SITE ARCHITECTS AND CONSTRUCTION WORKERS: BROTHERS AND KEEPERS OR STRANGERS?

by
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[N]either shalt thou stand against the blood of thy neighbor . . .
Leviticus 19:16 (King James).

Modern tort law has moved steadily toward wealth redistribution and has taken on some attributes of a social insurance system. Generally, those who suffer physical harm can transfer all or most of their losses to persons or entities whose conduct played a significant role in causing the harm.1 Yet despite the drastically diminished

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1 In the context of a worker versus architect case, one judge stated:

The gambling instinct endemic to our former frontier society has been replaced by a quest for security with which our contemporary society is identified. Even at law society is inclined toward certainty of result, not infrequently at the expense of unsurfeted recovery. Workmen’s Compensation, mandatory insurance programs and the trend toward no-fault insurance are but weathervanes of that direction. Even the “plea bargain” in criminal law has as its genesis the desire for a secure result for both the State and defendant in place of the element of chance inherent in a trial.

In retrospect, however, the hazards of a trial are forgotten, and thoughts of “what might have been” give heart to injured litigants who seek deeper pockets from which to make themselves whole. Pressed by those they represent, members of the legal profession during recent decades have more carefully perused disaster’s peripheries for contributing acts or omissions by professionals whose conduct might not measure up to an accepted standard.


I do not mean to suggest that all plaintiffs win; of course, some do not. Also, some plaintiff victories are more apparent than real—plaintiffs who win at the appellate level by overturning dismissals often subsequently lose on the merits. For a good illustration, see Nauman v. Harold K. Beecher & Assocs., 19 Utah 2d 101, 426 P.2d 621 (1967), where the Supreme Court of Utah held that the plaintiff-contractor’s foreman did have a cause of action against the defendant-corporate architect. However, after a trial on remand where judgment was awarded the plaintiff, the Supreme Court of Utah reversed. 24 Utah 2d 172, 467 P.2d 610 (1970).
effectiveness of the "no duty" defense to tort claims, many recent appellate opinions have struggled with the seemingly simple issue of whether a site architect owes any duty of care to construction workers. Even more amazing is that a slight majority of these cases and, more important, most of the recent ones, have bucked the strong tide of victim compensation and have denied that any such duty exists. To use a biblical analogy, courts holding that no duty exists do not see site architects and construction workers as brothers and keepers, but as strangers.

I suggest, however, that site architects and construction workers are not strangers. They participate together in the dangerous enterprise of constructing building projects. For this reason, architects should not be able to avoid an inquiry into their conduct by contending that they owe no duty to workers.

Section I of this paper states a typical construction worker injury case. Section II explores generally the duty issue in tort law as viewed through the eyes of the leading commentator. Section III canvasses the case law. Section IV states arguments that can be made for and against the imposition on the site architect of a duty to construction workers. Section V proposes a new approach, and section VI gives reasons for the proposal.

These days the controversy relates to which defendant will bear ultimate responsibility. See generally, Fleming, Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court, 30 Hastings L.J. 1464 (1979). The construction context is discussed in J. Sweet, Legal Aspects of Architecture, Engineering and the Construction Process 739-87 (2d ed. 1977).

The site architect makes periodic visits to determine whether the owner is receiving the quantity and quality requirements of the construction contract. Often an engineer is responsible for these periodic visits, particularly in heavy construction or industrial work. When performing this review function, architects and engineers have been considered synonymous by the courts. When I use "architect" in this paper, I am also including engineers who are performing the function of a prime design professional—that is, acting as principal designer, design advisor, and owner representative during construction, with varying powers to be discussed later.

Denial of the existence of a duty does not mean the worker is uncompensated. He usually recovers payment under workers' compensation. The issue, then, is not compensation versus no compensation but rather workers' compensation versus tort compensation, at least as far as the worker is concerned. In this paper I must pass by the effect of duty allocation on the question who should best bear the loss as between the workers' compensation carrier who has made direct payment to the injured worker and the architect's professional liability carrier against whom the ultimate payout is usually sought in the third-party claim.
I. A Typical Case

Suppose an employee of an excavation subcontractor is injured during a cave-in because the subcontractor did not shore and brace the excavation as required by contract and by law. The injured worker will very likely recover lost earnings and medical expenses from his employer’s workers’ compensation insurance carrier. Then he may institute claims against any third parties whose failure to act in accordance with the legal standard of conduct may have caused the harm. It is likely that the employer’s workers’ compensation carrier will also be interested in such a third-party claim; it may even participate in the worker’s action, hoping to reimburse itself for any compensation payments it has made.

An action cannot be brought against the subcontractor because workers’ compensation laws usually grant the employer immunity. Keep in mind, however, that the person most directly responsible for the injury is usually the worker’s employer, here the subcontractor. Nevertheless, there are ample third-party possibilities for the worker. If immunity does not extend to the prime contractor as a "statutory employer," a claim may be asserted against him based upon either the imputation to him of his subcontractor’s negligence or his own failure to compel compliance with safety rules which he knew or should have known were not being followed. A third-party claim is also likely to be brought against the owner of the project, particularly a large institutional owner. This claim could be based upon the owner’s real or imputed knowledge of unsafe practices which he did not see fit to correct. Alternatively, a claim against the owner could be based upon his vicarious liability for the negligence of the prime or subcontractor, the owner being deprived of independent contractor protection because his use of an architect gave him control of the method of construction. The claim against

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7 Id. § 65.

8 See id. § 72.31.


10 As a rule, however, use of an architect does not deprive the owner of independent
the owner could also be based on one of the many exceptions to the independent contractor rule. Finally, if the worker’s injury was caused by defective equipment, a third-party claim could very likely be made against the equipment supplier or manufacturer.

This list of potential defendants is by no means exhaustive. Most important, for the purposes of this paper, the site architect is another third party against whom a claim could reasonably be made. The basis for this claim would be that the architect either knew or should have known—and there is an important distinction between these two standards—of the unsafe excavation practices and should have done something about them. As we shall see in section III, many jurisdictions have exonerated the architect by concluding she owed no duty to workers because her sole responsibility was to the owner to use best efforts to see that the completed project complied with the drawings and specifications.

To round out the picture, these complex multi-defendant lawsuits become even more confusing when the various defendants assert claims against each other or add parties based upon either express or quasi-contractual indemnity. Thus, a simple accident can generate a complicated and costly lawsuit.

II. Duty

Prosser discusses the multi-dimensional character of the duty doctrine in many parts of his treatise, but he does devote one section to duty generally. In that section he tells us that those who perform socially useful activities need protection from unreasonable burdens. One technique for providing protection is to require that, before any inquiry is made into the conduct of the actor who has caused the harm, the judge must first determine whether the actor owed a duty to the person harmed. A duty exists, Prosser says, when


See W. PROSSER, supra note 2, § 71; RESTATEMENT (SECOND) OF TORTS §§ 416-29 (1965).


See J. SWEET, supra note 1, at 776-87, for seven case studies.

