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Comments on Liability of Architects and Engineers

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COMMENTS ON LIABILITY OF ARCHITECTS AND ENGINEERS

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I. HISTORICAL

Under the Code of Hammurabi the Babylonian justice for a builder was both swift and severe. Death was required "of a builder's son for a house being so carelessly built as to cause the death of the owner's son." The Romans continued the vogue of Lex Talons. From the moment of Babylonian law the pendulum swung to the furthest extreme in English law of no liability. So drastic a change required nearly four thousand years. The early British barristers developed a rule that an architect's or engineer's duty is not merely ministerial but that he is in a position of an arbitrator between the parties so that he could not be held liable for the results of his decisions so long as it was free of fraud or collusion. Although he might decline to give the grounds of his decision it was held no help to the plaintiff, the courts ruling that this super arbitrator was not required to set forth the reasons or basis of his decisions.

The early decisions in America followed the English rule regarding architects and engineers, holding them not liable for negligence in making decisions. In modern times the pendulum, however, is slowly swinging away from the English rules and our early cases. The architect's or engineer's decision is binding on all parties but liability is governed by our common law rules of negligence. In at least three general classes of cases an architect or engineer has been held liable for his negligence.

II. RESPONSIBILITY FOR DEFECTS ATTRIBUTED TO PLANS AND SPECIFICATIONS.

An architect, in preparation of plans, drawings and specifications, owes to his employer the duty to exercise his skill, ability, judgment and taste both reasonably and without neglect.[1] The

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1. Looker v. Gulf Coast Fair, 203 Ala. 42, 81 So. 832 (1919); Bayshore Development v. Bondfoey, 75 Fla. 455, 78 So. 507 (1918); Block v. Happ, 144 Ga. 145, 86 S.E. 316 (1915); Trunk & Gorden v. Clark, 63 Iowa 620, 145 N.W. 277 (1914); Kortz v. Kimberlin, 158 Ky. 566, 165 S.W. 654 (1914); Simpson Bros. Corp. v. Merrimac Chemical Co., 248 Mass. 346, 142 N.E. 922 (1924); Chapel v. Clark, 117 Mich. 638, 76 N.W. 62, (1898); Major v. Leary, 241 App. Div. 606, 268 N.Y. Supp. 413 (1933); White v. Pallay, 119 Ore. 97, 247 Pac. 316 (1926); Presnall v. Adams, (Tex. Civ.

measure of damages for defects of construction attributable to lack of skill either in preparation of plans or supervising of construction involves two different rules, depending on the character of the defect rather than on a difference in the law of the various jurisdictions. If the defects can be remedied, this cost is the measure of damages.[2] Where the structure cannot be corrected without unreasonable or disproportionate expense, the measure of damages is the difference between the value of the building as designed and built and the value it would have had if it had been properly constructed and designed.[3] The test is that if the defect is so intimately connected with the body of the structure, or is so inherent in some permanent part of such structure that it cannot be remedied at reasonable expense or without tearing it down and rebuilding it, then the proper measure of damages becomes the difference between the value of the building now and the value it would have if it had been made upon correct plans and specifications.[4]

Complications arise where there are two causes contributing to the defect. The architect is only liable for his part thereof but he is not allowed anything for the preparation of the plans as he failed to supply proper ones.[5] Efficiency of an architect in the preparation of plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one in that profession.[6] But an architect undertaking to prepare plans does not imply or guarantee either a perfect plan or satisfactory results.[7]

These general defects attributed to error in the plans or specifications of the architect usually occur: (1) the fixtures are not adequate to their intended use; (2) The roof, floors, or walls become cracked,[8] buckle, or collapse;[9] (3) The foundation is not

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App.), 214 S.W. 357 (1919); Shipman v. State, 43 Wis. 381 (1877). This rule is also followed in Canada, Couchon v. MacCosham, 19 D.L.R. 708. Because of the contractual relation with the owner a principal-agent relationship exists. See generally 6 C.J.S. Architects, § 7 (1937).

