ASSESSING THE DUTY OF CARE ARCHITECTS OWE TO THIRD PARTIES IN THE CASE OF FAILURE OF PROFESSIONAL DUTY UNDER ENGLISH LAW

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ABSTRACT

The legal status of architects has undergone various changes in history from the ancient Babylonian time to date. The architect in history was highly exposed to a strict liability legal status towards third parties. Having realised this, a good degree of protection was then put on the architect and soon it was realised that the architect was too protected. The courts and society thereafter went on an assort to strip the architect of this protection leaving the architect subject to expanding liability to third parties. The introduction of the theory of negligence and the fall of privity, which was the architect's greatest defence, left the architect open to third party actions. The introduction of various statutes equally exposed the architect to further third-party criminal actions.

The profession of architecture has been defined and its duties which are basically the preparation of designs and specifications as well as the supervision of construction works to ensure adherence to plans and specifications. Liabilities may rightly arise out of these duties from third parties due to professional negligence. The subject of negligence has been outlined in this study and focused on the architect's legal position from historical times to date. Through an analytical and deductive study, the factors which have increased the architect's liabilities on third parties have also been identified and outlined. The study also identifies the defences available to an architect to prevent liability and it also looks at various ways to reduce the effect of liabilities incurred from third party claims. The study finally outlines the effects of the expanded liabilities from third parties on the profession of architecture.

Keywords: Legal Status, Architects' Acts of Negligence, Liability, Remedies

INTRODUCTION

Globally, the role of architects has constantly evolved and become more multidisciplinary. Architectural services are characterised by the application of scientific principles to the resolution of a complex and, in most cases, unique problem, which requires skills that are gained through education and training[1]. The architectural practice suffered a considerable change during the 20th century from an 'anti-competitive culture' to a challenging environment

[1] R. Mcdonald and S Madhavaram, 'Marketing of Professional Project Services: An Exploratory Study of the Role of Operant Resources in the Context of Architectural Firms' (2007) 17 (1) Marketing Management Journal 95–111.

where firms have to fight to promote and sell their services[2]. Moreover, since the economic downturn of 2008/2009, the competitive environment has been intensified for professional service-oriented industries, where architecture is included[3]. Because of the above the architectural engineering consultancies have greatly competed to give satisfaction to their clientele and gain their loyalty.[4]

During their execution of duty, architects sometimes become negligent to the extent of affecting their clients, contractors and third parties. The negligence may bring about economic loss or injury to third parties, the contractor or the client. This negligent act by the architect may be defined as breach of duties, standard, care and diligence required of the professional. The main focus of this study is to discuss the Legal implications of the breach of duty in the architectural profession to third parties. Solutions will also be sought and suggested to prevent occurrences of such negligent acts in the near future. The study will also look at possible remedies for the architect by way of defences which exist in law to free himself from liabilities.

Research Objectives

The aim of this study is to appraise legal implications of the architectural profession by discussing the duty of care architects have during their course of duty towards third parties.
The specific objectives are:

- To identify legal implications of architects' acts of negligence in the course of duty under English Law.
- To identify the extent of liability, an architect owes to third parties due to negligence resulting in design failure and negligent supervision of works under English Law.
- To identify remedies available to an architect which he may rely on when there is a breach of the duty of care under English Law.

Significance of the Study

This study intends to contribute to theory and practice. Theoretically, the study will identify possible liabilities that may be caused due to negligence in relation to competency levels of professional architects. Practically, the study may avail relevant information for architects locally and internationally to enhance their professional requisite skills and consolidate their competitive edge in the construction business without incurring liabilities during the execution

[2] J Kolleeny and C Linn, *Marketing: Lessons from America's Best-managed Architectural Firms*, (McGraw Hill Construction, New York 2002)

[3] S Smith and F Offodile, 'Service Operations Management: Case Studies of Architectural Firms' Commitment to Quality Assurance' (2011) 9(2) International Journal of Services and Operations Management 141–161.