W. PROSSER, supra note 2, §§ 42-44, 53-64, 92-104.

Id. § 53.
the claimant is entitled to the protection of the person against whom
the claim has been made. Admitting that this is a question-begging
formula and noting that there is no universal test, he suggests var-
ious factors which have played a role in determining duty.18

Two strands of the duty concept are relevant to this paper. The
first, which Prosser calls “Acts and Omissions,” determines when a
person must act for the protection of another. Generally, one need
not act unless there is a sufficient relationship between the person
who can help and the person in peril.17 It is, then, the status of the
parties which often controls. The common law crystallized the duty
concept by determining whether particular status relationships are
sufficient to give rise to the duty to act. Illustrations of status rela-
tionships which create a duty are, according to Prosser, innkeeper-
guest, carrier-passenger, storeowner-customer, school-pupil, ship-
seaman, and jailor-prisoner.18 These examples show that the duty
to act can be based upon the person in danger being in the hands
of another, with the latter being in a position to help. Sometimes
harm can be caused by wrongful conduct of third parties. If so, the
nature of the duty to act may require that, within certain status
relationships, one must take reasonable steps to control a third
party in order to prevent harm to another. As illustrations of status
relationships creating a duty of prevention, Prosser names hospital-
patient and school-pupil.19 In addition, because of dissatisfaction
with the normal “no duty to act” rule which governs outside of these
enumerated relationships, the status exceptions seem to be expand-
ing.20

It can be misleading, however, to analogize the relationships
which give rise to a duty to rescue or to prevent harm to the relation-

18 Id. § 53, at 325-27. See note 155 infra for an illustration of how these factors have been
expanded in one state.
17 Id. § 56. Accord, M. Shapo, The Duty to Act (1977). As a corollary to the first duty
“strand,” Prosser also tells us that even if there is no duty to act, attempting to help, or what
is called “assumption of an obligation,” can create a duty, usually because acting made the
18 W. Prosser, supra note 2, § 56, at 341-42.
19 Id. at 349. Landlord-tenant is another status relationship creating such a duty. Duarte
Properties, 87 Cal. App. 3d 44, 150 Cal. Rptr. 722 (1978) (duty owed by commercial landlord
to control others while on the commercial property, derived from duty of landowners generally
to manage property).
20 W. Prosser, supra note 2, § 56, at 342.
ship between site architects and construction workers. The duty to act may appear to require that the architect take control of the construction operation or at least order the work discontinued until dangerous practices are ended. The first, however, is beyond the architect's usual power, and the second, although sometimes within her power, is usually related to the continuance of the project itself and not to the manner in which the work is done. The question that has proved most troublesome, however, is not what the architect should do if she owes a duty to a construction worker; rather, the threshold inquiry is whether the architect owes any duty to a worker.

The second duty strand, included in a chapter Prosser calls "Tort and Contract," deals with the extent to which a contract breach can create rights in third parties. Prosser compares nonfeasance with misfeasance and notes that a breach of contract not only can create rights in contractually intended beneficiaries but can also, if the breach is the result of negligence, create tort liability to third parties. Because the key participants in a construction project, particularly the architect, have contractual obligations, this strand of the duty concept is fertile ground for analysis of the architect's tort liability.

Prosser does not deal directly with the architect's duty to construction workers; however, he does tell us that denying the exist-

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21 In 1970, the contract documents published by the American Institute of Architects (AIA) took away from the architect the power to stop the work. Subparagraph 3.3.1 gave this power to the owner. While architects had rarely used this power, the principal reason for this change was to limit architects' liability. As we shall see in III, existence of this power has been used by some courts both to find that a duty existed and to determine the nature of the duty owed. See Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

22 See note 58 infra.

23 W. Prosser, supra note 2, §§ 93-104. Prosser amplifies this in his discussion of the liability of suppliers of chattels and services, with special emphasis on the abolition of privity and the imposition of strict liability in tort.

24 Id. § 93.

25 A reader of Prosser would come away with the idea that no such problem exists. He cites none of the seminal cases I shall discuss in III on the duty issue. Furthermore, he states: "It is no longer in dispute that one who renders services to another is under a duty to exercise reasonable care in doing so, and that he is liable for any negligence to anyone who may foreseeably be expected to be injured as a result." Id. § 104, at 679 (footnote omitted). He states that "[i]t is now the almost universal rule that the contractor is liable to those . . . injured by the structure," id. at 681, and that this applies to "supervising architects and engineers," including "liability for design as well as for negligent construction." Id. (footnote
ence of any duty grants the actor immunity. Immunity shields a person whose failure to live up to the legal standard of conduct played a substantial part in causing personal harm to another.

III. THE CASES

Now let us look at cases which have dealt with these questions of duty in the site architect-construction worker context. This section does not consider cases involving the architect’s design function, since those cases have generally not raised the duty issue. We shall examine cases involving the architect’s site function which is unrelated to the design function. This site function includes periodic visits to the construction site to observe the contractor’s performance in order to determine whether the owner is receiving a project which meets the quantity and quality requirements of the construction contract. While site visits serve many purposes, the principal ones are to issue payment and completion certificates, to interpret the contract and resolve disputes, to advise as to whether change orders should be issued, and to advise the owner on the progress of the work.

A. The Early Cases: 1866-1953

As we shall see in section III B, the resolution of the duty issue has centered around the scope of the architect’s function during construction. However, most of the early cases discussing the site architect’s function generally did not involve claims by injured workers against the site architect. Rather, most involved disputes between the owner and the architect over the extent of the architect’s responsibility for checking on the contractor’s work.

omitted). He cites none of the important cases decided between 1959 and 1971, the date of the fourth edition. See III infra for a discussion of these cases. Very likely his statement was based solely upon research he did for earlier editions.

Prosser also tells us that status immunity has been drastically curtailed. Id. §§ 53-64, 93, 96.

The first worker claim case was *Lottman v. Barnett*, a preworkers' compensation case decided in 1876, involving the death of a worker in a girder collapse. In affirming a jury-verdict-based judgment against the architect, the court recognized one strand of the duty doctrine—the affirmative duty to act. The court seemed to conclude that the third party had no cause of action against the architect for nonfeasance as opposed to misfeasance, a conclusion that is also drawn by New York courts. The court was able to avoid a direct confrontation with this issue, however, by holding that the architect was liable either because the injured worker's negligent co-worker, whose acts most directly caused the collapse, was the architect's agent, or because the architect had told the negligent worker to execute a plan he had devised.

Twenty years later, the court in *Humpton v. Unterkircher* was confronted with a worker's claim against the owner, rather than the architect. The owner argued that the negligent parties, the contract-

Garden City Floral Co. v. Hunt, 126 Mont. 537, 255 P.2d 352 (1953), involved an unsuccessful defense by a breaching contractor who contended that he was entitled to more supervision by the architect. This case is still cited in worker injury cases. See *Vorndran v. Wright*, 367 So. 2d 1070 (Fla. Dist. Ct. App. 1979). This out-of-context use of the *Garden City* case demonstrates the unjustified leap courts make from the conclusion that the primary responsibility of the architect is to determine compliance with the design to a denial that any duty exists to workers.


