

1-1964

## Architect's Liability to Third Persons for Negligence in the Preparation of Plans and Specifications

William R. Benz

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

William R. Benz, *Architect's Liability to Third Persons for Negligence in the Preparation of Plans and Specifications*, 15 HASTINGS L.J. 579 (1964).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol15/iss4/10](https://repository.uchastings.edu/hastings_law_journal/vol15/iss4/10)

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

"shall not exceed the amount for which the claim could have been settled."<sup>26</sup>

### Conclusion

Professional liability insurance for attorneys offers not only financial security, but also a method for expedient and efficacious settlement of just claims without needless notoriety. The policies do not appear to contravene any ethical standards or the canon of ethics of the American Bar Association.<sup>27</sup> The fact that such policies are now offered by a number of insurance companies is highly indicative of an anticipated market.

*Joseph Moless\**

---

<sup>26</sup> Lloyd's of London ("Ham Pool") Attorney's Indemnity.

<sup>27</sup> Dautch, *Lawyers' Indemnity Insurance*, 46 *COM. L.J.* 412, 413 (1941).

\* Member, Second Year Class.

## ARCHITECT'S LIABILITY TO THIRD PERSONS FOR NEGLIGENCE IN THE PREPARATION OF PLANS AND SPECIFICATIONS

Is an architect liable to third persons injured as a result of his negligence in the preparation of plans and specifications? In California the answer appears to be yes.

In the past the architect has been sheltered from liability to third persons for his negligence by either (1) shifting responsibility to the owner after completion and acceptance of the structure,<sup>1</sup> or (2) limiting his duty of care to those who were parties to the contract<sup>2</sup>—the privity of contract doctrine. These technical limitations on liability apparently resulted from concern over the large number of persons endangered by a defective structure and the extensive period of liability (the life of the structure).<sup>3</sup>

*Boswell v. Laird*,<sup>4</sup> an early California decision, considered the liability of architects, who had contracted to design and build a dam, for property damage to a third party during the course of construction. The court said that the contractor<sup>5</sup> was liable for injuries to third parties before completion and acceptance,<sup>6</sup> but "by acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties, the liability of the contractors has ceased, and their own commenced."<sup>7</sup>

---

<sup>1</sup> See, e.g., *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345 (1857).

<sup>2</sup> See, e.g., *Geare v. Sturgis*, 14 F.2d 256 (D.C. Cir. 1926).

<sup>3</sup> See Bell, *Professional Negligence of Architects and Engineers*, 12 *VAND. L. REV.* 711, 713 (1959).

<sup>4</sup> 8 Cal. 469, 68 Am. Dec. 345 (1857).

<sup>5</sup> The court referred to the defendants as contractors, although they performed as both architects and contractors.

<sup>6</sup> That contractors and architects are liable to third persons during the course of construction, see *Chance v. Lawry's, Inc.*, 58 Cal. 2d 368, 24 Cal. Rptr. 209, 374 P.2d 185 (1962) (contractor liable); *Paxton v. Alameda County*, 119 Cal. App. 2d 393, 259 P.2d 934 (1953) (approving architect's liability in principle); PROSSER, *TORTS* 517 (2d ed. 1955).

<sup>7</sup> 8 Cal. at 498, 68 Am. Dec. at 358. *Accord*, *Fanjoy v. Seales*, 29 Cal. 243 (1865); *Kolburn v. P. J. Walker Co.*, 38 Cal. App. 2d 545, 101 P.2d 747 (1940).

The court further stated that the owners, before acceptance, must subject the work to proper tests to see that it is sufficient as to all particulars necessary for the safety of third persons.<sup>8</sup> The reasoning of the court was essentially a proximate cause analysis in that the intervening act of the owner in accepting the defect and maintaining the dangerous condition broke the causal connection between the negligent contractor and the injured third person, shifting the responsibility to the owner.<sup>9</sup> Later California decisions retained the general rule of nonliability after acceptance by the owner, but incorporated it into the privity of contract doctrine.<sup>10</sup>

The privity doctrine was first pronounced by the Court of Exchequer in *Winterbottom v. Wright*,<sup>11</sup> in which a mail coach driver alleged that his injuries were caused by a third party's breach of contract to keep the coach in repair. The court said that since the defendant's duty to act arose under a contract, he was under no duty to those not parties to the contract. The court foresaw outrageous and limitless consequences unless the duties of the contracting parties were thus limited. It is difficult to see why the mere existence of a contract should interfere with a tort duty, but the idea was accepted and expanded into a general tort rule, enabling the courts to strictly limit liability.

