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Architects' and Engineers' Third Party Negligence Liability—The Fall of the House of Privity*

BACKDROP TO LIABILITY

Almost 5,000 years ago, under the ancient Babylonian Code of Hammurabi, the forerunner of the Roman *lex talonis* was in vogue. Justice for builders and designers was swift and sure. As a result of the collapse of a building, if a child died, the son of the builder was killed in return; if an arm was lost by a third person, the builder's arm was removed; if a death occurred the builder himself was put to death.¹

The passing of centuries brought a more dignified and less stringent attitude toward punishment, until under early English law, it became necessary for a contractual relationship to exist between the architect and the owner in order for liability to be incurred by the architect. Today, we have risen from the launching pad of negligence and are again approaching the orbit of the strict liability of Hammurabi, not with retaliatory punishment, but rather with an economic penalty, justification for which is usually made on the basis of the doctrine of spreading the risk.

THE ROLE OF THE ARCHITECT AND ENGINEER

An architect is one who plans and designs buildings and who usually supervises their erection. Virtually all jurisdictions have licensing statutes which require that persons who hold themselves out to be professional architects meet certain standards of competence by fulfilling specific requisites prior to the passing of an examination. The engineers with whom we are concerned here are those engineers who engage in activities similar to architects, and hence the terms architect and engineer will be used interchangeably.

In examining the legal status of an architect, we find that he wears a coat of many colors. Because of his contract with an owner, we find a principal-agent relationship in existence.² With the exception of the setting out of specific goals that the building program must meet, the owner exerts virtually no control over the architect in the execution of plans and specifications; the architect is thus ordinarily thought of as an

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1. 2 ENCYCLOPAEDIA BRITANNICA 862, 864 (1958).

2. 3 AM. JUR. *Architects* § 5 (1936). 6 C.J.S. *Architects* § 7 (1937).

independent contractor with respect to the preparation of these documents.³

In the supervision of the construction, however, he is an agent of the owner, with certain limitations. Some of these may be provided by contract and some may be provided by the common law. A supervising architect may not substitute a sub-contractor, for example, nor does he have authority over the employment or discharge of workmen.⁴ He may, however, direct the manner of work, reject unfit materials, and determine what brands of materials shall be used where the specifications are ambiguous.⁵ If the architect should exceed the scope of his authority, his acts may be ratified by his employer as in other cases of agency.⁶

Because of the usual contractual provision that the architect shall act as an arbitrator in disputes between the contractor and the owner, the architect under those conditions assumes a quasi-judicial capacity.⁷ Because of this capacity when acting as an arbitrator, his immunity has been corroborated in many cases.⁸ A number of English cases at the turn of the century followed the general rule that the architect or engineer is the agent and representative of the building owner.⁹ Later cases, however, recognized that the architect and the engineer have both a judicial and a ministerial function. The position was then taken that an architect in the role of an arbitrator or quasi-arbitrator is only liable when fraudulent intention is proved, as distinct from negligence alone.¹⁰ Modern courts have held that the architect is in a position where his role as the owner's agent is not adequate to describe the authority with which he is vested.¹¹

It is apparent that there are many areas in the course of carrying on a building operation wherein the architect or the engineer is neither agent nor independent contractor nor quasi-arbitrator, but part of each. Courts over the years have had a great deal of difficulty in drawing a fine line of distinction between these various roles. The problem becomes more acute under today's extension of professional liability.¹²

3. *Ibid.*

4. *Ibid.*

5. *Ibid.*

6. *Ibid.*

7. 3 AM. JUR. *Architects* § 19 (1936).

8. Annot., 43 A.L.R.2d 1227 (1955).

9. 103 L.T. 168 (1897).