But in *Clemens v. Benzinger*, 211 App. Div. 586, 207 N.Y.S. 539 (1925), the court found the needed misfeasance in a situation that looked suspiciously like nonfeasance. The court also showed how easy it can be to convert site responsibilities into design matters. New York has gone its own way, yet New York cases, particularly the early ones, are still cited. See *Associated Eng'rs, Inc. v. Job*, 370 F.2d 633, 646-47 (8th Cir. 1966), *cert. denied sub nom. Troy Cannon Constr. Co. v. Job*, 389 U.S. 823 (1967).

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21 62 Mo. 159 (1876).
22 97 Iowa 503, 66 N.W. 776 (1896).
tors, were independent contractors and that he was therefore shielded from vicarious liability for their negligence. The court agreed and rejected the worker's contention that the architect's power to direct the contractors made them servants of the owner.\textsuperscript{31} It held that the architect was only concerned with results and not with the manner or method by which the results were to be accomplished. Thus the architect's power to direct did not create vicarious liability for the contractors' acts in either the architect or the owner. Though no claim had been made against the architect, the court seemed to assume that the architect owed no independent duty to the worker to act affirmatively for the latter's protection.

\textit{Potter v. Gilbert}\textsuperscript{2} involved a claim against an architect by the representative of a worker who was killed in a wall collapse. Had there been an allegation of design negligence, the defendant architect would have been liable to "any one lawfully on the premises."\textsuperscript{33} In New York, however, the architect is liable for negligent supervision only if he "knowingly permits a departure from the plans or specifications"\textsuperscript{34} or fails to condemn any improper work which he in fact discovers.\textsuperscript{35} However, the plaintiff did not allege that the architect knew there had been a departure from the plans in time to remedy the defect before the wall collapsed. The plaintiff merely asserted that the architect would have known of the defect had he exercised reasonable diligence. The court rejected this contention and held that the architect was not obligated to discover the departure.

The court discussed duty and drew the same nonfeasance-misfeasance line as to liability to third parties as was drawn in \textit{Lottman} and \textit{Humphit}: although third parties may recover under ordinary tort principles for improper performance, only the person who has paid for the promise to perform can sue for its nonperformance.\textsuperscript{36} Yet the court made clear that the worker would probably have been successful had there been actual knowledge by the architect of noncompliance with the contract requirements; inaction cou-

\begin{footnotes}
\item[31] See note 10 supra.
\item[33] \textit{Id.} at 634, 115 N.Y.S. at 427.
\item[34] \textit{Id.}
\item[35] \textit{Id.}
\item[36] \textit{Id.}
\end{footnotes}
pled with such knowledge would apparently have been considered misfeasance.\textsuperscript{37}

Let us detour for a moment from worker claims to look at \textit{Clinton v. Boehm},\textsuperscript{38} an unlikely candidate for a leading early case. \textit{Clinton} did not directly involve a worker claim against the architect. Instead, it involved a claim by an architect for fees, which was met by the owner's counterclaim for indemnification for a judgment against him in favor of the estate of a worker killed when he fell through an unguarded shaft near a materials hoist. In holding that the trial court should have sustained the architect's demurrer to the counterclaim, the appellate court stated that the architect's function was to be vigilant in seeing that the plans and specifications were followed, that proper materials were used, that building laws were complied with, and that the owner received what he bargained for. The court then noted that the building could be built properly even if safety laws were violated.\textsuperscript{39}

We cannot quarrel with the court's description of the major reasons for hiring an architect. Nor can we debate the conclusion that the contractor has primary responsibility for worker safety. Finally, the owner, we would agree, should not be able to recover from the architect for performance which the architect did not promise. But these points of agreement do not lead inexorably to the conclusion for which \textit{Clinton} was later cited,\textsuperscript{40} that the architect owes no duty to workers because his principal function is to see that the end product measures up to the contract requirements. Even if we focus upon the owner's reason for hiring an architect, we cannot ignore the fact that the worker's estate had recovered a judgment against the owner.

The next case, \textit{McDonnell v. Wasenmiller},\textsuperscript{41} involved the death of

\textsuperscript{37} Id.
\textsuperscript{38} \textit{Id.} at 75, 124 N.Y.S. 789 (1910).
\textsuperscript{39} \textit{Id.} at 75, 124 N.Y.S. at 792. This statement of the court could be considered dicta. The court maintained that the counterclaim was not justified since the owner had not alleged that the judgment had been paid.
\textsuperscript{41} 74 F.2d 320 (8th Cir. 1934) (Nebraska law).
an employee of the owner, not of a contractor, in an explosion. Because the employee's estate had received workers' compensation payments, and since the discussion focused on the role of the architect, this case merits discussion. Emphasizing that the contract between the owner and the architect was one for "[a]ctive engineering supervision," and without seriously discussing duty, the court affirmed a judgment for the estate of the deceased worker based upon the architect's failure to order that the contractor install a proper anchor bolt. Even if we make allowances for the more expansive contract language and even if we note that the worker was not a construction worker, the case recognized a duty owed a third party by the site architect related to services during construction and should have some bearing on architect-construction worker cases. Yet McDonnell has been largely ignored.

The last worker claim case, Paxton v. Alameda County, involved a subcontractor's employee who was injured when sheathing collapsed while he was working on a roof. The architect had seen the inadequate sheathing on the ground at the construction site and had told the contractor's foreman that it would not be accepted. When the architect next checked, the roof was already up and the sheathing concealed. The appellate court permitted recovery from the county-owner, concluding that the jury could have found that the architect should have made another inspection, and imputing the architect's knowledge to the county-owner. For some reason, however, the architect himself was not sued on a theory of negligent supervision, and the evidence was insufficient to support the worker's claim against him based upon negligent design.

Those early cases which dealt with the site architect's function during construction agreed that the architect's principal function was to obtain for the owner an "end product" that complied with the plans and specifications. But except for the now frequently criticized and avoided nonfeasance-misfeasance distinction still drawn

\[\text{id. at 327.}\]
\[\text{119 Cal. App. 2d 393, 259 P.2d 934 (1953).}\]
\[\text{W. PROSSER, supra note 2, ¶ 93.}\]
in New York, the few cases that involved claims by construction workers against site architects did not establish that a site architect owed no duty to construction workers or that worker safety was not at all his concern. Even New York would hold an architect liable who knew of unsafe practices and did not act.

B. The Seminal Cases: 1959 to 1967

Let us look closely at five important cases from four jurisdictions which form the core of the current duty controversy. Perhaps we can see why the present confusion exists and why we have what has been described by one court as "a decided split of authority." Also, a chronological look at the cases and the responses to them by the American Institute of Architects (AIA) will introduce the role that contracts, particularly those of the AIA, play in this duty controversy.

