persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test—products which would fall within the privilege."[64]

There appears also to be a limit to the amount of compulsion that the state can use. If the force becomes too great, the sense of justice in the due process clause will be "shocked" and the evidence will be inadmissible.[65] It seems then that the state must not only refrain from using any testimonial evidence obtained from the accused while taking the blood test, but it must also use a limited amount of compulsion.[66]

The Court relies most heavily on the *Holt* case and Justice Holmes' statement that a man's body is not properly excludable under the privilege.[67]

While the Court specifically states it is not adopting Wigmore's view concerning the scope of the privilege,[68] it comes much closer to assenting to his theory than in the past. Justice Black, joined by Justice Douglas dissenting, had regrets that the term, testimonial, as espoused by Wigmore was used by the majority to narrow the fifth amendment's protection. Justice Black also felt that the evidence had both a testimonial and communicative nature.[69]

On the basis of the dissenting opinions, it appears that at least three of the four dissenters felt the privilege had been violated. Chief Justice Warren relied on his dissent in *Breithaupt*, which expressed the view that compulsory blood tests shocked the sense of justice in violation of due process.[70]

Although Justice Black feels the reasoning of the majority is unsound as shown in the last sentence in the fifth amendment section of the case, that sentence best sums up the Court's thinking: "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."[71]

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64 *Id.* at 765 n.9. *But see* State v. Holt, No. 52734 (Iowa, filed Mar. 5, 1968) where the Iowa Court held admissible testimony as to defendant's refusal to submit to a chemical test for intoxication. The court reasoned: "If evidence as to refusal, the taking of a blood specimen over objection, and the result of the test is admissible it should follow that evidence of refusal after warning is admissible."

65 Rochin v. California, 342 U.S. 165 (1952).

66 Schmerber v. California, 384 U.S. 757, 760 n.4 (1966).

67 *See* note 25 and accompanying text *supra*.

68 Schmerber v. California, 384 U.S. 757, 763 n.7 (1966).

69 *Id.* at 757.

70 *Id.* at 772.

71 *Id.* at 765.

THE ARCHITECT'S TORT LIABILITY FOR PERSONAL INJURY

INTRODUCTION

The history of the architect's tort liability dates back to the days of Babylon. At that time the Code of Hammurabi dictated that the rule "an eye for an eye; a tooth for a tooth" determine the architect's fate. If the architect designed a building which fell and killed the owner, he was executed. If the owner's son was killed or injured, a like injury was inflicted upon the architect's son.[1] English courts and early American courts took the position that the architect was in the position of an arbitrator and, as such, would not be held liable for the result of his decisions unless fraud or collusion could be shown.[2] However, since the turn of the century, American courts have been slowly disarming the architect of his immunity and exposing him to liability for common-law negligence.[3]

The purpose of this note is to analyze the recent tendency of the courts to broaden the architect's liability to third persons for personal injury. The discussion will be divided into two divisions. The first division will evaluate the architect's position in situations where personal injury results from a defective design. Consideration will also be given in this division to the question of whether or not the architect could be held liable for the breach of an express or implied warranty. The second division will be concerned with the architect's duty to supervise the construction of the building which he designed. The cases relating to his duty to supervise will be generally categorized according to the following: (1) his duty, if any, to see that the building is constructed in compliance with the plans and specifications, and (2) his duty to see that the contractor does not use methods or techniques of construction which may cause injury to third persons.

I. LIABILITY FOR DEFECTIVE DESIGN

A. *Negligent Design*

In the early part of the twentieth century the same privity of contract requirement which had been applied to negligently manufactured chattels was applied to an architect's negligent design of a building.[4] In each case the injured party had to establish privity of contract between himself and the architect or manufacturer before the courts would allow recovery.[5] The

1 Witherspoon, *Architects' and Engineers' Tort Liability*, 16 DEFENSE L.J. 409 (1967).

2 5 AM. JUR. 2d *Arbitration and Award* § 107 (1962).

3 *See* Craviolini v. Scholer & Fuller Associated Architects, 89 Ariz. 24, 357 P.2d 611 (1961), discussing and distinguishing the quasi-arbitrator function of an architect, among his other functions, under modern law.

4 Gear v. Sturgis, 14 F.2d 256 (D.C. Cir. 1926); Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926); Bayne v. Everham, 197 Mich. 181, 163 N.W. 1002 (1917).