10. See *Stevenson v. Watson*, 40 L.T.R. (N.S.) 485 (1879); 71 SOL. J. 745 (1927); 71 SOL. J. 935 (1927).

11. Witherspoon, *When is an Architect Liable*, 31 N.D.L. REV. 54 (1955).

12. Banks, *Damages for Breach of Contracts of Service*, 10 INDUS. L. REV. 97 (1955); Annot., 25 A.L.R.2d 1088 (1955).

GENERAL TORT LAW

Modern tort law concerning liability to third persons not parties to a contract finds its roots in *Winterbottom v. Wright*.¹³ The rule of that case was held for many years to mean that there was no liability of a contracting party to one with whom he was not in privity. A gradual erosion of that rule began to take place shortly after its inception. Exceptions where liability was found included the seller of chattels who knew that the chattel was dangerous for its intended use, and also instances where the chattel was of a type inherently dangerous to human safety.¹⁴ The famous *MacPherson v. Buick Motor Co.*¹⁵ case put the quietus on the *Winterbottom* rule, at least insofar as chattels were concerned. It was held, in effect, that there was a responsibility on the part of the manufacturer of chattels to the ultimate consumer which rested not upon the contract, but upon the relation arising from the purchase and the foreseeability of harm if proper care in the manufacture were not used.

The present day tendency is to carry the liability of the manufacturer of chattels into the area of strict liability and make him, in effect, a guarantor of his products even though he exercises all reasonable care in their manufacture. All indications are that this extension of liability to third persons will continue insofar as chattels are concerned.¹⁶

While the liability of other contractors to third parties has not advanced either as rapidly or as extensively as that of suppliers of chattels, the forces which have held the idea of privity seem to be diminishing gradually under the counterattack of social improvement. For contracts other than in the building industry, many courts have held that where there is misperformance of the contract, those who furnish labor or services have an obligation of reasonable care for the benefit of third persons who might be endangered as a result of the misperformance.¹⁷

Liability of the building contractor with respect to third persons has been difficult to fix in past years. Many recent cases, however, have made the distinction between buildings and chattels appear rather flimsy.¹⁸ Thus having extended liability to third persons first in the field of suppliers of chattels, next in the field of other contractors, then in the

13. 10 Mees & W. 109 (1842).

14. *Huset v. J.I. Case Threshing Mach. Co.*, 120 Fed. 865 (8th Cir. 1903); *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398 (1896); *Schubert v. J.R. Clark Co.*, 49 Minn. 331, 51 N.W. 1103 (1892).

15. 217 N.Y. 382, 111 N.E. 1050 (1916).

16. PROSSER, TORTS 507 (2d ed. 1955).

17. *Id.* at 514.

18. *Id.* at 518

field of some professionals, and finally in the field of building contractors, the next logical step is being taken in the field of architects and engineers.

LIABILITY AND RIPOSTE

Because an architect's relationship with a construction operation is born out of a contract it is quite natural to find that his liability for negligence has grown out of the same contract. On that basis it is necessary to examine the architect's duties resulting from his agreement with the owner to design a building and to supervise the construction, when the latter is required.

As in other professions, the architect has a duty to meet professional standards of conduct. He implies that he possesses the skill and ability, including taste, sufficient to enable him to perform the required services reasonably well, and that he will exercise his skill, ability, judgement and taste reasonably and without neglect.¹⁹ The architect has a duty to provide for reasonable strength of the structure, proper materials, character of the construction, and he must keep abreast of the improvements in the industry.²⁰ The owner, as against the architect, may rely upon the sufficiency of the construction of the building when it is certified by the architect to have been completed in accordance with the plans.

An architect's duty to direct and inspect construction work carries with it the duty to condemn work which he considers unfit.²¹ He does not, however, in the absence of a special agreement, imply or guarantee a perfect plan or completely satisfactory results. He is liable only for failure to exercise reasonable care and skill.²² There is no implied promise that miscalculations may not occur and while the architect implies the use of ordinary skill, he is not an insurer of the accuracy and perfection of his work. He does not profess that his plans will be absolutely perfect. Neither does his duty extend to compliance with statutory regulations for the protection of workmen, although the architect himself is charged with knowledge of the statutory regulations and restrictions governing the erection and use of the building.²³

Even the owner's approval of the architect's plans before they were used in the construction has been held not to excuse the architect from the exercise of ordinary and reasonable care in the designing and formu-

19. 3 AM. JUR. *Architects* § 7 (1936).

20. *Ibid.*

21. 6 C.J.S. *Architects* § 17 (1937).

22. 3 AM. JUR. *Architects* § 7 (1936).