Day v. National U.S. Radiator Corp. (Day I) involved a public hospital project. A subcontractor's employee was killed when a boiler exploded while being tested. The subcontractor's failure to install a required pressure relief valve caused the explosion. The widow of the worker sued the architects, the consulting engineer, various manufacturers and suppliers, and their insurers. The widow was joined in her lawsuit by the workers' compensation carrier, a common occurrence in worker versus third-party tort actions. After a lengthy trial all defendants except the architects were exonerated.

The architects contended before the intermediate Louisiana appellate court that persons not in privity could not recover for negligence consisting of nonperformance of a contractual duty. But as we have seen, the nonfeasance-misfeasance distinction does not necessarily mean that worker safety is never the architect's concern. The architects also pointed to their contract and contended they supervised merely to achieve an end product for the owners which would comply with the plans they prepared.

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16 See note 29 supra.
19 Id. at 117.
20 Id.
Rejecting absence of privity as a defense, the intermediate appellate court in Day I cited *MacPherson v. Buick Motor Co.* for the proposition that "the relationship between the parties and the foreseeability of harm" determines duty, and saw no reason to grant to those in the construction industry an immunity denied to manufacturers. Though there had been no negligence in the overall design, the court concluded the architects were negligent because they should have been aware that the boiler was installed without the pressure relief valve and was about to be tested. To identify a source for this specific duty, the court stated: "The terms and conditions of the architect's contract with the Building Authority clearly imposed upon the architect the obligation of supervising installation of all plumbing and heating facilities." The concurring judge found sufficient negligence in the architects' approval of a shop drawing which did not include the important pressure relief valve.

*Day I* shocked the AIA. It seemed to require that the architect be present, if not continuously, at least at every crucial point in the construction process, judged from a worker safety standpoint. This, the AIA felt, went beyond the proper role of the architect and his contract commitment. Also, this expansion of his contractual obligation might make him liable to the owner for project defects or failures beyond normal professional responsibility for proper design. Finally, the AIA believed that by concluding the architects were negligent in approving shop drawings which did not show the pressure relief valve, the court revealed its misunderstanding of the architects' function in reviewing shop drawings. To the AIA, review is made for design purposes only and is not intended to be an approval of the means by which design compliance will be achieved.

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51 217 N.Y. 382, 111 N.E. 1050 (1916).
52 117 So. 2d at 118.
53 Id. at 124.
54 Id. at 131 (Tate, J., concurring). In denying a request for a rehearing the court, though still contending that the architects had been negligent in not being present while the boiler was being tested, concluded no rehearing was needed because approval of shop drawings was sufficient negligence.

Ironically, the *Day I* case involved a failure to comply with the design. Most later cases involved construction methods, an activity generally considered the province of the contractor and not the architect. Whichever type of breach occurs, however, the issue is what the architect can be expected to do, judged both by his specific contract obligations and by the obligations imposed upon him by his status as site architect. *See V infra.*

55 2 American Institute of Architects, Architect's Handbook of Professional Practice
The importance the AIA attached to this case is shown by its having submitted amicus briefs to the appellate court and later to the Louisiana Supreme Court, where the case was finally reviewed. In addition, in response to this case, the AIA and the National Society of Professional Engineers (NSPE) created a Joint Task Force to study the liability problem. The resultant report convinced the AIA to delete "supervision" from AIA architect-client forms and replace it with language emphasizing observation through periodic visits, which they felt reflected the proper responsibility of the architect. This was done despite the reversal of Day I by Day II, which I will discuss shortly.

A year after Day I the Arkansas Supreme Court handed down an opinion which further disturbed the AIA. Erhart v. Hummonds involved an excavation cave-in which killed or injured several subcontractor employees. But here, unlike the situation in Day I, the architect knew of the unsafe excavation methods and acted upon this knowledge. On Thursday he saw insufficient shoring and demanded that the contractor replace the job superintendent, threatening that he would exercise his contractual power to stop the work. Friday a new superintendent arrived and promised to install

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2 AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE Document B121, art. 17 (1961 ed.). The move was opposed vigorously by William Stanley Parker, a prime drafter of AIA documents for close to half a century. He contended courts would not treat supervision and observation differently. It may come as posthumous solace to Parker, but the court in one case, Dickerson Constr. Co. v. Process Eng'r Co., 341 So. 2d 646 (Miss. 1977), in fact saw no difference. Even though the contract used "observation" and the trial court used "supervision" in its instructions, the court held there was no error. This case does not necessarily mean, however, that the AIA was wrong and Parker right. Actually both Parker and the AIA agreed that supervision did not mean continuous on-the-job control. But Parker thought a terminological change would diminish the stature of the architect and would not affect the results of cases. The AIA, influenced by its attorneys, thought otherwise.

In addition, see Kleb v. Wendling, 67 Ill. App. 3d 1016, 385 N.E.2d 346 (1979), in which the architect testified that supervision and administration involved the same service, and "administration" replaced "supervision" to avoid architect liability.

Some courts have held that the power to stop work, where it still exists, applies only to the tangible work and not to work methods. See, e.g., Wheeler & Lewis v. Slifer, ___ Colo. ___, 577 P.2d 1092 (1978); McGovern v. Standish, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976) (Structural Work Act case). But see Emberton v. State Farm Mut. Auto Ins. Co., 71 Ill. 2d 111, 373 N.E.2d 1348 (1978). Other courts have interpreted this power to include methods of
the needed shoring the following Monday. No work was done over
the weekend, but during that period a drizzle softened the excava-
tion walls. When the architect's representative drove a heavy car to
the site early Monday morning, the weight and soil condition caused
the cave-in.

The complaint alleged the architects were negligent "in failing to
inspect and direct the erection by the contractor of the necessary
protection for the workmen according to the plans and specifica-
tions, [and] in failing to require compliance in accordance with
Little Rock Ordinance No. 2801 . . . ." It was also alleged that the
architects were negligent in failing to stop the work "until the dan-
gerous conditions had been corrected." Affirming a jury verdict for
the plaintiffs, the court stated that the issue was not whether the
architect owed a duty to the owner, but "whether there was a breach
of duty owed to the workmen by the architect arising out of the
safety provisions of the contract."

The construction contract between owner and contractor required
the contractor "to prevent sloughing or caving, and to protect
workmen" and empowered the architect to inspect excavation. The
court noted that the architect also was required to supervise
generally and to direct the work, with power to stop the work "to
insure the proper execution of the contract." It appears the court
held that the contract between contractor and owner imposed a
duty on the architect in favor of the workers despite the absence of
privity between workers and architect. While the architect was not
a party to the contractor-owner contract, he apparently could be
bound to it inferentially through his oral agreement with the
owner.

construction. In addition to Erhart, see Nauman v. Harold K. Beecher & Assocs., 19 Utah

232 Ark. at 136, 334 S.W.2d at 871. Plaintiff also contended the architect's representa-
tive was negligent when he drove his car close to the excavation.

Id.

Id. at 137, 334 S.W.2d at 872. The court cited an earlier case, Hogan v. Hill, 229 Ark.
758, 318 S.W.2d 580 (1958), in which a motorist was allowed to sue a highway contractor who
violated a safety provision in a road construction contract.