5 Cases cited note 4 *supra*.

rationale for applying this rule to the architect was that his duty to use reasonable care in designing a building was founded upon his contract with the owner and that this contractual duty did not extend beyond the contracting parties.[6] In 1916, Justice Cardozo rendered his landmark opinion in *MacPherson v. Buick Motor Co.*[7] This case swept aside the doctrine of privity of contract with regard to a manufacturer's liability for the negligent design of chattels. It held that an automobile manufacturer who marketed a negligently designed product was liable to anyone who forseeably might use that product. The test then became whether or not it was *forseeable* that the plaintiff might use the product. While this famous decision abolished the privity requirement in regard to the negligent manufacture of chattels, its doctrine was not applied to the negligent design or construction of buildings until more than thirty years later. The courts did develop several exceptions to the privity doctrine when there was a showing that: (1) the architect had committed what amounted to willful negligence;[8] (2) an implied invitation to enter the premises had been extended from the architect to the injured party;[9] or (3) the defect was one which presented an imminently dangerous condition on the premises.[10]

The Supreme Court of Pennsylvania, in *Foley v. Pittsburg-Des Moines Co.*[11] was the first to declare that the forseeability test should be extended to cases where improvements had been constructed on real property. In that case the plaintiff was seeking to recover for the wrongful death of her husband who had been fatally burned when a tank, built by defendants, collapsed and allowed the escape and ignition of liquefied gas. The defendant claimed that the tank was a structure on realty and that the plaintiff could not recover due to her lack of privity of contract. The court answered this argument by saying:

> The principle inherent in the *MacPherson v. Buick Motor Co.* case and those that have followed it is that one who manufactures and delivers any article or structure with the knowledge that it will be subjected to use by others, must, for the protection of human life and property, use proper care to make it reasonably safe for such users and for those who may come into its vicinity; certainly the application of that principle cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon land.[12]

The *Foley* case applied this rule to a contractor, not an architect. It was not until 1957, in *Inman v. Binghamton Housing Authority*,[13] that a court

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6 Cases cited note 4 *supra*.

7 217 N.Y. 382, 111 N.E. 1050 (1916).

8 Murphy v. Barlow Realty Co., 206 Minn. 527, 289 N.W. 563 (1939); Greenwood v. Lyles & Buckner, Inc., 329 P.2d 1063 (Okla. 1958).

9 Colbert v. Holland Furnace Co., 331 Ill. 78, 164 N.E. 162 (1928).

10 Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926); Johnson v. Long, 56 Cal. App. 2d 834, 133 P.2d 409 (Dist. Ct. App. 1943); Berg v. Otis Elevator Co., 64 Utah 518, 231 P. 832 (1924).

11 363 Pa. 1, 68 A.2d 517 (1949).

12 363 Pa. 1, 34, 68 A.2d 517, 533 (1949); *See also* RESTATEMENT (SECOND) OF TORTS §§ 385, 395 (1965), which defines the duty of a contractor to erect a structure having no dangerous defects as being similar to the duty of a manufacturer of chattels.

13 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

applied *MacPherson* to a case involving an architect's liability for negligent design. The *Inman* case involved a porch which had been designed without a railing. Plaintiff, a young child, had fallen off the porch and had been injured. The plaintiff alleged that the architect was negligent in designing a porch without a railing. The court held that the forseeability test of the *MacPherson* case was applicable to architects and that injured persons no longer needed to show privity of contract with the architect in order to recover for injuries resulting from his negligent design. But the court then went on to hold that the architect was not liable for his negligent design of the porch because it was a patent danger which was obvious to the layman. Thus, the architect would be answerable only for latent or hidden dangers resulting from his negligent design. The foregoing rules have been considered the touchstone for determining the liability of the architect.

There appears to be little controversy as to the general definition of the architect's duty to provide a safe design. This definition was clearly enunciated in the California case of *Paxton v. Alameda County*[14] as follows:

> 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 application of his learning, in an effort to accomplish the purpose for which he is employed.
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> . . . The standard is that set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in the same locality, at the same time.[15]

In the *Paxton* case a construction worker fell through the roof of a building designed by defendant. The court held that even though the architect designed a roof with rafters 30 inches apart, instead of using the customary 24 inch span, he was not negligent because he had used reasonable care in calculating the strength of the materials and the stress which they would withstand. The court went on to say that the fact that he had made these calculations in accordance with the standards of good practice in his profession prevented a finding of negligence, even if there had been mistakes in his computations.