23. 6 C.J.S. *Architects* § 17 (1937).

lating of his plans.²⁴ Neither does the failure of the contractor to check the plans before using them excuse the architect from the consequences of an error in the plans.²⁵

Although the architect's duties are spoken of in broad terms, they are in reality detailed and varied in their scope. An architect may design not only the exterior of a building but the structural members, the heating, ventilating, air-conditioning, electrical equipment, and general mechanical design as well; in addition, he may assist in the letting of the building contracts; he may supervise the construction; he may issue certificates of payment, including a final certificate declaring the building complete according to the plans and specifications. He thus becomes involved in relationships with many and various people in such a manner that it is virtually impossible for him not to violate some measure of an architect's duties, depending upon his interpretation of the word "reasonable." It is probable that because of this tremendously broad scope of contact resulting from the architect's original contract, there has been very little attempt until recently to extend the liability of the architect beyond the parties privity to that contract.

PRIVITY OF CONTRACT

Historically, of course, privity of contract was required before a breach of the architect's duty would create liability to *anyone*. Even though an architect is liable to the owner for damages resulting from the architect's negligence, he is not liable where the owner deals with the contractor independently.²⁶ In the absence of collusion or fraud, there are many cases that have held that a third party not privity to the contract cannot rely upon the contractor's negligent errors or omissions causing damage, in order to hold a party to the contract liable.²⁷ Cases involving property owners, contractors, and architects, and concerning the issuance of certificates of payment by the architect where these certificates were either negligently or improperly issued to someone's damage, indicate that where the architect is not immune as a quasi-arbitrator, he is liable only to the owner.²⁸ The classic case of *Derry v. Peek*²⁹ has been used for many years to show that where there is no fraud, contracting parties are not liable to third persons who are not privity to the contract. The cases are

24. *Allied Enterprises, Inc. v. Brooks*, 93 S.E.2d 392 (Ga. 1956); Annot., 25 A.L.R.2d 1088 (1955).

25. *Ibid.*

26. 3 OHIO JUR. *Architects* § 3 (1922); 6 C.J.S. *Architects* § 19 (1937).

27. PROSSER, *TORTS* 514 (2d ed. 1955); Annot., 34 A.L.R. 67 (1925).

28. Annot., 43 A.L.R.2d 1227 (1955).

29. 14 App. Cas. 337 (1889).

legion that have followed that doctrine; the architect has found immunity in his share.³⁰ In the well known case of *Geare v. Sturgis*³¹ in which a building collapsed and killed a third person, the architect and the contractor were held not liable on the ground that no privity of contract existed between them and the person killed. One additional influential factor was that the building had been accepted by the owner and was therefore under the owner's maintenance and control. In *Curtin v. Summer-set*,³² the court said that the consequences of holding opposite to the rule requiring privity of contract would be far reaching.

If one who erects a house or builds a bridge . . . owes a duty to the whole world that his work . . . contains no hidden defects, it is difficult to measure the extent of his responsibility and no prudent man would engage in such occupations upon such conditions.³³

There are a number of cases involving an architect's contractual liability to the owner that have indicated that an owner does not waive his rights against the architect as a result of having accepted a building as a completed structure.³⁴

OVERTHROW OF PRIVACY

In all natural evolution the extension of the effects of some particular individual change in a chain of events can be almost limitless. Thus it is that the effects of *Glanzer v. Shepard*,³⁵ in which a weigher of beans was found liable to a buyer despite the absence of a contractual relationship between them, were felt throughout the genes of liability to third persons in all areas; its effect is even now being visited upon architects and engineers. The court held that no privity of contract is necessary for

30. *May v. Howell*, 32 Del. 221, 121 Atl. 650 (1923); 76 SOL. J. 556 (1932); 76 SOL. J. 666 (1932); 76 SOL. J. 829 (1932); 73 SOL. J. 744 (1929); 164 L.T. 78-9 (1927); see also nn. 11 & 27 *supra*.

31. 14 F.2d 256 (D.C. Cir. 1926).

32. 140 Pa. 70, 21 Atl. 244 (1891).