232 Ark. at 138, 334 S.W.2d at 872 (quoting contract).

Id. (quoting contract).

Oral arrangements between the architect and the owner are not likely to deal expressly
with the general conditions governing the relationship between the contractor and the owner.
The *Erhart* decision to impose liability on the architect was not, however, unanimous; a dissenting opinion foreshadowed a change in attitude by the Arkansas court seven years later. The dissenting judge concluded that the issue of negligence should not have been submitted to the jury. The dissent argued that the architect did all he could have been expected to do, that compliance with safety codes was the contractor's responsibility, and that public safety officials generally look to the prime contractor and not to the architect or subcontractors when safety problems develop.  

Several aspects of the *Erhart* decision are worth mentioning. First, the issue of existence of a duty, which later divided many jurisdictions, was largely assumed by the majority. Second, the architect in that case did notice the unsafe practices and therefore probably had a contractual obligation to do something about them, distinct from any obligation in tort. The *Erhart* majority thought the jury should decide whether the architect's action was reasonable and thus fulfilled his contractual obligation. Third, the dissent stated that general supervision in the sense of overall control should not be the role of the architect. This was another reason why the AIA changed its contract language and removed reference to "supervision and direction of the work." Fourth, the dissent's conclusion that the primary responsibility for safety is upon the prime contractor pointed ahead to the troublesome question whether that primary duty precluded the architect from having any concurrent or supplementary duty or whether it was simply a factual indication of the architect's compliance with the legal standard of conduct.

The architect may be bound by implication, however, to those terms of which he is aware or should be aware. Even if the architect does not know of the actual terms of the owner- contractor relationship, he is likely to know what is customary. At the other extreme, the architect may have helped draft the owner-contractor contract; in that event, courts may use the owner-contractor contract to interpret the owner-architect contract. See, e.g., Reber v. Chandler High School Dist. #202, 13 Ariz. App. 133, 474 P.2d 852 (1970); Luterbach v. Mochon, Schutte, Hackworthy, Juerisson, Inc., 84 Wis. 2d 1, 267 N.W.2d 13 (1978); cf. Loyland v. Stone & Webster Eng'r Corp., 9 Wash. App. 682, 514 P.2d 184 (1973) (reference to owner-contractor contract, but emphasis on owner-architect contract).

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Now we return to Louisiana and the decision on appeal to the Louisiana Supreme Court involving the accident which killed Willie Day. The supreme court in Day II reversed Day I's judgment for Day's widow and ordered judgment be given for the architects. The court, though noting that the contract required the architects to supervise the work, emphasized language in the agreement between the architects and the owner which stated that the purpose of the architects' supervision was to obtain conformity with the construction contract requirements.

Because Day II has been cited extensively, we should look at its crucial language. As to the nature of the architects' contractual responsibility to check on the work, the court stated:

As we view the matter, the primary object of this provision was to impose the duty or obligation on the architects to insure to the owner that before final acceptance of the work the building would be completed in accordance with the plans and specifications; and to insure this result the architects were to make "frequent visits to the work site" during the progress of the work. Under the contract they as architects had no duty to supervise the contractor's method of doing the work. In fact, as architects they had no power or control over the contractor's method of performing his contract, unless such power was provided for in the specifications. Their duty to the owner was to see that before final acceptance of the work the plans and specifications had been complied with, that proper materials had been used, and generally that the owner secured the building it had contracted for.

As to the existence of a duty owed by the architects to the workers, the court stated:

Thus we do not think that under the contract in the instant case the architects were charged with the duty or obligation to

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65 I emphasize the procedural ruling because it could have been based upon an absence of any evidentiary showing of negligence as well as the absence of any legal duty. It is often difficult to tell the real basis for such a ruling. Accord, Porter v. Iowa Power & Light Co., 217 N.W.2d 221 (1974) (affirming directed verdict in favor of defendant architect); Brown v. Gamble Constr. Co., 537 S.W.2d 685 (Mo. Ct. App. 1976) (reversing trial judge's denial of defendant architect's motion for directed verdict).
66 241 La. at 304-05, 128 So. 2d at 666.
inspect the methods employed by the contractor or the subcontractor in fulfilling the contract or the subcontract. Consequently we do not agree with the Court of Appeal that the architects had a duty to the deceased Day, an employee of Vince, to inspect the hot water system during its installation, or that they were charged with the duty of knowing that the boiler was being installed.49

This, coupled with the court's statement that the architects would have been liable if they had designed negligently or had known of the deviation and yet permitted the test,70 showed that Day's representative lost not because the architects owed Day no duty at all but because she did not show that the architects either breached their contract or performed negligently. The issue was not the existence but the extent of a duty. Day II cannot justify an architect closing his eyes to contract deviations which he knows expose a worker to an unreasonable risk of harm.71

Comparing Erhart and Day, in Erhart the architect knew of unsafe practices and attempted to deal with them, while in Day the architect neither knew nor could have been expected to know of the danger to the worker. Also, unlike Day II which held there was no negligence issue to submit to the jury, Erhart approved submitting to the jury the issue of what should have been done when the danger was discovered.

Day II may have arrested some AIA fears stemming from Day I, but it did not change the AIA's plan to drop the dangerous "supervision" expression and replace it with something narrower in scope. While the Day case did not provide an absolute "no duty" defense, its statement of the architect's function and its treatment of the negligence question as initially one of law enabled the architects to avoid an inquiry into their conduct by the trier of fact. It seemed, at least for the moment, to stem expansion of the architect's responsibility to third parties by making it clear that, absent contrary contractual provisions, the architect is to check the role of work for compliance with the design but is not to direct how compliance is to be accomplished.

49 Id. at 305, 128 So. 2d at 666.
50 Id. at 303, 128 So. 2d at 666.
But in 1965 a bombshell exploded in Illinois that rocked the AIA as much as *Day I* had six years earlier. In *Miller v. DeWitt*\(^2\) (Miller *I*), a case in the Illinois Appellate Court, three employees of the prime contractor were injured during a gymnasium remodelling when a roof collapsed because of inadequate temporary support. The injured workers sued the architect and the school district-owner, alleging both negligence and a violation of the Illinois Structural Work Act.\(^3\) That statute imposes liability without fault upon the person "in charge" of the work for "wilful" statutory violations. In addition, the architect sought indemnification from the prime contractor who employed the plaintiff workers.

Appealing from a jury verdict for the workers and dismissal of the indemnity claim, the architect contended to the intermediate appellate court that he had no control over the techniques or methods of construction and that his function was solely to achieve an end product. The contract between owner and architect stated that the architect would guard the owner against defects and deficiencies in the work of the contractor. The contract between owner and contractor gave the architect general supervisory powers to direct the work, similar to the AIA language of the period.