[4] A Dana, S Muneer and M Almubarak, 'Determinants of Customer Satisfaction in the Architectural Engineering Industry' (2015) International Management Review

of their duties. It may also provide clear information and insight into the critical legal professional competences of architects, which should guide in the modelling of architectural training and practice in various jurisdictions worldwide.

RESEARCH METHODOLOGY

The method of study will be mostly analytical, comparative and deductive. A detailed analysis of case law, statutes, articles, books and any other authentic research materials will be conducted. The law under consideration is mostly English Law and the United Kingdom and Zambian jurisdictions will be the main scope. USA cases from various states will also be referred to for purposes of establishing specific legal principles which are required for this study.

THE ARCHITECT'S LEGAL POSITION

Expansion of the Legal Liability to Third Parties

From the time of Babylonian law (Under the code of the Hammurabi) through the Roman principle of *Lex talionis* (an eye for an eye; a tooth for a tooth), the pendulum swung to the furthest extreme in English law of no liability for the architect. Liability was limited to instances involving fraud or collusion by architects under the English and early American Common Law.[5] There was an expansion of the architect's liability when the English common law adopted the negligence theory. The same trend was taken up by American courts[6]. The past few decades have seen an expansion of the architect's liability to third parties from a variety of sources as outlined below.

Elimination of Privity

Under the privity of contract doctrine, only a person who bought a defective product can bring an action for breach of contract. [7]The doctrine defines the scope of liability one has towards third parties for breach of contract. Therefore only a party to the contract may recover for breach of the contract. The introduction of the negligence theory eroded the privity of contract doctrine. In the case of *MacPherson v Buick Motor Co*[8] it was ruled that a supplier of a negligently designed product is liable for his negligence if his product was defective and reasonably foreseeably expected to cause injury to anyone who might use the product. This ruling was a landmark and changed the way liability to third parties is imposed on the supplier of a product.

[5] L Drake, *The Architect's Tort Liability for Personal Injury,* . REV. 242, 242 (1968).

[6] W.Prosser, *Law of Tort* 143 (4th edn. 1971);

[7] C Elliott and F Quinn, *Tort Law* (8th edn, Pearson 2011)

[8] *MacPherson v. Buick Motor Co* [1916] 217 N.Y. 382

The case of *Inman v Binghamton Housing Authority*[9] saw the application of the foreseeability test in the construction industry. In this case an architect designed a porch without a railing and a young child fell from there injuring himself. The New York court of appeal applied the foreseeability test of the MacPherson case and reiterated that the principle would apply to architects without the need for privity of contract for an injured party to recover for negligent design. However, the architect was held not liable by the court because the danger was patent. The architect was only to be liable for hidden or latent dangers from his negligent design. Therefore, the general rule today is that an architect's negligent actions will not be saved by privity of contract.

Owner Acceptance Rule

Under the acceptance rule, after the building has been completed and accepted by the owner an architect is not liable to a third party. When the rule is applied the architect's, negligence does not matter. The rationale behind this principle is to prevent the architect from being held liable in perpetuity after the construction is complete. This is based on economic social policy considerations that may be achieved using other means. Another rationale for the rule is based on the fact that the architect has no control over the maintenance of the building, which the owner has which may basically be the proximate cause of the injury. The assumption here, is that when the owner accepts the building, the architect no longer has control over the building and the responsibility for its condition shifts to the owner.[10].

The owner acceptance rule has however been abolished in most jurisdictions worldwide in parallel with the fall of the privity doctrine because the lack of duty rationale for the rule was often amplified by lack of privity of contract. One possible justification would be a deliberate public policy asserting that simple shift in control of the structure does not end the architects' responsibility for the work since architects are responsible for the structure in terms of design and construction supervision. Therefore, the owner acceptance rule has little or no impact today.