2. Schreiner v. Miller, 67 Iowa 91, 24 N.W. 738 (1885); Truck and Gorden v. Clark 163 Iowa 620, 145 N.W. 277 (1914); Barraque v. Naff, 202 La. 360, 11 So. 697 (1892);Dysart-Cook Mule Co. v. Reed & Heckenlively, 114 Mo. App. 296, 89 S.W. 591 (1905); Swartz v. Huhn, 71 Misc. 149, 126 N.Y. Supp. 568 (1911); Cheaverin v. Vail, 61 R.I. 117, 200 Atl. 462 (1938).

3. Bayshore Development Co. v. Bondfoey, 75 Fla. 455, 78 So. 507 (1918); Truck & Gorden v. Clark, 163 Iowa 620, 145 N.W. 277 (1918).

4. See 3 Am. Jur., Architects § 20 (1936).

5. Boyd v. Foster, 202 Ill. App. 251 (1916); Couchon v. MacCosham, 19 D.L.R. 708.

6. Am. Surety Co. v. San Antonio Loan & Trust Co., 101 Tex. 63, 104 S.W. 1061 (1907).

7. White v. Pallay, 119 Ore. 97, 247 Pac. 316 (1926).

8. Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1915).

9. School District of Ring Co. v. Josenbaus, 88 Wash. 624, 153 Pac. 326 (1916).

sufficient to provide adequate support[10] or (4) The waterproofing is not sufficient to prevent leads or seepage. Occasionally the owner claims that the architect is responsible for defects in the work which are alleged to have been caused by improper or unsuitable materials prescribed in the specifications. These are usually claimed as offset or counterclaims where the architect sues the owner for fees for preparation of plans and specifications.[11] But where there is error or oversight in the preparation of the plans necessitating repairs they nevertheless can not be made with unnecessary expense or in an extravagant form and still form a basis for recovery of the amount of the disbursements[12] where an architect is employed to complete a building according to the plans and specifications of a preceding architect. The supervising architect was not responsible to the owner for errors or mistakes in such plans nor could he be held responsible if the quality of the materials and workmanship prescribed did not meet the approval and expectation of the owner.[13] The supervising architect was required to complete the building in a reasonably careful and skillful manner and in substantial compliance with the plans and specifications of the original architect who prepared them.

III. LIABILITY FOR PERSONAL INJURY OR DEATH CAUSED BY IMPROPER PLANS OR DESIGNS OR SPECIFICATIONS.

In early cases frequently it was declared that no cause of action in tort can arise from a breach of contract unless there is between the defendant and the injured party what was termed "privity of contract."[14] In more modern times this doctrine has been limited in some jurisdictions, modified in many states, and rejected by others.[15] The court in New York[16] held a manufacturer of an

10 White v. Pallay, 119 Ore. 97, 247 Pac. 316 (1926).
11. Stewart v. Boelme, 53 Ill. App. 463 (1893).
12. Bayshore Development Co. v. Bondfoey, 75 Fla. 455, 78 So. 507 (1918).
13. May v. Howell, 32 Del. 221, 121 Atl. 650 (1923).
14. 38 Am. Jur., Negligence § 21 (1941).
15. 13 A.L.R. 2d 191; 58 A.L.R. 2d 865; 165 A.L.R. 2d 569; Manufacturer's liability for negligence causing injury to person or damage to property of ultimate consumer or user.
16. MacPherson v. Buick Motor Co., 217 N.Y. Supp. 382, 111 N.E. 1050 (1916). Analysis of decisions in which a remote user has recovered in tort from a manufacturer, supplier or contractor for example are: sudden collapse of an imperfectly constructed scaffold-Devlin v. Smith, 89 N.Y. 470 (1882); Faulty erection of concrete ceilings-Adams v. White Construction Co., 299 N.Y. 641, 87 N.E.2d 52 (1949); Breaking of poorly made handle on coffee urn, Hoening v. Central Stamping Co., 273 N.Y. 485, 6 N.E.2d 415 (1936); Explosion of defectively manufactured soda bottle, Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932); Explosion of an electric transformer improperly packed, Rosenbrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571