In order to determine the level of skill and care ordinarily possessed and

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[14] 119 Cal. App. 393, 259 P.2d 934 (Dist. Ct. App. 1953). *See also* Looker v. Gulf Coast Fair, 203 Ala. 42, 81 So. 832 (1919); Kortz v. Kimberlin, 158 Ky. 566, 165 S.W. 654 (1914). The Iowa Supreme Court defined the architect's duty in a case where the architect sought to recover his fees for a defectively designed building, saying: "As practicing architects, plaintiffs were bound to furnish plans and specifications prepared with a reasonable degree of technical skill, and such as would produce, if followed and adhered to, a building of the kind called for, without marked defects in character, strength, or appearance." Trunk & Gordon v. Clark, 163 Iowa 620, 624, 145 N.W. 277, 279 (1914).

[15] Paxton v. Alameda County, 119 Cal. App. 393, 398, 259 P.2d 934, 938 (Dist. Ct. App. 1953).

practiced by architects in the community, it is necessary to introduce expert testimony for the consideration of the jury. Such testimony is generally sufficient to generate a jury question.[16] While there also have been attempts to create a jury question as to the architect's negligence by means of the doctrine of *res ipsa loquiter*, to date the courts have refused to apply this doctrine to architects.[17] The more recent cases have shown an increasing willingness to conclude that the architect breached his duty to exercise the care ordinarily practiced by other architects in the community. One of these is the case of *Montijor v. Swift*[18] which concerned an architect who had designed and supervised the remodeling of a bus depot. A stair railing was positioned so that its lower end did not extend over the bottom stair step. Plaintiff, who fell on the unguarded step, claimed that the architect was negligent in not designing the rail so that it would extend over all the steps. The court refused to disturb a jury finding that this was a breach of the architect's common-law duty to properly design the stair railing. This case might be interpreted as extending the doctrine of forseeability to the point where lack of imagination could be considered negligence.

The State of Illinois also had little difficulty in finding negligence arising from an architect's designs. In *Laukkanen v. Jewel Tea Co.*[19] a piling designed by the defendant fell on the plaintiff during an 80 m.p.h. gust of wind. The court held the fact that the defendant used light-weight concrete block having a wind safety factor of 10% instead of heavy-weight concrete block having a wind safety factor of 50% created a jury question as to the defendant's negligent design.

This trend of the California and Illinois courts has also been exhibited in a Florida decision.[20] There the court held that an architect who recommended the lengthening of a counterweight arm attached to an exhaust fan was negligent in so doing. The lengthening of the arm had put an additional strain on a defective weld joint and the arm had fallen, injuring the plaintiff. A verdict against the architect was allowed to stand, even though the court found that the architect was in no way responsible for the defective weld joint. In the dissenting opinion it was said that the adding of the additional weight only created a condition without which the latent fault of the manufacturer's defective weld would not have become active.

The architect is also confronted with a serious problem concerning the time from which the statute of limitations begins to run. His liability to third persons for any injury continues during the lifetime of the building if his

16 Graham v. Pennsylvania Co., 139 Pa. 149, 21 A. 151 (1891); Willner v. Woodward, 201 Va. 104, 109 S.E.2d 132 (1959); Hommel v. Badger State Inv. Co., 166 Wis. 235, 165 N.W. 20 (1917).

17 Spencer v. Beatty Safway Scaffold Co., 141 Cal. App. 2d 875, 297 P.2d 746 (1956); Day v. National U.S. Radiator Corp., 241 La. 288, 128 So. 2d 660 (1961); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 40, at 232 (3d ed. 1964).

18 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (Dist. Ct. App. 1963).

19 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

20 Mai Kai, Inc. v. Collucci, 186 So. 2d 798 (Fla. 1966).

negligent design contributed to or caused the accident[21] because the statute of limitations does not begin to run until the time the plaintiff is injured unless there is a special statutory provision to the contrary.[22] A satisfactory solution to this problem might be to enact a statute of limitations which would begin running from the time of the completion of the building so as to protect the architect from claims arising after an unreasonable length of time.[23]

B. *Strict Liability and Breach of Warranty*

In cases involving defective chattels, manufacturers have often been held liable for breach of warranty as well as for negligent design.[24] However, courts have been hesitant to hold that an architect may be liable for a breach of an implied warranty.[25] The distinction between an architect and a manufacturer is that the architect is a professional man and his business consists of rendering services rather than selling products. A Florida court recently elaborated on the inapplicability of the warranty theory against professional men.