Time of Discovery Rule

A statute of limitations bars a plaintiff from taking an action against a defendant after a lapse of a specific time period and is meant to provide a defending party a fair opportunity to defend against the action. Statutes of limitation for negligent acts will not begin to run until some damage or injury happens. It becomes challenging however if the injury occurs long after the negligent act. The major question is when does the statute begin to run; is it at the time of the injury (damage) or at the time the negligent act took place? The old rule demonstrated that counting started on the day of the negligent act and not from the time of the injury. [11] This rule subjected the architect to liability for a fixed period of time but it did not work very fair with the victims of the misdid because they could not sue the architect after that specific period. The

[9] *Inman v Binghamton Housing Authority* (1957) 3 N.Y. 2d 137. 164 N.Y.S.2d 699
[10] J L Nischwitz , 'The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties' (1984) Ohio St LJ 45 217
[11] J L Nischwitz, 'The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties' (1984) Ohio St LJ 45 217

injustice that was brought about by that rule brought about the introduction of the discovery time rule. In this rule, the statute of limitation starts running from the time of discovery of the alleged wrong or from the time the wrong should have been discovered by the plaintiff.
The application of the discover rule has subjected architects to liability in perpetuity. Basically, architects have liability for the fullness of their career and even in retirement. This subjects the architect to defending against stale claims and be forced to rely on faded memories, lost evidence, and witnesses who have died or disappeared. This has led to the enactment of special statutes aimed at stopping the expansion of liability for indefinitely unknown long periods of time.

Social Legal Climate

Many societies in the world today have become very legalistic. They want to sue any little wrong they observe in society and the architect's misdeeds are not an exception. The search for a 'deep pocket' has intensified so much and architects are not exempted from this search as they are believed to have professional indemnity (liability insurance) to cover for their professional liabilities.

Workers Compensation

A bigger part of third parties wanting to sue an architect are construction workers who get injured during construction. The courts have extended the architect's supervisory duties to include the safety of the execution of construction works. Workers compensation systems in many countries are inadequate, thus making architects a prime target for legal suits by injured workers looking for a 'deeper pocket' which is enhanced by the architect's professional indemnity.
Under normal workers compensation, workers who suffer from losses such as pain and disfigurement are not compensated. As a result, many workers will look for compensation from elsewhere including from architect, basing on traditional tort theories.

The above outlined points have expanded the architect's liability to third parties and are discussed further below in detail particularly the negligence theory.

Introduction of Statutes

The proper carrying out design duties by an architect requires that the design works are carried out lawfully without contravening the building regulations, planning laws, bye laws and other relevant legal requirements. In the case of *BL Holdings Ltd v Robert J Wood and partners*[12] the court stated that the architect's advice, though wrong, was of a kind that a reasonably competent architect might give. Under a design and build arrangement, the contractor was said to be strictly liable to the employer for any breach of the building regulations. The same position was established in the case of *Newham LBC v Taylor Woodrow (Anglian) Ltd* where there was a notorious collapse of a block of flats at Ronan Point.

[12] *BL Holdings Ltd v Robert J Wood and partners* (1979) 12 BLR 1

In the UK, The Construction (Design and Management) Regulation 2015 designers have severe and wide-ranging obligations, the breach of which carries criminal penalties. It is required that designers do everything reasonably practicable to avoid danger to the health and safety of anyone working on the site, or those who may be affected by the work (third parties included). This puts a huge obligation on the principal designer to ensure that good health and safety obligations are met.

The Occupational Health and Safety Act, 2010 of Zambia also puts a similar obligation on designers:

20. *(1) A person who designs or constructs a building or structure, or part of a building or structure who knows, ……. shall ensure, so far as is reasonably practicable, that it is designed or constructed to be safe and without risks to the health or safety of persons using it as a workplace for a purpose for which it was designed.*

21. (1) An architect and engineer shall carry out their duties in such a manner as to ensure the occupational health and safety of persons at, or near, a workplace.

This act widens the responsibility of architects to third parties as they design work places and penalties for this liability may be imprisonment or fines.