The privity rule became subject to certain exceptions as to suppliers of chattels, where the article was "imminently" or "inherently" dangerous.<sup>12</sup> Then Judge Cardozo, in *MacPherson v. Buick Motor Co.*,<sup>13</sup> held that the privity rule did not apply where the nature of the product was such that it was reasonably certain to place life and limb in peril when negligently made. *MacPherson* caused the exception to swallow the asserted general rule of nonliability,<sup>14</sup> and now no negligent manufacturer can shield himself behind the privity doctrine.<sup>15</sup> The privity doctrine was carried over into the area of building construction, and still survives, but the trend seems to be towards the repudiation of the doctrine in this field as well.<sup>16</sup>

The California courts recognized the privity doctrine, but applied to building construction the same exceptions that had been applied to suppliers of chattels. In *Johnston v. Long*,<sup>17</sup> the court, in overruling the defendant contractor's demurrer, said a building contractor was liable "if the

<sup>8</sup> 3 Cal. at 498, 68 Am. Dec. at 358.

<sup>9</sup> *Accord*, *Thornton v. Dow*, 60 Wash. 622, 642, 111 Pac. 899, 906 (1910).

<sup>10</sup> See, e.g., *Dahms v. General Elevator Co.*, 214 Cal. 733, 7 P.2d 1013 (1932) (elevator repair contract).

<sup>11</sup> 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

<sup>12</sup> PROSSER, TORTS 499 (2d ed. 1955).

<sup>13</sup> 217 N.Y. 382, 11 N.E. 1050 (1916).

<sup>14</sup> PROSSER, TORTS 500 (2d ed. 1955).

<sup>15</sup> MORRIS, TORTS 154 (1953). See generally *id.* at 153-56; PROSSER, TORTS §§ 84-85 (2d ed. 1955).

<sup>16</sup> See MORRIS, TORTS 155-56 (1953); PROSSER, TORTS § 85 (2d ed. 1955); 5 AM. JUR. 2d *Architects* § 25 (1962). RESTATEMENT, TORTS § 385 (1934), states that a person who erects a structure on land is liable for bodily harm to third persons after acceptance by the owner under the same rules that determine the liability of a manufacturer of chattels.

<sup>17</sup> 56 Cal. App. 2d 834, 133 P.2d 409 (1943).

work done and turned over by him is so negligently defective as to be imminently dangerous to third persons."<sup>18</sup> The court reversed a nonsuit in *Hale v. Depaoli*,<sup>19</sup> again involving a building contractor, and, applying the *MacPherson* rule, further extended the exception to all things "reasonably certain to place life and limb in peril when negligently made."<sup>20</sup> In *Dow v. Holly Mfg. Co.*,<sup>21</sup> a building contractor (who had also prepared the plans and specifications for the house) was held liable for a death caused by the installation of a defective gas heater. The court relied on the *MacPherson* rule, and noted that it had become a substitute for the general rule of nonliability, rather than an exception.<sup>22</sup> In *Biakanja v. Irving*,<sup>23</sup> the court affirmed a judgment for the beneficiary under a will (which had failed for lack of attesting signatures) against the notary public who had negligently drawn the will. The court said that the requirement of privity had been greatly liberalized and that the determination of liability "is a matter of policy and involves the balancing of various factors."<sup>24</sup>

Then in *Montijo v. Swift*<sup>25</sup> the plaintiff was injured when she fell on a stairway in a bus depot. Evidence at the trial indicated that the stair rail did not extend to the last step, and that the tile construction created an optical illusion as to where the steps ended. The architect who had designed and supervised construction of the stairway was made a defendant. In reversing judgment for the defendant notwithstanding the verdict for the plaintiff, and affirming the order granting a new trial,<sup>26</sup> the court said "an architect who plans and supervises construction work, as an independent contractor, is under a duty to exercise ordinary care in the course thereof for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so, even though such injury may occur after his work has been accepted by the person engaging his services."<sup>27</sup>

<sup>18</sup> *Id.* at 837, 133 P.2d at 410.