Affirming the trial court's judgment for the workers,\(^4\) the appellate court emphasized the architect's broad overall powers and rejected the argument that the architect had no power over how design compliance was to be accomplished. As to duty, it pointed to the abolition of the traditional privity requirement and found a duty in the architect "to exercise ordinary care . . . for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so . . .\(^{75}\)

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\(^4\) The court also affirmed dismissal of the architect's claim for quasi-contractual indemnity from the contractor.
\(^5\) 59 Ill. App. 2d at 91, 208 N.E.2d at 274. To support this the court cited Montijo v. Swift, 219 Cal. App. 2d 351, 33 Cal. Rptr. 133 (1963), a case which involved an injury to a subsequent user caused by a design error—hardly appropriate authority unless all errors and all plaintiffs are lumped together. The California position is discussed in note 101 infra.

The only American worker case cited in *Miller I* was Erhart v. Hummonds, discussed at text accompanying notes 57-65 *supra*. In addition, the court cited Clay v. A.J. Crump & Sons Ltd., [1964] 1 Q.B. 533, which permitted an English worker to sue an architect for negligent
Miller I made it even more urgent that the AIA expand its earlier efforts to rewrite contract language to avoid what it thought to be unfair liability. In 1966 it revised its General Conditions of the Construction Contract to make clear what it had always believed to be the architect’s proper function during construction by further defining and limiting the architect’s overall role and responsibility during construction.76

Between December 19, 1966, and March 6, 1967, four important appellate opinions were handed down. Let us first look at the Illinois Supreme Court’s opinion reviewing Miller I, which we shall refer to as Miller II.77 The court noted the defendant architect’s contention that an architect has neither the right nor the “duty to control the methods used by the contractor but has only the duty to see that the construction when completed meets the plans and specifications contracted for by the owner.”78 After lengthy quotations from both the owner-architect and the owner-contractor agreements, the court stated: “[T]he parties agree that architects must exercise reasonable care in the performance of their duties and may be liable to persons who may foreseeably be injured by their failure to exercise such care, regardless of privity.”79 Everyone agreed that privity was not needed. At least in a second strand sense,80 a duty did exist. Worker safety in a broad sense was the concern of the architect. The issue, according to the Miller II court, was the extent of the duties either promised by contract or undertaken in fact by the architect.

The Miller II court noted that the architect did not issue specifications for temporary shoring, did not compute load factor or safety supervision. Clay is criticized in I. WALLACE, HUDSON’S BUILDING AND ENGINEERING CONTRACTS 68-69 (10th ed. 1970). Wallace stated that the court did not adequately understand the division of responsibility for construction methods or the nature of temporary work as contrasted with permanent work. The case is also reported at [1963] 3 W.L.R. 866 and [1963] 3 All E.R. 687.

76 In 1963 the architect’s function had been changed from “general supervision” to “periodic visits” during which he would observe. 2 AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT’S HANDBOOK OF PROFESSIONAL PRACTICE Document A201, art. 38 (1963 ed.). In 1966 the AIA expanded on this, seeking to make clear that the architect was not responsible for how the contractor accomplished the required work. 2 AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT’S HANDBOOK OF PROFESSIONAL PRACTICE Document A201, subpara. 2.2.4 (1966 ed.). Each new edition attempts to make this clearer.

78 Id. at 276, 226 N.E.2d at 633.
79 Id. at 283, 226 N.E.2d at 637.
80 See notes 23-24 supra and accompanying text.
factor, and did not oversee the shoring used. With apparent approval, the court cited a number of cases, including *Day II*, for the proposition that as a general rule the duty to supervise means simply that the architect is to see that the building when constructed will meet the requirements of the plans and specifications. But the implications of the duty to supervise are greater when the architect has the explicit contractual power to intervene and even stop the work if it is being done in an unsafe and hazardous manner. While the court noted that the architect in the case before it had no duty to specify the particular method of shoring, "under the terms of these contracts the [architect] had the right to insist upon a safe and adequate use of that method."81 The court held that the trier of fact must decide whether the architect knew or should have known that the shoring was inadequate or unsafe and whether what was done or not done was reasonable.82

Because of the *Miller II* court's emphasis on the architect's power to stop the work, the AIA deleted this power in 1970. The AIA's revised General Conditions of the Contract for Construction gave this power solely to the owner.83

Before discussing the differences among *Day*, *Erhart*, and *Miller*, let us define their areas of agreement. All agreed that absence of privity between architect and worker did not in itself give the architect an absolute defense to a worker claim. Replacing discarded privity with easily established foreseeability is the equivalent of holding that the site architect owes some duty to the worker which may give rise to an action based upon a negligent breach of contract. More specifically, all three courts agreed that if the architect actually discovers conditions which unreasonably expose the worker to

81 37 Ill. 2d at 265, 226 N.E.2d at 638. A principal criticism of this case is that the court converted a right into a duty. See Reber v. Chandler High School Dist. #202, 13 Ariz. App. 133, 136, 474 P.2d 852, 854-55 (1970); Note, *Contracts—Indemnity—Architect's Duty to Supervise—Employer's Duty to Indemnify Despite Workmen's Compensation Act—Miller v. DeWitt, 9 B.C. INDUS. & COM. L. REV. 757, 760-61 (1968); Comment, supra note 71, at 546-47 (1969). Yet this criticism is itself simplistic. Even if it is true that a power to do something does not always mean the possessor of the power must use it, this does not answer when he must use it.

82 The court also found the architect was "in charge" and had violated the Structural Work Act. This has caused particular trouble in Illinois. See note 105 infra.

83 2 AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE Document A201, subpara. 3.3.1 (1976 ed.).
a risk of physical harm, the architect must act reasonably. Whether his action is reasonable is determined in the same manner as any other fact question. Finally, all agreed that worker safety is of some concern to the architect; it is “none of his business” in the sense that he is not paid to protect workers, but he cannot completely shut his eyes to unsafe practices.

But while these cases agreed that a duty exists, they disagreed as to the nature of that duty. All three cases looked at the owner-architect and owner-contractor agreements to define the duty; however, each court read these agreements differently. Day II noted the broad contract language giving the architect general supervisory powers, but substantially qualified the broad grant of power by pointing to other contract language stating that supervision related to insuring conformity to the contract requirements. This reading directed attention away from the construction process and toward the finished product. Any obligation to visit the site pertained to the objective of design conformity and not to the method of doing the work or to worker safety. Miller, on the other hand, and, by implication, Erhart, read the contractual language giving the architect broad supervisory powers literally and would not qualify it by looking at the “proper” or “usual” function of the architect.

Two final decisions round out the series of seminal cases. Associated Engineers, Inc. v. Job involved a prime contractor’s employee who sustained severe injuries when working on a power line which was suddenly reenergized by the owner. He received workers’ compensation benefits and then brought a third-party tort action against the owner and the engineer. The claims were based upon allegations that the owner had hired an inexperienced prime contractor and had permitted him to remain on the job; that both owner and engineer had failed to require that unsafe practices be corrected; and that the owner had turned on the electricity while aware of the prime’s unsafe practices. The jury returned a verdict for the plaintiff worker.