Chapter 441 of the Laws of Zambia, The Factories Act also puts a similar obligation of architects to design a safe working environment that ensures good health and safety environments.

The Defective Premises Act 1972 imposes a duty on designers and contractors to ensure that there are no defects on the workmanship and materials and the dwelling is fit for habitation. This duty is owed to everyone who subsequently acquires interest, whether legal or equitable in the dwelling.

In England the introduction of the Contracts (Rights of Third Parties) Act 1999 now facilitates for third parties to bring actions under contract under certain conditions. The doctrine of privity of contract had two rules as has been highlighted above. Firstly, a third party did not have obligations imposed by the terms of a contract and secondly the third party would not enforce a contract for which he has not provided consideration. The Act now allows third partied to enforce terms of the contract that benefit them and gives them access to a range of remedies available if the terms are breached. The Act also limits the alteration of contracts without the permission of the third parties involved.[13]

Architect's Standard of Liability

The standard of liability for an architect during the execution of duty is normally a question between that of reasonable care and skill or one that gives a *guarantee* that the design shall be fit for its purpose. In the first liability and architect shall be liable if 'professional negligence' can be proved. The second liability is equivalent to that of a seller or other suppliers of goods.

[13] https://en.wikipedia.org/wiki/Contracts_(Rights_of_Third_Parties)_Act_1999 Accessed 4th July 2020

Under a Traditional (Separated) project procurement system, the courts have made it clear that the standard of reasonable care and skill is applicable. This is called the '*Bolam* Standard'. In *Bolam v Friern Barnet Hospital Management Committee*[14] the Judge, McNair J stated:

The test is the standard of the ordinary skilled man exercising and professing to have that special skill…. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art

Architects will therefore be judged by the standard of an ordinary skilled man exercising and professing to have that special skill, not falling short of a responsible body of architects, or recognised practice within the profession. In the case of *Voli v Inglewood Shire Council*[15], Judge Windeyer said;

He [an architect] is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practicing the profession.

The RIBA Standard of agreement 2010 for an architect (2012 revision) at Clause 2.1 echoes the obligation stated above requiring an architect to exercise reasonable skill and care and diligence in accordance with the normal standards of the architect's profession. Part 2, Section 13 of the Supply of Goods and Services Act 1982 has a term to the effect that the architect will carry out their services with reasonable skill and care and is also implied where an architect is supplying services in the course of their business.

The scope and extent of an architect's liability will be determined on the facts of each case and on the express or implied terms of the relevant contract. The law imposes a strict liability legal standard of design liability on design and build contracts. The basic legal position was mentioned in *Francis v Cocktail*[16] where it was said:

When one man engages with another to supply him with a particular article or thing…… he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied.

This principle was reflected in *Viking Grain Storage v TH White Installations Ltd*[17] *during* to a design and build contract. In this case the defendant designed and erected a grain storage which was defective. The same principle was also accepted by the House of Lords in *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd*.[18] In this case a mast which was of a novel cylindrical design, collapsed due to a vortex shedding and asymmetric ice loading. The House of Lords held that EMI must have warranted that BICC's design would not be negligent. However, EMI were liable in negligence and there was therefore no need to ascertain if they were liable under strict liability for a defective design. The court stated that there probably *would* have been such liability.

[14] *Bolam v Friern Barnet Hospital Management Committee* (1957) 2 ALL 118
[15] *Voli v Inglewood Shire Council* (1963) CLR 74
[16] *Francis v Cocktail* (1870) LR 5 QB 501
[17] *Viking Grain Storage v TH White Installations Ltd* (1985) 333 BLR 103
[18] *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1

Another leading case is that of *Greaves & Co. (Contractors) Ltd v Baynham Meikle and Partners*.[19] The claimants were employed under a package deal contract to construct a warehouse which they subcontracted to the defendant. The floor cracked and became dangerous as a result the claimants were held liable to the clients for the cost of replacement. The claimants sought to recover costs from the defendants The Court of appeal held for the claimants. The courts stressed that even if there was no liability under negligence the defendants would have been liable for the failure of their design.