<sup>19</sup> 33 Cal. 2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948).

<sup>20</sup> *Id.* at 232, 201 P.2d at 13, 13 A.L.R.2d at 188. *Accord*, *Johnson v. City of San Leandro*, 179 Cal. App. 2d 794, 4 Cal. Rptr. 404 (1960) (paving contractor); *Hogan v. Miller*, 153 Cal. App. 2d 107, 314 P.2d 230 (1957) (building contractor); *Freeman v. Mazzer*, 150 Cal. App. 2d 61, 309 P.2d 510 (1957) (building contractor); *Schifano v. Security Bldg. Co.*, 133 Cal. App. 2d 70, 283 P.2d 306 (1955) (building contractor).

<sup>21</sup> 49 Cal. 2d 720, 321 P.2d 736 (1958).

<sup>22</sup> *Id.* at 727, 321 P.2d at 740.

<sup>23</sup> 49 Cal. 2d 647, 320 P.2d 16 (1958).

<sup>24</sup> *Id.* at 650, 320 P.2d at 19. Among these factors are "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Ibid.* See *Lucas v. Hamm*, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962) (beneficiaries under a will). The court approved *Biakanja* but found that the attorney who had drawn the will had not been negligent.

<sup>25</sup> 219 A.C.A. 416, 33 Cal. Rptr. 133 (1963).

<sup>26</sup> The trial court had held that the evidence was insufficient to show that the injury had been caused by the defect.

<sup>27</sup> *Id.* at 418, 33 Cal. Rptr. at 134.

The *Montijo* case is significant in that it rejects not only the privity doctrine, by affirmatively placing the architect under a duty of care to foreseeable plaintiffs, but also the theory of shifting responsibility after completion and acceptance by the owner. But there are additional factors which *Montijo* did not specifically consider.

The *Montijo* case involved an architect who had both planned and supervised the construction work. Does this rule also apply to the architect who merely prepares the plans and specifications? In *Paxton v. Alameda County*,<sup>28</sup> a workman was injured when he fell through roof sheathing. It was alleged that the architect was negligent in the preparation of the plans and specifications in that the spacing of the rafters was not in accord with the usual practice. The court held that the architect had not been negligent, but approved liability if he had been. Although the case involved liability during the course of construction, there is no reason to assume that acceptance by the owner would terminate the liability of the planning architect any more than it would the liability of the supervising architect.<sup>29</sup> The implication of *Paxton* and *Montijo*, taken together, is that an architect who prepares plans and specifications is under a duty of care to foreseeable plaintiffs, which survives completion and acceptance by the owner.

*Montijo* did not consider to what extent the intervening acts of the contractor, in building in the defect, and the owner, in accepting and maintaining the defect, would affect the architect's liability. *Johnston v. Long*<sup>30</sup> stated that a building contractor was not liable if the owner knew of the defect or could discover it by reasonable inspection.<sup>31</sup> It is doubtful that the *Johnston* case would apply today to the question of an architect's liability.<sup>32</sup> Where the injury-causing defect is not known to the contractor or the owner, there is no basis to consider their acts as superseding causes of the injury. An act merely negligent is not a superseding cause. To break the chain of causation the intervening act must be extraordinarily negligent.<sup>33</sup> If the contractor or owner knew of the defect, and had full realiza-

<sup>28</sup> 119 Cal. App. 2d 393, 259 P.2d 934 (1953).

<sup>29</sup> That defects in plans and specifications can be considered the cause of injury after completion and acceptance, see *Barnthouse v. California Steel Bldgs. Co.*, 215 A.C.A. 72, 29 Cal. Rptr. 835 (1963). A third person, injured after completion and acceptance of a grandstand, brought an action against the owner and the building contractor. The owner had furnished the plans. The court held that the injury-causing defect was the proximate result of fault in the plans and specifications and not negligence on the part of the contractor.