33. *Id.* at 80, 21 Atl. at 245; see also *City of Daytona Beach v. Gannett* 253 F.2d 771 (5th Cir. 1958); *Pancoast v. Russell*, 148 Cal. App.2d 906, 307 P.2d 719 (1957); *Bay Shore Development Co. v. Bonfoey*, 75 Fla. 455, 78 So. 507 (1918); *City of Carrollton v. Ayers*, 211 Ga. 728, 88 S.E.2d 368 (1955); *State ex rel. National Surety Corp. v. Malvaney*, 221 Miss. 190, 72 So.2d 424 (1954); *School District v. Josenhans*, 88 Wash. 624, 153 Pac. 326 (1915).

34. *Breaux v. Laird*, 230 La. 221, 88 So.2d 33 (1956); *Galvin v. Keane*, 100 Ohio App. 100, 135 N.E.2d 769 (1954). For additional cases involving privity in architect's contracts, see *Spencer v. Beatty Safway Scaffold Co.*, 141 Cal. App.2d 875, 297 P.2d 746 (1956); *Palmer v. Brown*, 127 Cal. App.2d 44, 273 P.2d 306 (1954); *Smith v. Goff*, 325 P.2d 1061 (Okla. 1958); *White v. Pallay*, 119 Ore. 97, 247 Pac. 316 (1926); *Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951); *Avent v. Proffitt*, 109 S.C. 48, 95 S.E. 134 (1918).

35. 233 N.Y. 236, 135 N.E. 275 (1922).

liability. The principle was adopted that one who follows a common calling, and who serves another, may come under a duty to a second party, even though a third party may give the order or make payment.

With that beginning, cases arose which attempted to find liability to third persons. A pattern in the cases began to appear indicating an awareness that there is no visible reason for the distinction between the liability of one who supplies a chattel and one who erects a structure.³⁶ A number of cases have reached this conclusion.³⁷ A recent case, *Inman v. Binghamton Housing Authority*,³⁸ spells out the prevailing attitude. While holding that the architect was not liable, the court said that the doctrine that holds a manufacturer of an inherently dangerous chattel, defectively made, liable to remote users, is applicable to those who plan and put up structures on real property.

A Pennsylvania court said:

There is no reason to believe that the law governing liabilities should be, or is, in any way different where real structures are involved instead of chattels. The principle inherent in the *MacPherson v. Buick Motor Co.* case and those that have followed it cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon the land.³⁹

In cases dealing with the manufacturer's liability to remote users, the stress has always been upon the duty of guarding against hidden defects and of giving notice of concealed dangers. In the *Inman* case, because there was no suggestion that the structure possessed a latent defect or an unknown danger, liability of the architect was not found. Different pleadings might have yielded the opposite result.

More recently in *United States v. Rogers & Rogers*,⁴⁰ a contractor sued the architect for negligence in supervision in that the architect allegedly negligently construed and interpreted reports of tests on concrete and he then negligently approved structures made of that concrete when he should have known that the specifications were not being met. The

36. PROSSER, TORTS 517 (2d ed. 1955).

37. *Hanna v. Fletcher*, 231 F.2d 469 (D.C. Cir. 1956), cert. denied, *Gichner Iron Work, Inc. v. Hanna*, 351 U.S. 989 (1956); *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908 (3d Cir. 1948); *Hale v. Depoali*, 33 Cal.2d 228, 201 P.2d 1 (1948); *DelGaudio v. Ingerson*, 142 Conn. 564, 115 A.2d 665 (1955); *Hunter v. Quality Homes*, 45 Del. 100, 68 A.2d 620 (1949); *Colbert v. Holland Furnace Co.*, 333 Ill. 78, 164 N.E. 162 (1928); *Berg v. Oris Elevator Co.*, 64 Utah 518, 231 Pac. 832 (1924); *Colton v. Foulkes*, 259 Wis. 142, 47 N.W.2d 901 (1951); see also RESTATEMENT, TORTS § 385 (1934); 2 HARPER AND JAMES, THE LAW OF TORTS 1556 (1956); Annot., 13 A.L.R.2d 191 (1955).

38. 3 N.Y.2d 137, 143 N.E.2d 895 (1957).