The purpose of establishing the architect's standard of liability in this study is to be able to ascertain the extent of liability his execution of duty will have on the third parties. The case of *Hawkins v Chrysler (UK) Ltd and Burne Associates.*[20] demonstrated this. In this case, the defendants provided employees with showering facilities at their factory and one injured himself after slipping on wet tiles. They accepted liability and claimed it back against the architects who had designed, specified and supervised the installation of those showers. Based on these facts, it was held by the Court of Appeal that there was no reason to imply any warranty that the materials selected would be fit for their intended purpose by the architects. Architects were only expected to use reasonable care and skill. The courts therefore could not raise professional liability to a new higher level.

Professional Negligence

The application and effect of the standard of care expected of an architect depends on the context in which it is applied. It will be important to examine an architect's functions in order to determine his duty. The two primary and prominent functions of an architect are (1) preparation of plans and specifications and (2) supervision of the construction process. The architect's liabilities to third parties emanate from these two fundamental duties.

Preparation of Plans and Specifications

Traditionally an architect is known to be a designer of buildings as has been highlighted above. The overall responsibility for the design of a project will usually be borne by the architect, where one is involved. The architect is charged with the duty to design a structure that is structurally sound, practical and aesthetically pleasant. In *Paxton v Alameda County*[21] an architect designed a building and during construction a construction worker was injured when he fell from a roof. It was held that the architect wasn't liable for negligence and had used reasonable care even if the design departed from the normal practice. This case brought out with clarity the position that if an architect fails to exercise due care in the preparation of designs, he can be held liable.

In *Laukkanen v Jewel Tea Co*[22] an architect is held liable for a negligent design based on his failure to use a heavy-weight concrete block with a greater wind safety factor. He instead

[19] *Greaves & Co. (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99
[20] *Hawkins v Chrysler (UK) Ltd and Burne Associates* (1986) 38 BLR 36
[21] *Paxton v Alameda County* (1953) 119 Cal. App. 2d 393
[22] *Laukkanen v Jewel Tea Co.* (1966) 78 III. App. 2d 1533, 222 N.E.2nd 584

designed a hollow concrete block pylon that fell on the plaintiff during a severe storm. The architect was. In *Mai Kai, Inc v Colucci*[23] an architect was held liable when a restaurant patron was injured because of the architect's negligent design of a counterweight supporting an exhaust fun. The counterweight had a defective weld.

All in all, as demonstrated in the cases above, the legal position is that an architect shall be held liable for his negligent designs if the court or jury finds that he has failed to satisfy an established standard of care. In most cases in which a third party is injured because of a defect in plans or specifications, 'no haven where an architect……. may safely take cover' exists[24]. However, the burden of proof lies on the plaintiff to satisfy the requirements of establishing the duty of care owed.

Selection of materials and specifications is one of the most important aspects of design. The designer is expected to exercise reasonable care and skill and does generally not warranty that the materials used will be fit for their intended purpose. Nevertheless, architects are expected to serious steps to prove reasonable care and skill. Even in novel designs the same is expected. The House of Lords in *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd*[25] stated thus*:*
The project may be alluring. But the risks of injury to those engaged in it, or to others, or to both, may be so manifest and substantial and their elimination may be so difficult …. ……Circumstances have at times arisen in which it is plain common sense and any other decision foolhardly. The law requires even pioneers to be prudent.

A specification is a document which sets out the technical requirements of the services to be provided and the work to be performed. A specification may indicate the materials to use, the standard of workmanship, components to be used, specific performance required or the work methods which are required to adopt.[26]

The case of *Ian McGlinn v Waltham Contractors*[27] shows the consequences of architects not providing specifications. The architect did not prepare a specification during the design of a large house in Jersey resulting into the contractor failing to produce a house which would resemble the quality of the boat as the client wanted. The judge said that the architects were under obligation to produce a specification for the works and had since failed to do this. Architects were held liable for failing to spell out to the contractor the very high standard the client required.