The issue of the existence of any duty was raised directly by the Job defendants. The engineer contended that it owed “no duty at

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*See note 64 supra and note 123 infra for further discussion of these agreements.

all to concern itself with the plaintiff's safety.\textsuperscript{86} The court saw the issue, however, as whether the engineer had agreed to supervise the construction "to the extent of overseeing and regulating energization procedures, safety practices, and work-crew competence."\textsuperscript{87} The court found such an obligation in the contract, rejected the contention that the engineer had no contractual right to control the manner, method, and detail of work performance, and concluded that the matter was properly submitted to the jury. The court, while implicitly accepting the end product theory as a starting point, examined the powers given the engineer by contract and concluded that he "undertook more than an obligation to assure that the end product conformed to specifications."\textsuperscript{88}

\textit{Job} did not openly recognize any "great split." It cited \textit{Day}, \textit{Erhart}, and \textit{Miller}, along with other earlier cases, and sought to reconcile them on the basis of differences in contract language. Yet it also recognized their inconsistencies, noting that different courts had given different "readings" to the same broad language,\textsuperscript{89} as we saw in both \textit{Day} and \textit{Miller}. While the court in \textit{Job} did imply that the result might have been different had the language been less broad, its holding for the worker despite the absence of evidence that the engineer knew of the unsafe practices, together with its apparent approval of \textit{Erhart}, seemed to reflect an attitude closer to \textit{Miller} than to \textit{Day}.

\textit{Walker v. Wittenberg, Delony & Davidson, Inc.}\textsuperscript{90} presaged the "great split" which was soon to come. In \textit{Walker}, which involved the collapse of a freestanding wall when supporting braces were removed, an injured worker sued the architects, a supplier, and the owner. The trial court dismissed the complaint as to the owner and directed a verdict for the other defendants after the plaintiffs case was presented.

The contract between owner and contractor in \textit{Walker} gave the

\textsuperscript{86} 370 F.2d at 643. Even the exact meaning of this contention is unclear. The contention may mean the engineer has no obligation to search out unsafe practices as opposed to a duty to correct those he sees.

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.} at 645.

\textsuperscript{89} \textit{Id.} at 646-47.

\textsuperscript{90} 241 Ark. 525, 412 S.W.2d 621 (1966), rev'd on rehearing, 242 Ark. 97, 412 S.W.2d 626 (1967).
architects authority over general supervision and inspection of the work, in language similar to that found in the contracts under consideration in Day, Erhart and Miller. In its original opinion the appeals court held that it was error to direct a verdict for the architects. Citing Erhart on the issue of duty, the court rejected the architects’ argument that they were interested only in the end result, that they were required only to make periodic visits, and that they were not responsible for “‘on the spot’ directions.”

On rehearing, however, the court found the architects had no contractual duty “to be present continuously during construction.” As in Erhart, there was only a general oral contract between owner and architects. The court looked at the owner-contractor agreement for further information and concluded that safety, means, and methods were the responsibility of the contractor and not the architects. The court also noted that the architects did not in fact perform supervisory activities, but simply inspected the premises from time to time. In addition, the court rejected an argument based upon a local ordinance requiring that a licensed architect supervise certain types of construction, and concluded that the supervision required by the statute did not include control over means and methods not affecting the end result.

Erhart was distinguished by the Walker court as involving different work and a different contract. The court followed Day and found that the architects had no contractual obligation to be present at the time when the unsafe direction was given. Again, there was no direct confrontation of the issue whether a duty may ever exist, but merely the conclusion that as a matter of law the architects had done nothing wrong in this particular case.

None of the seminal cases denied the existence of any duty owed by the site architect to the construction worker. While the split that did emerge between 1967 and 1979 at least on the surface centered around the existence of the duty, the seminal cases involved the nature of the duty. The cases reflect different perceptions of the architect’s function during construction and illustrate how language in owner-architect and owner-contractor contracts affects the architect’s role and responsibility.

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81 Id. at 528, 412 S.W.2d at 624.
82 242 Ark. at 98, 412 S.W.2d at 626 (1967).
C. Cases from 1967 to 1979: Emergence of the Great Split

During the period from 1967 to 1979, close to two dozen reported appellate opinions passed upon the issue of the existence of any duty owed by the site architect to construction workers. To some extent, of course, the distinction between a holding based on existence of a duty and a holding which determines whether an existing duty has been breached is arbitrary. Some courts, for example, justify a ruling favorable to the worker by pointing to broader-than-normal site responsibility language as a source of duty, as was done in the Job case. Yet a court's attitude toward architects' duty and liability in general can be reflected in its willingness to interpret contract language broadly. Also, some courts do not make clear whether a holding for the architect as a matter of law is based upon a denial that any duty exists or upon a clear failure to show that the architect breached some duty owed. Despite these ambiguities, however, some trends can be observed.

Between 1967 and 1973, courts in Florida, Michigan, Nebraska, Utah, Washington, and North Dakota seemed to follow Miller. These opinions focused upon modern tort law with its

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95 See Geer v. Bennett, 237 So. 2d 511 (Fla. Dist. Ct. App. 1970). But see Vorndran v. Wright, 367 So. 2d 1070 (Fla. Dist. Ct. App. 1979), which limits this holding. Vorndran distinguished Geer by noting that Geer involved supervisory language which gave greater control over techniques of construction to the architect. In Vorndran, on the other hand, the architect was only to visit the site periodically to check on whether the work followed design requirements. This shift is similar to that seen in Arkansas and described in III B supra.
97 See Simon v. Omaha Pub. Power Dist., 189 Neb. 183, 202 N.W.2d 157 (1972). In a later case involving a claim by an employee of a subcontractor against a prime contractor, however, Simon was given a limited reading, the court emphasizing the owner's overall control through its trained engineer and its control of safety. Hand v. Rorick Constr. Co., 190 Neb. 191, 206 N.W.2d 335 (1973).
101 Although there are no direct holdings, California should probably be put into the Miller camp as well. First, Montijo v. Swift, 219 Cal. App. 2d 351, 23 Cal.Rptr. 133 (1963), though involving harm to a subsequent user caused by a design error, contains language broad enough to cover a site worker's claim based on "supervision." Second, California's weighing
emphasis upon compensating victims, replacing privity with foreseeability, and allowing the trier of fact, usually the jury, to determine whether the architect’s conduct measured up to the required standard. These cases, like Miller, read language dealing with the architect’s responsibility in a way that favored the worker. In most of the cases the architect knew of unsafe practices and either did nothing or took ineffective action. Three courts pointed to contractual language giving the architect or engineer power or overall responsibility not usually found in construction projects.