inherently dangerous Buick automobile liable for injuries to remote users. Dean Prosser[17] declared, "There is no visable reason for any distinction between the liability of one who supplies a chattel and one who erects a structure." Pennsylvania was one of the first courts to follow this line of reasoning and held, "There is no reason to believe that the law governing liability should be, or is, in any way different where real structures are involved instead of chattels. There is no logical basis for such distinction. The principle inherent to liability cannot be made to depend merely upon the technical distinction between a chattel and a structure built upon the land."[18] Architects, engineers and contractors should be liable to persons with whom they have no privity of contract for injuries sustained after the erection of a dangerous structure under the same principles of negligence applicable to manufacturers.[19] Some authorities hold that the proper test of liability is whether the manufacturer, architect, or builder should recognize that his failure to exercise reasonable care involves an unreasonable risk of causing substantial bodily harm to those gainfully using the chattel or structure in a manner and for a purpose for which it was created.[20] Indemnity from the claims of third persons is due a tortfeasor who has a contractual right to expect his joint tortfeasor to do that which would have prevented injury if it had been done as agreed.[21] "Thus an architect or engineer in preparing plans and specifications for the construction of a building under employment by the owner, is following an independent calling, and is doubtless responsible for any negligence in failing to exercise the ordinary skill of his profession, which results in the erection of an unsafe structure whereby anyone lawfully on the premises is injured."[22] "By undertaking professional service to a client, an architect impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordinarily possessed by architects of good standing practicing in the same locality. It is his further duty to use the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality; to use reasonable diligence and his best judgment in the exercise of his skill and the

(1923); Where chattel was of a type that is inherently dangerous to human safety, Huset v. J. I. Case, 120 Fed. 865 (1903).

17. Prosser, Torts, § 85, 13 A.L.R.2d 191.

18. Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949); See also Geore v. Sturgis, 56 App. D.C. 364, 14 F.2d 256 (1926).

19. Person v. Cauldwell-Wingate Co. (C.A.N.Y.), 176 F.2d 237 (1949).

20. Restatement, Torts, § 385 (1936).

21. John Wanamaker v. Otis Elevator Co. 228 N.Y. 192, 126 N.E. 718 (1923).

22. Potter v. Gilbert, 115 N.Y. Supp. 425, 90 N.E. 1165 (1910).

application of his learning in an effort to accomplish the purpose for which he is employed."[23] But there are limitations on the duties of an architect. "The responsibility of an architect does not differ from that of a lawyer or physician. When he possesses the requisite skill and knowledge and in the exercise thereof has used his best judgment, he has done all that the law requires. The architect is not a warrantor of his plans and specifications. The result may show a mistake or defect, although he may have exercised the reasonable skill required."[24]

An architect was held not liable when he was employed by a school trustee to draw plans and specifications for a school building which met with the approval of the trustee, where a child fell over a wall onto a concrete floor. The alleged negligence was based on the absence of a guard rail.[25] The court laid great stress on the theory that a public officer invested with discretoin when exercising his judgment in matters brought before him, is immune from liability to persons who may be injured as the result of an erroneous or mistaken decision, provided he acts within the scope of his authority and without willfulness, malice or corruption.[26] The court held that the architect was employed simply to draw plans and specifications for the school building, that the plans and specifications were submitted to the trustee, discussed, changed, modified and corrected, and finally approved, and that this circumstance was sufficient to relieve the architect of liability. "It would be a strange rule of law which would excuse the act of the official in passing upon the plans and adjudging them sufficient and yet would hold the person who drew them liable in damages because of alleged incompetence."

The third classification involves those cases where injuries or death result to persons working on a structure when it collapses as a result of the architect's defective plans or designs. These cases arise before the building is completed. The two previous illustrative classifications arose after completion.