[23] *Mai Kai, Inc v Colucci* (1966) 186 So. 2d 798 (Fla. Dst. Ct. App.)
[24] J L Nischwitz , 'The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties' (1984) Ohio St LJ 45 217
[25] *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1
[26] M Cousins, *Architect's Legal Pocket Book* (2nd edn, Routledge 2016)
[27] *Ian McGlinn v Waltham Contractors* EWHC 149 (TCC) HHJ

Supervision of Construction

One of the main duties of an architect is the supervision of construction works. Supervision of works comes in two divisions namely; (1) Supervision for adherence to designs and specifications (2) supervision of construction methods and techniques. The role of an architect to supervise construction works is not easy to define compared to that of preparation of designs. The employment of an architect is governed by the agreement between him and the employer and therefore courts have to closely look at the contract and the terms of reference therein.

Supervision for adherence to designs and specifications

The duty to supervise works to ensure strict or substantial conformity to plans and specifications has generally been agreed to be the responsibility of an architect on a construction site. Any deviations from the plans by a contractor may be evidence to prove that the architect did not supervise adequately and was negligent in his duties. In *Schreiner v Miller*[28], the court held that the architect had a duty to assure substantial conformity. In *Paxton v Alameda County*, an architect was found to be under duty to supervise with reasonable care when he was notified that the contractor was deviating from the original architect's plans.

The details of the duty to supervise for adherence to designs and specifications are the subject of litigation and the existence of the duty is generally recognised. The negligence standard of care, as outlined above, is essential in determining if the architects was negligent in the execution of his supervisory duty.

An architect may owe a duty of care to subsequent owners of a building he designed or supervised because of latent defects arising over time. This can be the case even where the architect has no reasonable possibility to inspect the duty of the negligent builder. In *Baxall Securities Ltd v Sheard Walshaw Partnership*[29] a flooding occurred because of the inability for the drainage system to cope with heavy rainfall. An action was brought in tort because of the nonexistence of a contract between the plaintiff and defendant. The architect was found to owe a duty of care to the claimant because of the latent defects in the building despite there being no reasonable possibility of inspection. Lord Keith in *Murphy v Brentwood District Council* [30]also stated the same line of legal thought. Thus it is established that the architect has a traditional duty to check and ensure compliance by the contractor, *Investors in Industry Ltd & South Bedfordshire DC*[31]

Supervision of Construction Methods and Techniques

The question of whether an architect has the duty to supervise the way construction is executed and when this applies is a very controversial one. Most claims coming from third parties who are construction workers, actually come from this line of function of an architect. This liability actually emanates from physical injuries or deaths caused by faulty or dangerous methods of which bring about poor construction safety. The two lines of inquiry are, if the architect has

[28] *Schreiner v Miller (1885)* 67 Iowa 91, 24 N.W. 738
[29] *Baxall Securities Ltd v Sheard Walshaw Partnership* (2001) TCC at paras 107 and 111
[30] *Murphy v Brentwood District Council* [1991] AC 3398 at 460-465
[31] *Investors in Industry Ltd & South Bedfordshire DC* [1986] 1 All ER 787

been contracted to supervise the works and if so, to what extent. The contract between the architect and employer is vital as it outlines the duties and responsibilities of the architect. It is important to ascertain the architect's duty to supervise construction methods since it is generally taken it is not the architect's duty to supervise construction methods unless he assumes it in some manner.