> An engineer, or any other so called professional, does not "warrant" his service or the tangible evidence of his skill to be "merchantable" or "fit for an intended use." These are terms uniquely applicable to goods. Rather, in the preparation of design and specifications as the basis of construction, the engineer or architect "warrants" that he will or has exercised his skill according to a certain standard of care, that he acted reasonably and without neglect. Breach of this "warranty" occurs if he was negligent. Accordingly, the elements of an action for negligence and for breach of the implied "warranty" are the same.[26]

The Illinois Supreme Court in a 1966 case supported this statement.[27] While there was a finding that a professional engineer was liable for negligent design, the court refused to apply any doctrine which would find liability without negligence. The court expressly stated that a design engineer could not be exposed to the same liability as a manufacturer.

However, there is one case which may have cracked the armor which protects professional men against liability for breach of warranty. In *Schip-*

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21 Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956); Hale v. DePaoli, 33 Cal. 2d 288, 201 P.2d 1 (1948).

22 Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

23 For an expression of the view that the architect's susceptibility to liability should be continued indefinitely, *see* Comment, 55 CALIF. L. REV. 1361, 1378 (1967).

24 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

25 Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc., 168 So. 2d 333 (Fla. 1964); Annot., 25 A.L.R.2d 1085, 1092 (1952). However, an architect may be liable for defective plans if he *expressly* warrants them. Smallwood v. Pettit-Galloway Co., 187 Ark. 379, 59 S.W.2d 1031 (1933); City of McPherson v. Stucker, 122 Kan. 595, 256 P. 963 (1927); Gould v. McCormick, 75 Wash. 61, 134 P. 676 (1913).

26 Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc., 168 So. 2d 333, 335 (Fla. 1964).

27 Laukkanen v. Jewel Tea Co., 78 Ill. App. 2d 153, 222 N.E.2d 584 (1966).

per v. Levitt and Sons, Inc.[28] the designers of mass-produced homes were held liable to a person injured as a result of a design defect in a hot water system which resulted in dangerously hot water issuing from bathroom taps. The court, in drawing an analogy between the defendants and a manufacturer, relied heavily upon the fact that they were doing all the designing, construction, and selling themselves. Whether this case extends liability for breach of warranty to an architect who has no part in constructing or selling the structure is still unclear. It has been heralded by the American Academy of Trial Lawyers as a true landmark decision, marking a turning point in modern tort law.[29]

II. Negligent Supervision

The second area in which courts have found architects liable is for personal injury arising out of the architect's negligent supervision. Determining the architect's duty to supervise is considerably more difficult than determining his duty to design with reasonable care. The reason for this difficulty is that the courts must delve into the transactions between the architect, owner and contractor to determine which supervisory duties are allocated to the architect, which to the contractor, and which to both. Occasionally an architect will be engaged to design a structure and will not undertake either the duties of supervision or inspection. However, an owner generally wants to be sure that his building is constructed as designed, and one of the best persons to see that this is done is the architect. If the architect is to be effective in seeing that the structure is built as planned, he must have the power to reject defective work, and, in the end, to stop the work if it is not going according to plan. In trying to determine the architect's liability for negligent supervision the court must closely examine the contract between the architect and the owner to determine the supervisory duties undertaken. The contract between the owner and the general contractor also sheds light upon the parties' intention as to what responsibility and authority the architect will have in respect to supervision.

A. *Supervision to Prevent Deviation from the Design*

One of the earliest cases to discuss the architect's duty to see that a building was constructed according to the plans and specifications was the Iowa case of *Schreiner v. Miller*.[30] This case involved a suit to recover property damages for cracked walls resulting from a defectively constructed founda-

[28] 44 N.J. 70, 207 A.2d 314 (1965). *See also* Hill v. Polar Pantries, 219 S.C. 264, 64 S.E.2d 1080 (1951).

[29] Witherspoon, *Architects' and Engineers' Tort Liability*, 16 Defense L.J. 409 (1967). For an argument in favor of holding architects to strict liability, *see* Comment, 55 Calif. L. Rev. 1361, 1379 (1967).