In an interesting and illustrative case, the architect was held liable.[27] The plaintiff's intestate was employed by a contractor engaged in the erection of structural steel for a grandstand. Fatal

23. Paxton v. Alameda County, 119 Cal. App.2d 393, 259 P.2d 934 (1953).
24. Bayne v. Everham, 197 Mich. 181, 163 N.W. 1002 (1917).
25. Sherman v. Miller Construction Co., 90 Ind. App. 462, 158 N.E. 255 (1926).
26. 43 Am. Jur. Negligence § 21 (1941).
27. Clemens v. Benzinger, 211 App. Div. 586, 207 N.Y. Supp. 539 (1925).

injuries were sustained when he was struck by a steel column which fell because a wrong type of bolt had been used to anchor it to concrete which had not hardened sufficiently to bear the strain of the column. Judgment was rendered against the contractor who did the concrete work, the contractor doing the structural steel work, and the architect who was also supervising the work. The appellate court affirmed the judgment and liability of the architect. Liability could be predicated on his supervisory activities, namely his failure to notify the contractor engaged in the erection of structural steel of the true conditions, after authorizing and directing the placing of the anchor bolts in the drilled holes with their strength as supports wholly dependent on the resistance of the unhardened cement, or it could have been based on the defect of the original plans in which the type of anchor bolt to be used was not specified. The architect approved the detailed plans prepared by the contractor in which the improper type of bolt was specified. "For defects in the original plans and the approval of detailed plans arising from negligence on the part of the architect, liabililty resulted." Where there is a latent or concealed defect resulting in injury, liability results."[28]

IV. LIABILITY OF ARCHITECT OR ENGINEER FOR IMPROPER ISSUANCE OF CERTIFICATE.

The American Institute of Architects has zealously fought to preserve the high standing of all architects in the courts of the nation and especially to preserve the immunity which its members have enjoyed for centuries. The members of this outstanding Association are loyal and fraternal in the defense of their members, and the attorney who tries to prove lack of good faith, fraud, failure to exercise skill and care, or even simple negligence, is confronted by a most difficult situation. The problem is analogous to that of a plaintiff in a malpractice case who wishes to produce a disinterested doctor. In all the early cases, and even at the present time, the architect's certificate is agreed to be conclusive as between the parties, and as he is acting in a dual capacity and as a quasiarbitrator there is no resulting liability.[29] The reasoning of these early cases was based on the contract wherein the plaintiff owner and defendant contractor had both agreed that the architects would be the sole arbitrator.[30] Then the court held that

28. Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).
29. 42 L.R.A.N.S. 282.
30. Corey v. Eastmen, 166 Mass. 229, 44 N.E. 217, (1896).

where an architect was negligent in approving a contractor's claim for a greater amount than was actually due, he was liable to the owner for the excess payments made in reliance on the certificate but not for the cost of completing the building in accordance with the contract terms.[31] Where defects in construction were discovered after a supervising architect had given the final certificate, evidence of such defects might give rise to a claim for damages in recoupment in the architect's action for his services, but a showing of negligence did not constitute a complete defense to the claim for compensation.[32] Architects being skilled persons are held to a higher degree of care than unskilled persons and if they fail in the duty owed either in the preparation of the plans or in the supervision of the work liability would result for the damages proved by the owner.[33]

Where a roof collapsed after an architect, who prepared plans and supervised the work, gave his final certificate, the court rejected the theory that progress payments were merely authorization for the contractor to draw a proportionate part of his pay. The fact that the condition which caused the collapse was known to the owner was held not to preclude recovery since the owner was entitled to rely on the sufficiency of the construction as certified by the architect. The certificates given during the progress of the work were each evidence that the work had been satisfactorily completed by the contractor.[34]

A supervising architect who acted fraudulently or in collusion with one of the parties in issuing payment certificates was held liable for all resulting damages. There is a question of fact presented when a case involves an architect's negligence in issuing a certificate, but a false certificate based on fraud or collusion renders the architect liable for all damages, as he owes an owner a fiduciary duty of both liability and good faith.[35]