39. *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 34, 68 A.2d 517, 533 (1949).

40. 161 F. Supp. 132 (S.D. Cal. 1958).

court stated that California courts no longer followed the common law rule that privity of contract must exist in order for negligent performance of the contractual duty to give rise to liability for damage to an intangible economic interest. Quoting from another case,⁴¹ the court said:

The determination whether in a specific case the defendant will be liable to a third person not in privity is a matter of policy and involves the balancing of various factors among which are the extent to which the transaction was intended to affect the plaintiff, foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, closeness of the connection between the defendant's conduct to injuries suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm.

The court in the *Rogers* case also said:

Considerations of reason and policy impel the conclusion that the position and authority of the supervising architect are such that he ought to labor under the duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner. . . . The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority exercised in such a relationship carry commensurate legal responsibility.

The architect's status as an independent contractor would bring him under this now generally accepted doctrine: If a thing constructed is inherently or eminently dangerous, or if the contractor's act results in creating a danger, the probable consequences of which would be injury to persons, other than the owner, who may come in contact with the structure, the liability of the contractor for the consequences of his negligent act is not limited to the owner but extends as well to any third person not a trespasser who receives injury or damage as a direct result of such act.⁴²

In *Day v. National-U. S. Radiator Corp.*,⁴³ an architect was held liable in damages for the fatal injury of a workman who was killed as a result of a boiler explosion. It was alleged that the explosion occurred because the architect had improperly and negligently supervised the job. Although it was conceded that the subcontractor was guilty of gross negligence in the installation of the hot water system to which the boiler was attached, the architect was found liable because he had not noted the improper connection during his supervisory inspections.

41. *Biakanja v. Irving*, 49 Cal.2d 647, 650, 320 P.2d 16, 19 (1958); see *Peek v. Richmond Elementary School District*, 326 P.2d 860 (Cal. Dist. Ct. App. 1958); *Hoehn v. Minnesota Mining & Mfg. Co.*, 248 Minn. 162, 79 N.W.2d 19 (1956); *Dow v. Holly Mfg. Co.*, 49 Cal.2d 720, 321 P.2d 736 (1958).

42. Annot., 13 A.L.R.2d 233 (1955).

43. No. 59, 697, Div. D., 19th Dist. Ct., La., in *Stearman, Court Rulings Extend Engineers' Liabilities*, AMERICAN ENGINEER, Feb. 1959, p. 11.

Of all the architect's duties, that portion which involves supervision is probably the least understood by courts and attorneys, and is also the area out of which most litigation will arise. This is the gray area of judgement, as exemplified by the *National-U. S. Radiator* case. How closely may an architect be expected to inspect the work in progress? What are the physical tolerances that can be used as a measure of his legal duty? The necessity for each case to be decided on the basis of its own facts is well recognized; there are, however, some generalizations that can be made with regard to the term "supervision."

As in most areas of misunderstanding, the roots of the weed are firmly embedded in the definitions and accepted uses of the word. Supervision, as is usually explained in a cursory fashion in the owner-architect contract, does not mean daily superintendence of the work. Where the latter is required, special provisions are made for a paid representative of the owner to be present on the job site during all working hours. In the ordinary instance, however, no such elaborate arrangements are made. The architect stops at the job site at various intervals, the frequency of which is determined both by the contractor's need for interpretation of the plans and specifications, and the owner's need for his interests to be protected in that the plans and specifications must be accurately followed. These job visits may occur each day at one stage of the construction, and each week at another stage.

Who can say what error or omission by the contractor might cause future injury to a third party and which a reasonable architect might miss, even with daily inspections? Can the architect be held liable for latent defects which cause injury and which he was not astute enough to be able to predict during his supervisory visits? Clearly, these are questions that must be answered by the courts in the future. Some pattern may have begun to take shape, but it is unlikely that attorneys will have an established guide in this area of "supervision" for some time to come.