[30] 67 Iowa 91, 24 N.W. 738 (1885).

tion. The court, in finding the architect liable, held that in undertaking to supervise construction he assumed the duty to see that the house was constructed with reasonable care. It was further stated that this duty required him to cause the foundation to be sufficiently deep, or otherwise protected, in order to prevent settling which would cause the walls to crack. In a similar case which discussed a professional engineer's duty to supervise construction of a bridge, it was held that while he was not an insurer that the contractors would perform their work properly in all respects, he, nevertheless, had a duty to exercise reasonable care to see that they did so.[31]

In the early part of the twentieth century, the courts were far less concerned with privity in cases involving negligent supervision than in cases involving negligent design. The explanation for this lack of concern is that the courts usually found a positive act or a misfeasance which was a violation of the architect's common-law duty, as opposed to his contractual duty, to exercise reasonable care to prevent injuries to third persons. A classic example of such a case is *Clemens v. Benzinger*.[32] In this case the plans called for the anchoring of vertical steel columns to split end or expansion bolts which were to be imbedded in the concrete floor. By mistake, some of the split end bolts were not imbedded in the concrete when it was poured. The architect told the contractor to drill holes in the concrete, insert the bolts, and pack grouting around them. The contractor did this, but he anchored the columns to the bolts before the grouting was fully set. As a result, the column fell and injured the plaintiff. The evidence showed that while the grouting was not fully set, it appeared to be so to the contractor. The court held the architect liable on the theory that the condition arose under the architect's recommendation; and that, therefore, the architect had a duty to warn the contractor against anchoring the columns to the bolts before the grouting had sufficient time to set.

The duty to supervise with reasonable care may also arise when an architect is put on notice that the contractor has deviated or is about to deviate from the plans and specifications. In *Paxton v. Alameda County*[33] the architect noticed that the contractor was using substandard material on the roof of the building. He told the contractor not to use this material but to use what was called for in the specifications. The architect failed to follow-up to see if his instructions were complied with, and the contractor built the roof with the defective materials. Later, a roofer fell through the roof and was injured. The court held the architect liable saying that, once he was put on notice that defective materials were being used, he was under a duty to make certain that the situation was corrected.[34]

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31 Cowles v. City of Minneapolis, 128 Minn. 452, 151 N.W. 184 (1915).
32 211 App. Div. 586, 207 N.Y.S. 539 (1925).
33 119 Cal. App. 393, 259 P.2d 934 (Dist. Ct. App. 1953).
34 In this case the California Council of Architects, becoming increasingly concerned with the growing scope of architects' liability, filed an amicus curiae brief raising the question of whether or not the contractor's failure to use proper materials was an intervening cause. The court dismissed this argument saying that the liability of the contractor had no bearing on the issue.

However, the *Inman*[35] decision opened the door for the courts to base the architect's duty to supervise on the contract between the architect and owner rather than on a common-law duty not founded upon the contract. The result has been an increasingly more liberal trend towards finding negligent supervision, as evidenced by a recent case in which it was held that an engineer should have been aware of deviations from his design, even though in fact he was not aware of the deviations and had no notice of them.[36] In that case the engineer was held liable for failure to exercise due care to discover that a contractor did not properly fasten a heat duct to the ceiling. The means of attachment was not readily visible from the floor, but the court held that the engineer, in properly exercising his supervisory duty, should have climbed a ladder to check the contractor's work. For this reason the plaintiff was allowed to recover from the engineer for injuries sustained when the heating duct fell.

The American Institute of Architects[37] has provided standard contracts for use between the architect and owner and for use between the owner and contractor. The recent revisions of these contracts have completely omitted the word "supervision" in describing the architect's duties and have instead provided that the architect provide "general administration" of the construction.[38] The reason for this change in terminology stems from the AIA's feeling that the courts have, to a certain extent, misinterpreted the architect's role in the construction of a building. These revised contracts make an attempt to clearly place the responsibility for supervision upon the general contractor and to disclaim the architect's duty to see that the plans and specifications are strictly followed. For example, the contract provides:

> The Architect will make periodic visits to the site to familiarize himself generally with the progress and the quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. . . . The Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. *The Architect will not be responsible . . . for the Contractor's failure to carry out the Work in accordance with the Contract Documents.* (Emphasis added.)[39]

Another provision of the contract retains the architect's authority to stop work on the project if necessary to insure proper construction, but the contract disclaims any liability to persons working on the job for a good faith decision to exercise or not to exercise that authority.[40] In yet another sub-

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35 Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

36 Pastorelli v. Associated Engineers, Inc., 176 F. Supp. 159 (D.C.R.I. 1959).

37 Hereinafter referred to in text as the "AIA."

38 "The Architect will provide general Administration of the Construction Contract, including performance of the functions hereinafter described." AMERICAN INSTITUTE OF ARCHITECTS, AIA DOCUMENT A 201, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, ¶ 2.2.1 (11th ed. 1967) [hereinafter cited as AIA DOCUMENT A 201].

