that error would be deemed negligent no matter the scale of damages that it causes.

Mockbee and Jones take issue with the schoolhouse hypothetical, comparing it to a driver running a stop sign:

If a driver is negligent and runs a stop sign, but such negligence is observed by another driver entering the intersection, the damage caused by the first driver can be avoided or minimized by the action of the second driver. The first driver is still negligent, but without damages the negligence is not actionable.

* * *

Similarly, the occurrence of random events is not a sufficient basis to reject the Threshold Approach as discussed . . . above, as the damages experienced in every negligence case are subject to randomness. If the driver . . . above runs the red light but no one else is approaching the intersection, there is no wreck, then no harm, no foul. Again, the extent of the personal injury and property damage will vary from case to case while the underlying “negligent” act or omission does not.²⁶

In this explanation, Mockbee and Jones confuse the absence of damages, and thus the absence of a necessary element of negligence, with a scenario where damages occur, but the amount of those damages is determinative of whether negligence exists. This proposition breaks new ground.

VI. The Threshold Approach 2.0 Ignores All Other Professions

Mockbee and Jones respond to the criticism that no other professionals benefit from a similar threshold by asserting that “[u]nlike medicine, law, accounting, and other professions, A/Es have the empirical data to establish a threshold for the standard of care based on historical change order percentages resulting from A/E errors and omissions . . .”²⁷ But certainly, the damages suffered by the average victim of a botched knee surgery must fall into some predictable range, just as the cost of rectifying typical errors by trust and estate lawyers could be quantified in relation to the size of the estate. Yet, we do not rely on the same measure of predictability in other fields, so why use them in design? The concept of granting doctors and lawyers a free ride for the amount of predictable damages they cause has never been

²⁶Id. at 166–67.

²⁷Mockbee & Jones at 170.

advanced seriously. Just as with doctors and lawyers, the variations on the Threshold Approach for designers flies in the face of the common law negligence regime, which is built on the idea that those whose negligence caused the loss should be held responsible for bearing the loss, no matter the amount.

Physicians, dentists, appraisers, lawyer, accountants, and designers all must perform at the level of skill and competence of other members of their professions. As explained in the 2011 Article, doctors are not immune from suit when the severity of the injury resulting from medical malpractice is modest. Why should a designer enjoy a more lenient standard? What is it about the profession of design that should allow for losses from negligence that are under a certain, somewhat arbitrary, amount to be borne not by the negligent tortfeasor, but by the injured party who was not at fault? Why should designers' malpractice be measured by the financial impact? There appears to be no good or fair reason.

VIII. Conclusion

Like the Original Threshold Approach before it, Mockbee and Jones's Threshold Approach 2.0 is a thinly veiled attempt by the designers and their liability carriers to create a substantial, owner-funded "deductible" that must be exhausted before either the designer or its carrier must answer financially for the damages caused by the designer's negligence. It adds an element of proof to a plaintiff's design malpractice case—a step with no foundation in tort law. And, the factors one must examine in setting the threshold duplicate what one must consider whether a designer's error violated the standard of care.

That said, there is a place for the Threshold Approach. Its place is in negotiated design contracts where an owner can elect to assume the first layer of the cost of design malpractice as part of the negotiation over fee, scope of work, etc. However, absent such an agreement of the parties—particularly with sophisticated parties knowledgeable in design and construction issues—neither the Original Threshold Approach, Threshold Approach 2.0, nor any other version invented by defense counsel has any proper place in tort law.