PROFESSIONAL LIABILITY INSURANCE

A further development in this now rapidly increasing extension of architects' and engineers' liability to third persons is the initiative taken by the professional societies in making insurance available for the protection of architects and engineers. Both the American Institute of Architects and the National Society of Professional Engineers have arranged for insurance policies prepared especially for these two professions. Standing committees of these societies engaged in a comprehensive study of professional liability insurance as it might apply to architects and to engineers in private practice. These studies were carried out over a period of several years, culminating in 1957 with a notification of each member of the

availability of professional liability insurance and the reasons for its need. The following statement was made by the chairman of the A. I. A. professional liability committee:⁴⁴

. . . the committee set about to develop a policy form which would provide the maximum protection for the architectural and engineering professions . . . when the new policy was finally written it accurately reflected the wishes of the committee and in many parts the wording suggested by the committee.

Similar statements by officials of the N.S.P.E. complete the professional sanction.

The coverage in these policies is not limited to bodily injury or property damage caused by the accident; full coverage is provided for expenses of defendants in addition to the limit of indemnity; coverage is available for past errors, omissions and negligent acts.⁴⁵ Very likely courts and juries will be influenced by the knowledge that this insurance exists, and in line with the general policy of spreading the financial burden for injury over more people, it would seem that third party liability suits will increase in the area of professional engineering and architecture just as it has in other areas.

FUTURE TRENDS

The tremendous increase in population of the United States in the past several years and the promise of its continued increase in the future is indicative of an increasing amount of construction work that will be performed. The construction industry has resisted automation rather effectively and will probably continue to do so, thus indicating that the number of construction employees will increase rather than decrease. With greater numbers of architects and engineers, there will undoubtedly be more and more possibilities for negligence to occur. The effect of the licensing laws on the competence of the architects and engineers will, of course, be felt; it is folly, however, to expect that negligence can be reduced simply on the basis of professional people having met a particular minimum standard required by a license law, even though that standard be raised.

When an injury does occur, it seems proper that even though it arises out of an error in judgement rather than negligence, the one who is injured should have redress against the one whose error in judgement caused the injury. This general trend must be accepted in a world in which opposing ideologies are vying for leadership in giving benefits to the citizenry.

44. Smay, *A New Look at Professional Liability Insurance*, Journal of the American Institute of Architects, Dec. 1957.

45. See Professional Liability Policy Form, Continental Casualty Co., Chicago, Ill.

It must be expected that a private enterprise economy that is seeking ways to meet the collectivist challenge, will indeed spread the financial burden and the risk so that individual standards may be elevated without the onerous raising of arms in supplication to a paternal government. The method of equalizing the burden through insurance seems to be working well in that regard.

It is interesting to note that the liability of other professional people to third persons has long since been recognized. The accountants, for example, whose financial statements are generally used by third persons, have been in third party liability litigation over many years.⁴⁶ The general rule is that third parties may recover from public accountants on the ground of fraud but not on the ground of negligence. The fact that third party losses resulting from auditors' negligence are normally of a financial nature seems to have some influence on the decisions. In the case of an architect or an engineer where personal injury and death can occur as a result of the architect's negligence, it seems the stringency should have been much greater and liability should have arisen much sooner.

A further factor worthy of consideration is the inability of the architect to once again become the Master Builder of the middle ages. The construction of a large modern building reflects so many facets of technology that the architect, who must of necessity become involved in them, finds it increasingly difficult if not a virtual impossibility to maintain competence in them all. The architect hires specialists in these areas — engineers for structural, acoustical and mechanical design — but even though the responsibility might extend to these sub-agents, the architect remains the supervisor and must of necessity protect himself accordingly. Further, this ever widening extension of the architect's duties indicates the increased possibilities in the future of an error in judgement which might result in injury to a workman, or an occupant of the building.

These factors all point to an assuredly increasing tendency to find architects and engineers liable for injuries to third parties resulting from professional negligence.

As an epilogue to the drama, it seems discreet to consider the possibility of a lowering of professional standards through the medium of increased liability. Time was when a professional man was thought of not only as a master in his particular area of knowledge, but also as a man of stature to his clients and to the public in general. If he is to be held increasingly responsible for his errors in judgement, then the one time exalted status of the professional man is reduced to that of any

46. Beaver, *The Auditor's Legal Liability to Third Parties*, 7 WEST. RES. L. REV. 145 (1956).