39 AIA DOCUMENT A 201, *supra* note 23 ¶ 2.2.4.

40 The Architect will have authority to reject Work which does not conform to the

paragraph the contract provides: "The Architect will not be responsible for the acts or omissions of the Contractor, any Subcontractors, or any of their agents or employees, or any other persons performing any of the Work."[41]

The purpose of these provisions is not to disclaim totally the architect's liability for injuries resulting from deviations from the drawings and specifications. Rather, these provisions should be interpreted as an attempt to limit his liability to those situations where he is fully aware of the deviation and the danger which it presents. In spite of the lengthening of the clause and the shortening of the duties and whether it is called "supervision," "inspection," "administration," "casual observation" or even "a glance," the architect does owe some duty to see that the building is built substantially according to the plans and specifications.[42]

B. *Duty To Supervise Methods and Techniques of Construction*

Thus far, discussion of the architect's duty to supervise has been limited to situations involving his duty to see that the contractor builds the structure according to the drawings and specifications. This duty is somewhat different from the architect's duty to supervise the contractor's methods and techniques of construction. The architect's duty to supervise methods of construction is more limited than his other supervisory duties because methods of construction usually are within the realm of the contractor's authority and control rather than the architect's.[43]

One of the early cases finding liability for improper supervision of construction methods based such liability on the fact that the architect actively advised the use of an improper construction technique.[44] In that case the architect recommended the hiring of a person to operate a jackscrew and expressed his approval of the unsafe manner in which the operator was using the screw to lift the wall of a building. The wall fell, injuring the plaintiff, and the court held the architect liable for this positive act of misfeasance.

The Iowa court has held that an architect had a duty to the *owner* to see

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> Contract Documents. Whenever, in his reasonable opinion, he considers it necessary or advisable to insure the proper implementation or the intent of the Contract Documents, he will have authority to require the Contractor to stop the Work or any portion thereof, or to require special inspection or testing of the Work as provided in Subparagraph 7.8.2 whether or not such Work be then fabricated, installed or completed. However, neither the Architect's authority to act under this Subparagraph 2.2.12 nor any decision made by him in good faith either to exercise or not to exercise such authority, shall give rise to any duty or responsibility of the Architect to the Contractor, any Subcontractor, any of their agents or employees, or any other person performing any of the Work.

AIA DOCUMENT A 201, *supra* note 23 ¶ 2.2.12.

41 AIA DOCUMENT A 201, *supra* note 23 ¶ 2.2.18.

42 Goodin, *Architects and Malpractice*, 34 INS. COUNSEL J. 290, 292 (1967).

43 "The Contractor shall supervise and direct the Work, using his best skill and attention. He shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract." AIA DOCUMENT A 201, *supra* note 23 ¶ 4.3.1.

44 Lottman v. Barnett, 62 Mo. 159 (1876).

that proper construction techniques were used, but that case did not involve injury to a person.[45] There, an architect who failed to see that the foundation was constructed with reasonable care was held liable to the owner for cracks which subsequently developed in the walls. There are no Iowa cases concerning claims for personal injuries to persons other than the owner. The early decisions in other states consistently held that there was no liability to third persons because there was no privity of contract between the injured person and the architect.[46] In a case typifying the application of this doctrine, the wife of a deceased workman was denied recovery against the architect because "[t]he architect owed no duty of active vigilance to the decedent to supervise the work of the employer of the decedent, although he may have owed such duty to the owner by whom he was employed."[47] An Indiana court applied the privity doctrine in a somewhat different manner when it held that an architect who failed to include instructions in the plans for protecting a basement entryway during construction was not liable for such an omission after the owner had accepted the plans as being sufficient.[48]

These early decisions, which based the architect's immunity on lack of privity of contract, were logically unsound, as was so aptly pointed out in the *Inman* case several years later.[49] However, one court[50] as early as 1908 recognized a far sounder basis for determining the architect's duty to supervise the methods and techniques of construction. Instead of basing its decision on the existence or nonexistence of privity between the architect and the plaintiff, the court closely examined the relationship between the architect, owner and contractor to determine whether or not the architect assumed the duty to supervise the methods of construction. In that case a worker was killed when he fell down an elevator shaft in a building which was under construction. The plaintiff alleged that the architect was liable for failing to check to see that the contractor had put a temporary railing around the shaft. After close examination of the owner-architect-contractor relationship the court held that the architect had assumed neither a contractual duty nor a common-law duty to supervise the methods of construction, and therefore he was not liable. It concluded that such supervision was solely the responsibility of the general contractor and was outside the architect's realm of authority.