In *Pancoast v Russell*[32] a home owner brought an action against an architect for negligent performance of the duty to inspect and approve contractor's work. The architect was held liable for failing in his duty to supervise construction methods. The term 'general supervision' which was used in the contract was interpreted to mean something other than superficial supervision. This brings out the view that the architect's contractual obligation of 'general supervision' goes beyond supervision for adherence to designs and specifications. This case illustrates the beginning of the liberal expansion of the architect's duty. Another case which demonstrates the expansive view of the architect's supervisory role is *Pastorelli v Associated Engineers, Inc*[33]. It was held that an architect or engineer has supervisory duties must demonstrate reasonable care to ensure that the contractors execute their work properly. The court's application of a negligence standard demonstrates a duty to supervise construction methods. This principle was further demonstrated in *Erhart v Hummonds*[34] where the court held that the architects had a duty to supervise construction methods. In this case a wall caved in and killed during an excavation.

The case of *Miller v DeWitt* [35]brought about the Miller Doctrine. The workers for a contractor got injured when the roof of the building they were renovating collapsed. An action was brought against the architect in negligence for failure to ensure that the roof was properly shored by the contractor. Based on the employer architect contract, the supreme court held that the architect had a duty to supervise construction methods and techniques. The court thoroughly examined the employer-architect contract as well as employer-contractor contract and interpreted the meaning of the agreements to impose, on the architect, the duty to interfere or even stop work if the contractor practiced unsafe and or hazardous construction methods which were in violation of the employer-contractor agreement. The court therefore imposed on the architect a duty of ensuring that the contractor fulfilled the employer-owner agreement and that safe and adequate construction methods were used. This is an expansion of duty which neither party intended.

This case extended the architect's liability beyond that contemplated in the employer-architect contract and beyond the intents of the parties. The Miller Principle is not consistent with the view that a contractor knows construction methods better than an architect, whose primary duty is design, and is in a better position to devise, implement and control construction methods and techniques than an architect. These inconsistencies have led to some beliefs that the courts have created a duty that is beyond normal practice of an architect which amounts in effect to liability

[32] *Pancoast v Russell* (1957) 148 Cal. App. 2d 909, 307 P.2d 719
[33] *Pastorelli v Associated Engineers* (1959) 176 F. Supp. 159
[34] *Erhart v Hummonds* (1960) 232 Ark. 13333, 1334 S.W.2d 869
[35] *Miller v DeWitt* (1967) 37 III. 2d 2733, 226 N.E.2d 630

without proof of negligence which is basically strict liability. Architects have been held to a duty to supervise construction methods and techniques as the doctrine is still viable.

However, where an architect is engaged under the RIBA Standard Agreement 2010, it is made clear that as a contract administrator the architect will 'visit the site' and not 'inspect' the work. The limited nature of the architect's obligation to monitor work is well recognised in English courts as observed in *East Ham BC v Benard Sunley & Sons ltd* and *Sutcliff v Chippendale & Edmontondson* [36]cases. Conversely an Australian court held an architect liable for the collapse of concrete that was poured between site visits, which took place on a twice-weekly basis. In *Clayton v Woodman & Son (Builders) Ltd*[37] a claimant bricklayer was injured when a wall collapsed when he was cutting a groove in it. It was held that it was not the architect's duty under the RIBA form of contract to advise the builder on the safety precautions to take or how to conduct his operations thus holding the architect not liable.

The case of *Oldschool v Gleeson (Construction) Ltd*[38] demonstrates that where the state of work being done is positively dangerous an architect may have the obligation to warn the contractor but not to supervise the method of execution of work. In this case a party wall collapsed during demolitions. The judge said the duty of the consulting engineer to the contractor did not extend to the execution of the works and it was no more than a duty to warn the contractors to take necessary precautions. It can be viewed that the architect or engineer visiting the site in a supervisory capacity does so in order to ascertain if the works are being constructed in accordance with the design and not in order to control the contractor's method of execution of the works.[39]

Therefore, to determine the extent of liability of an architect so far as the supervision of construction methods and techniques is concerned, the architect-employer contract needs to be analysed to detail by the courts, though sometimes the courts have extended the architect's liability beyond the contemplation of the parties.