In a well-reasoned case it was held that where the contract required a contractor to submit to the architect evidence that payrolls and bills for materials had been paid before a certificate of substantial completion was to be issued, it was negligence resulting in liability if the architect failed to require such evidence and by issuing his certificate released the retainage. The

31. Bump v. McGrannahan, 61 Ind. App. 136, 111 N.E. 640 (1916).
32. Lindberg v. Hodgen, 89 Misc. 454, 152 N.Y. Supp. 229 (1915).
33. Pierson v. Tyndall, 28 S.W. 232, (Tex. 1894).
34. School District v. Josenhaus, 88 Wash. 624, 153 Pac. 326 (1915).
35. Palmer v. Brown, 127 Cal. App. 2d 44, 273 P.2d 306. (1954).

surety had a right of subrogation, since it was entitled to protection. The court rejected the contention that the architect could not be held liable because there was no privity of contract between the architect and the surety. The duty to ascertain that the contractor had paid the bills was owed both to the building owner and the surety, for whose mutual protection the retainage was provided. The failure of the architect to exercise due care and diligence in carrying out his duties might result in loss to the surety when he undertook the performance of an act which, if negligently done, would result in loss, so that the law imposed upon him the duty to exercise due care to avoid such loss even in the absence of a contractual relationship. The fact the surety had taken no steps to ascertain that the outstanding bills for labor and materials were being paid by the contractor was held not to charge it with contributory negligence, since it had the right to assume that the retainage would not be released until the contract had been fully performed.[36]

Thus we see that either an architect or an engineer may be liable in these three general classes of cases:

1. For defects or insufficiency of work attributable to plans or specifications.

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36. State of Miss. for the use of National Surety Corp. v. Malvaney et al, 72 So. 2d 424, 43 A.L.R. 2d 1212. The rights accruing to the surety date back to the time the bond was executed. Canton Exchange Bank v. Yazoo Co., 144 Miss. 579 (1926); Derby v. U.S.F. & G. Co., 87 Ore. 34, 169 Pac. 500 (1917); Southern Surety Co. v. Schlesinger, 114 Ohio St. 323, 151 N.E. 177 (1926). Surety's right to retainage is protected under the doctrine of equitable subrogation. Ohio Gas Co. v. Galvin, 222 Iowa 670, 269 N.W. 254 (1936). Paying surety has right to retained percentage and superior to those of a lending bank which is a volunteer and common creditor. Am. Bank v. Lanston, 180 Ark. 643, 22 S.W.2d 381 (1929).

The famous MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1950) overruled the early theory of Winterbottom v. Wright, 10 Mees & W. 109 (1842) which had been cited since 1842, which held there was no liability of a contracting party to one with whom he had no privity. Exceptions had been recognized to this general rule either where the seller of chattels knew that it was dangerous for its intended use or if the chattel was of a type inherently dangerous to human safety. See Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896) and Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1898).

In the Malvaney case the defendant unsuccessfully raised five separate defenses and Justice Holmes decided all of these theoris against the architect:

1. There was no privity of contract between the architect and the surety and therefore no duty was owed the surety and no damages could be recovered regardless of negligence.

2. That retainage is not a trust fund and therefore there is no lien thereon either legal or equitable for the benefit of the surety.

3. If the surety had a cause of action, it did not keep up with the project and architect was entitled to the defense of contributory negligence.

4. That by agreement of the parties the architect was the sole judge of what evidence should be required that the material bills were paid and he acted in a quasi judicial capacity.

5. If the surety had any right under equitable subrogation it did not accrue until either the date the contractor gave notice of his default or when the surety actually paid the outstanding bills for materials.

2. For personal injuries or death resulting from improper plans or designs; and

3, For improper issuance of certificates either for progress payments or for the final estimate.

Liability coverage for the architect or engineer now seems a necessity for those professions just as it has become advisable for attorneys, doctors, dentists, and other professional people. A claim could be quietly and satisfactorily handled by an insurance adjuster, but a law suit against either an architect or an engineer, in addition to the financial loss, might ruin his future business reputation with his public.

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