The Arkansas Supreme Court has also recently analyzed the relationship between the architect, owner and general contractor in order to determine their respective authorities and responsibilities.[51] In that case, where an architect received as compensation for supervisory services additional fees over and

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45 Schreiner v. Miller, 67 Iowa 91, 24 N.W. 738 (1885).
46 Sherman v. Miller Constr. Co., 90 Ind. 462, 158 N.E. 255 (1927); Potter v. Gilbert, 130 App. Div. 632, 115 N.Y.S. 425 (1909).
47 Potter v. Gilbert, 130 App. Div. 632, 637, 115 N.Y.S. 425, 428 (1909).
48 Sherman v. Miller Constr. Co., 90 Ind. 462, 158 N.E. 255 (1927).
49 Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 165 N.Y.S. 2d 699 (1957).
50 Clinton v. Boehm, 139 App. Div. 73, 124 N.Y.S. 789 (1910).
51 Erhart v. Hummonds, 232 Ark. 133, 334 S.W.2d 869 (1960).

above his normal services, the court found that he had a duty to insist that the contractor properly shore the sides of an excavation. Because the plaintiff's injury resulted from a breach of that duty, the architect was held liable. The court based its decision largely upon the architect's special compensation for supervisory services.

In 1961 two more cases elaborated on the architect's duty to supervise methods and techniques of construction. In the first of these a workman sued the architect for injuries received when a boiler exploded during installation and testing.[52] It was alleged that the architect should have supervised the method of installation and testing. The court denied recovery, holding that this supervision was outside the architect's realm of authority. The court said that, in fact, the architect had no control over the contractor's method of performing the contract. In the second case, a New York court used similar reasoning in holding that an architect was not liable for an injury resulting when a drill fell off a temporary platform and struck the plaintiff.[53]

By 1961 there had emerged a consistent pattern in the modern cases concerning the architect's duty to supervise the techniques and methods of construction. These were not the architect's duties in the usual arrangement between architect, owner and general contractor; but such duties could be found if extraordinary circumstances such as special compensation for supervisory services existed.

However, in the recent Illinois case of *Miller v. Dewitt*,[54] the court interpreted the contract between the owner and the architect as imposing upon the architect a duty to supervise the techniques and methods used by the contractor. The plaintiff was a workman who was injured when a gymnasium roof fell on him during remodeling operations. The alleged negligence was the architect's failure to prevent the contractor from improperly shoring the roof during construction. In holding that there was a jury question as to the architect's negligent supervision the court relied heavily upon the contractual provisions which it claimed created a duty in the architect to supervise the techniques and methods of construction. The significance of this decision was that it based the architect's duty to supervise methods of construction solely upon the contract between the owner and the architect. There was no evidence that there were any positive acts of the architect to give rise to a common-law duty to supervise methods of construction or to warn of the danger in the methods being used.

The AIA has revised their standard contract form since the *Dewitt* case in an attempt to make certain that the architect's duty to supervise methods and techniques of construction will not in the future be derived from the terms of the contract. The word "supervision" has been completely dropped from

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[52] Day v. National U.S. Radiator Corp., 241 La. 288, 128 So. 2d 660 (1961).

[53] Olsen v. Chase Manhattan Bank, 9 N.Y.2d 829, 175 N.E.2d 350, 215 N.Y.S.2d 773 (1961).