<sup>30</sup> 56 Cal. App. 2d 834, 133 P.2d 409 (1943), *supra* note 17.

<sup>31</sup> This rule in *Johnston* was stated in the context of an exception to the privity doctrine. A building contractor was said to be liable if the defect was imminently dangerous, provided "the owner does not know of the dangerous condition or defect and would not discover it by reasonable inspection." *Id.* at 837, 133 P.2d at 410.

<sup>32</sup> *Johnston* was treated only as a part of the historical development of the privity doctrine in a case involving the negligence of a subcontractor in the building of a swimming pool, where the obvious defect issue was not involved. *Stewart v. Cox*, 55 Cal. 2d 857, 13 Cal. Rptr. 521, 362 P.2d 345 (1961).

<sup>33</sup> [T]he fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if a reasonable man knowing the situation existing when the act of the third person is done would not regard it

tion of the danger, their acts would apparently be considered extraordinarily negligent, and responsibility would be shifted from the architect.<sup>34</sup> The concepts of proximate cause, superseding cause and shifting responsibility are founded on considerations of policy.<sup>35</sup> As a matter of policy it is difficult to see why the intervening negligence of the contractor or owner should shield the architect. The preparation of plans and specifications is an affirmative act and begins the chain of causation. The original negligence of the architect continues to the time of the injury, and contributes substantially to it in conjunction with the acts of the contractor or owner. Each of the acts (by the architect, the contractor and the owner) is a concurring cause, and full liability should attach to each.<sup>36</sup>

If acceptance of the structure by the owner does not cut off an architect's liability for negligence, it follows a fortiori that approval of the plans by the owner should not cut off this liability where the architect's negligence is a concurring cause of the injury.<sup>37</sup>

### Conclusion

Certain objections may be raised to holding the architect liable for his negligence. One common criticism is that after the owner has accepted the structure, the architect has no control over its maintenance. This is of course quite true, but it is irrelevant. The liability is based on negligence in the preparation of plans and specifications (or in supervision) and does not extend to after-developing dangers.

That a structure may endanger a great many possible plaintiffs is also true, but this would seem to be all the more reason to hold architects

---

as highly extraordinary that the third person so acted or the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent.

*Id.* at 864, 13 Cal. Rptr. at 525, 362 P.2d at 349 (subcontractor liable to owner despite intervening acts of general contractor). *Accord*, RESTATEMENT, TORTS § 447 (1934). That the rules from RESTATEMENT, TORTS §§ 442-52 regarding proximate causation have been adopted in California, see, e.g., *McEvoy v. American Pool Corp.*, 32 Cal. 2d 295, 298-99, 195 P.2d 783, 786 (1948); *Stasulat v. Pacific Gas & Elec. Co.*, 8 Cal. 2d 631, 637, 67 P.2d 678, 681 (1937).

<sup>34</sup> "[N]egligent conduct with full realization of the danger may properly be considered highly extraordinary." *Stewart v. Cox*, 55 Cal. 2d 857, 865, 13 Cal. Rptr. 521, 525, 362 P.2d 345, 349 (1961).

<sup>35</sup> See PROSSER, TORTS §§ 47-49 (2d ed. 1955).

<sup>36</sup> *Cf.* *Palmer v. Brown*, 127 Cal. App. 2d 44, 62, 273 P.2d 306, 317 (1954). In a cross-action by the owner against the architects for negligence, the court said that the concurrent negligence of the contractor (who was not joined) would not relieve the architects of their own negligence.

<sup>37</sup> *But see* *Sherman v. Miller Constr. Co.*, 90 Ind. App. 462, 158 N.E. 255 (1927), which held that an architect was not liable because the plans had been approved by a school trustee. Since the trustee had acted in his official capacity, he was not liable under local law, and therefore, the court said, the architect could not be held liable. The conclusion is questionable since public officials generally have no experience in the technicalities of planning and constructing buildings. The very existence of such technicalities is the architect's *raison d'être*. Even if the public official is skilled in these technicalities the responsibility of the architect to third persons should not be discharged where the architect's negligence is a concurring cause.