[36] *East Ham BC v Benard Sunley & Sons ltd* [1966] AC 406; *Sutcliff v Chippendale & Edmontondson* (1971) 18 BLR 149
[37] *Clayton v Woodman & Son (Builders) Ltd* [1962] 2 QB 533
[38] *Oldschool v Gleeson (Construction) Ltd* (1976) 4 BLR 103
[39] M James, *Construction Law Liability for the Construction of Defective Buildings* (2nd edn, Palgrave Macmillan 2001)

ARCHITECT'S DEFENCES FOR BREACH OF DUTY

Liabilities for architects from the third parties come from various sources as outlined above. The architect has to have defences against these claims. The main defences of privity of contract and owner acceptance rule are no longer usable and an architect can no longer rely on them. Other possible defences are outlined below.

Basic Negligence Defences

The most common liability which an architect is sued for is negligence during the preparation of plans and specification or during supervision of works on site. The most common defence for the architect will be the denial of the existence of all or one of the requirements of the negligence elements; duty, breach, proximity and damage. The plaintiff has the burden of proof to prove the existence of all these elements in order for the case to be a total success. The proximate element is the most difficult for most plaintiffs to prove. The plaintiff needs to prove the proximate cause to have a causal connection between the alleged negligent act or omission with the injury sustained. The architect in defence has to prove that the alleged negligence was not proximate cause of the injury. If there is no proven proximity there will not be liability despite a breach of duty by the architect.

Contributory Negligence

Contributory negligence is one defence that is used in actions raised against an architect for personal injury of a third party. If successfully used, this defence has the capability of reducing the third party's recovery. The architect will need to prove that the plaintiff contributed to the injury which should have been prevented. Therefore, the architect should not be fully liable for the injuries but rather the third party should take part of the liability. This defence results in a proportionate reduction of the damages payable by the defendant.[40]

Contribution or Indemnity

When an architect successfully asserts a claim for contribution against another party, that party will be required to honour that part of damaged assessed against the architect. Contribution is therefore not a defence per se but it is a tool used to reduce the architect's liability. This may happen with a contractor who built the building or the owner of the building who probably has not maintained the property so well and it has contributed to the causing of the injury. The architect may mitigate his liability by joining all potential parties to the action for claims of contribution.

Indemnity is an attempt to shift the economic burden of the loss to a party whose fault is greater and it is not necessarily a defence. Indemnity may arise by operation of law to prevent an unjust result. During design, architects normally have other members on the design team like a

[40] Law Reform (Contributory Negligence) Act 1945, Section 1

structural or services engineers. In the case of design failure, the architect may seek indemnity from the negligent engineer. An allowance of indemnity may depend on a 'passive-active' dichotomy. A party is actively negligent if he had the active or primary role in the negligent act or one may be passively involved if he had a secondary role. Indemnity may be denied on grounds that the party involved is not a secondary tortfeasor.

CONCLUSION

The legal status of architects has undergone various changes in history from the ancient Babylonian time to date. The architect in history was highly exposed to a strict liability legal status towards third parties. Having realised this, a good degree of protection was then put on the architect and soon it was realised that the architect was too protected. The courts and society thereafter went on an assort to strip the architect of this protection leaving the architect subject to expanding liability to third parties. The introduction of the negligence theory and the fall of privity, which was the architect's greatest defence, left the architect open to third party actions. The introduction of various statutes equally exposed the architect to a further third-party criminal action.

The architect's duties are mostly the preparation of designs and specifications as well as the supervision of construction works to ensure adherence to plans and specifications. Liabilities may rightly arise out of these duties from third parties due to negligence. These duties are appropriate as the architect is best suited to undertake these duties relating to design. However, the expanded duties of supervision of work methods and construction techniques make liability of an architect to third parties highly expansive. Various contracts have been worded in a way that eliminates liability emanating from supervision of construction methods and techniques by stating that an architect just inspects work and does not supervise. However, any court looking to expand the architect's duty to provide recovery for an injured third party will have no much difficulty in going beyond the contract language.

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