[54] 59 Ill. App. 2d 38, 208 N.E.2d 249 (1965), *aff'd.* 37 Ill. 2d 273, 226 N.E.2d 630 (1967). *See also* 17 De Paul L. Rev. 439 (1967).

all provisions of the contract and the words "general administration" have been substituted.[55] Also, in an attempt to clearly establish the architect's lack of responsibility to supervise the construction methods, the contract provides: "The Architect will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work. . . ."[56] The only time the word "supervise" is used in the AIA form is in describing the *contractor's* duties: "The Contractor shall supervise and direct the work, using his best skill and attention. He shall be *solely responsible* for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract."[57] (Emphasis added.) In addition to these provisions, there is one entire article of the AIA form which is devoted to the contractor's duty to take various safety precautions for the protection of persons and property.[58]

After these new revisions it is difficult to see how a court could again base the architect's duty to supervise the methods and techniques of construction solely on the contract. However, in light of *Fabricius v. Montgomery Elevator Co.*,[59] these terms of the contract do not disclaim the architect's common-law duties. In *Fabricius*, a workmen's compensation carrier was held liable for negligently inspecting the work places, machinery and equipment covered by its policy. The court held that, even though the carrier was not obligated to inspect under the terms of its policy, it did in fact undertake to inspect, thereby giving rise to a common-law duty to use reasonable care in making the inspection. This case illustrates the principle that while a party may disclaim contractual duties in the terms of his contract, he cannot so disclaim his common-law duties. In light of the *Fabricius* case, the new provisions in the standard AIA contract form in effect disclaim the architect's contractual duty to act with reasonable care to prevent injury to persons who might be forseeably injured by improper construction techniques. It is of importance to note that the contract retains the provision giving the architect authority to stop the work if he feels it is not in compliance with the contract.[60] Therefore, the result should be a return to the rule which existed prior to the *Dewitt* case in Illinois. That is, the architect has no duty to interfere with the contractor's method of construction unless (1) he has expressly agreed in the contract to supervise these activities, or (2) he has knowledge of the use of some method of construction which is sufficiently dangerous to give rise to a duty to exercise his power to stop construction or to warn of the danger.

How the courts will treat these new provisions in the standard AIA contract form is still to be determined. However, it is likely that the courts, in view of their recent liberal attitude towards allowing personal injury claims

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55 AIA DOCUMENT A 201, *supra* note 23 ¶ 2.2.1.
56 AIA DOCUMENT A 201, *supra* note 23 ¶ 2.2.4.
57 AIA DOCUMENT A 201, *supra* note 23 ¶ 4.3.1.
58 AIA DOCUMENT A 201, *supra* note 23 art. 10.
59 254 Iowa 1319, 121 N.W.2d 361 (1963).
60 AIA DOCUMENT A 201, *supra* note 23 ¶ 2.2.12.

against the architect, will look closely at the circumstances of each case in an effort to find either a contractual or a common-law duty to supervise methods and techniques of construction.

Conclusion

The body of law concerning the architect's tort liability to third persons for personal injury has undergone a tremendous evolution in recent years. The major turning point occurred in 1953 with the *Inman*[61] decision which did away with the requirement that the plaintiff be in privity of contract with the architect in order to recover, and which substituted instead the rule that an architect would be liable for his negligent design to anyone whose injury was within the range of forseeability. However, his liability for design defects extends only to those which present a patent as opposed to a latent danger.[62]

The architect is generally not considered to warrant that his design is fit for a particular purpose. Instead, as in the case of other professional men, he warrants that he will exercise that skill and knowledge common to the members of his profession. The elements of this warranty therefore are the same as those of negligence.[63] One case,[64] however, indicates that there is a possibility that the architect will in the future be held to a warranty of his design for a particular purpose or at least to some type of strict liability.

In addition to using reasonable care in designing a building, the architect may also be held to a duty to supervise the construction of the structure he designed. This duty may be derived from two sources. It may be a contractual duty defined in the contract between the architect and owner, or it may be a common-law duty arising from the architect actually undertaking supervisory duties or from his knowledge of a dangerous condition created by the contractor's improper supervision.[65] The standard contract used by architects today attempts to disclaim a great portion of the architect's duty to supervise. However, if he undertakes to do any supervision at all, whether it be for the purpose of seeing that the structure conforms to the drawings or to supervise the method of construction, he will be under at least some duty to act to prevent injury to third persons. The standard to be applied to the architect in all such cases is whether or not he exercised the learning, skill and care ordinarily possessed and practiced contemporaneously by others in the same profession and in the same locality.[66]

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61 Inman v. Binghamton Housing Authority, 3 N.Y. 2d 137, 143 N.E.2d 895, 165 N.Y.S.2d 699 (1957).

62 *Id.*

63 Audlane Lumber & Builders Supply, Inc. v. D. E. Britt Associates, Inc., 168 So. 2d 333 (Fla. 1964).

64 Shipper v Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

65 *See* Division II *supra.*

66 *See* notes 14 and 15 and accompanying text *supra.*