With the exception of certain dicta contained in a recent North Carolina opinion, the unmistakeable movement has been clearly...
against Miller. Between 1969 and 1973, courts in Montana and Arizona held that no duty existed; the Arkansas court affirmed its holding in the Walker case protecting the architect; the Utah court reversed itself and denied existence of the duty; and the New York court continued to use its nonfeasance-misfeasance rule, which is even more protective of architects than the rule articulated in Day. Between 1974 and 1979, courts in Delaware, probably Iowa and Missouri, Indiana, Maryland (despite an earlier intermediate appellate court decision which seemed to lean the other way), Colorado, Wisconsin, and Florida (reversing an earlier trend) all gave the architect an absolute defense as a matter of law, generally by denying the existence of any duty to workers. The architect in most of these cases did not know of unsafe practices, and the unsuccessful claimants asserted that he should have known of them.

Why the shift? And why express a pro-architect holding by finding that no duty exists? The second question is easier to answer than


113 See Krieger v. J.E. Greiner Co., 282 Md. 50, 382 A.2d 1069 (1978) (collecting many cases).
117 See note 95 supra.
the first. Much of the "duty" analysis simply fails to distinguish between the existence of the architect's duty to provide for the safety of a worker and the exact scope of any obligation owed the worker by the architect. The existence of any duty is decided by the judge. But the specific extent of the duty is, as a rule, a question of fact unless the latter is controlled by unambiguous contract language. The ease with which a judge can decide the existence of a duty, compared with the complexities of presenting a fact issue to a jury, must have influenced the move toward "no-duty."

Why were architects increasingly treated more sympathetically? Here we must speculate. Perhaps judges were reacting to what they perceived as improper expansion of liability, particularly that of professionals. Or perhaps the shift was less policy-oriented and merely the result of changes in standard contract language made by professional societies of architects and engineers.119

With these questions in mind, section IV will examine arguments that can be made for and against rules and attitudes on either side of the issue of the liability of site architects to construction workers.

IV. THE ARGUMENTS

We must see the issue in a broad sense as well as a narrow one. I have focused mainly on the narrow issue of whether the architect owes any duty to the worker to concern herself with worker safety. But the implications of this issue are broader, and this has not been lost on the courts. Judges—as should we—seem concerned about:

(1) the desirability of extending full tort compensation to accident victims who are already entitled to workers' compensation benefits;120

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119 The leading insurer of architects and engineers reported recently on its bodily injury claims. Between 1960 and 1975, bodily injury claims (48% of which are made by workers) as a proportion of the total number of claims rose from 15.1% to 23.6%, while claims including both property repair costs and damages for bodily injury rose from 1.7% to 3.5%. The payout percentages, however, did not rise as much, going from 11.0% to 15.7% for injury claims and dropping from 7.9% to 4.3% for combined claims. IX VICTOR O. SCHINNERER & COMPANY INC., GUIDELINES FOR IMPROVING PROFESSIONAL PRACTICE No. 3, Special Study 5, at 2 (1979). The insurer believes "a major factor has been improvement in the standard AIA and NSPE contract documents since the early 1960's." Id. at 1.

120 For cases or opinions which expressly or impliedly suggest the worker is adequately compensated by workers' compensation or that third-party suits are to be discouraged, see Horn v. C.L. Osborn Contracting Co., 591 F.2d 318 (5th Cir. 1979) (dissent); West v. Guy F.
The modern tort system with its emphasis on enterprise liability and as many “deep pockets” as possible;\(^\text{121}\)

The expansion of enterprise liability through vicarious liability and restriction of the use of the independent contractor defense;\(^\text{122}\)

The role that the underlying contract should play in this tort area, especially when the AIA plays a significant role in drafting such contracts;\(^\text{123}\)

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\(^{123}\) I have completed a study of the process by which AIA contract forms are drafted. While the findings have not as yet been published, I can make a few observations here. The B-series forms pertain to the relationship between architect and owner. The principal one is B141, last published in 1977. For all practical purposes the entire input for the form is furnished by AIA members, its legal counsel, and its insurance counsel. The latter two are most important in the drafting of language which can bear upon limiting liability. I do not mean to suggest that voices are not heard within AIA membership which oppose the dilution of the architect’s role in the construction process and which worry about the effect that limiting language can have on the architect’s status and his or her ability to attract clients. But on the whole those who support limiting potential liability exposure carry the day.

As to the A-series forms, which regulate the relation between owner and contractor, the AIA does receive endorsement and input from the Associated General Contractors (AGC), as well as input from subcontractor groups. The principal A-series form is A201, last published in 1976. Sometimes the AIA and the AGC have a common interest in reducing the architect’s role and, at least for the AIA, the architect’s potential liability. At other times their interests have clashed, as in 1966 when the AIA attempted to obtain indemnification from the contractor in A201. The result of this conflict was that the compromise indemnification language was imposed more or less by the important liability insurers of architects and contractors.
(5) the fairness of holding the architect responsible for something she was not paid to do, particularly when the contractor who is often primarily responsible is shielded by statute from tort liability;\(^{124}\)

(6) the confusion and perhaps harm which can result if the architect actively intervenes in the method by which the work is performed;\(^{125}\) and

(7) the burden such a duty would place upon the architect through increased professional liability premiums.\(^{126}\)

Also, before we look at the arguments, let us express some points about which there is general agreement. The architect designs and the contractor builds. The contractor must follow the plans and specifications, but normally he determines the means and methods for accomplishing them. However, the architect has a role during construction as well. She personally visits the site during construction for several different purposes, and in large projects may also have a project representative or resident engineer continuously on the site. She observes the work in order to issue progress payment certificates, to see how the work is progressing, and ultimately to determine if the work has met the contract requirements. These

While owners, at least on some issues, may have the architect as a surrogate, no one in the process has the interest of workers in mind. Conceivably, this role could be played by representatives of the workers' compensation carrier industry, since these carriers can benefit from expanded third-party rights; however, they do not now actively take such a stance.

For cases relying on the contract, see Aetna Ins. Co v. Hellmuth, Obata & Kassabaum, Inc., 392 F.2d 472 (8th Cir. 1968); Krieger v. J.E. Greiner Co., 282 Md. 50, 382 A.2d 1069 (1978); Vonasek v. Hirsch & Stevens, Inc., 65 Wis. 2d 1, 221 N.W.2d 815 (1974). For cases downgrading the contract's importance, see Scrimager v. Cabot Corp., 23 Ill. App. 3d 193, 318 N.E.2d 521 (1974); Weber v. Northern Ill. Gas Co., 10 Ill. App. 3d 625, 296 N.E.2d 41 (1973) (contract gives general contractor-owner control with one contract clause and seeks to negate responsibility for safety with another); McCarthy v. J.P. Cullen & Son Corp., ___ Iowa ___, 199 N.W.2d 362 (1972) (property damage case). In the last case the court stated: "We reject the ingenious and startling theory that a person can, by contract with a third party, lay down his own rules as to when he will be liable to those whom his negligence injures." Id. at ___, 199 N.W.2d at 370.


\(^{126}\) See note 119 supra.
"observations," under the AIA's General Conditions of the Contract for Construction, are made "to determine in general if the Work is proceeding in accordance with the Contract Documents." While "Work" can be read narrowly to cover the project itself, it could possibly encompass safety matters, at least obvious ones, especially where the project is large enough for the architect to have a full-time project representative. Yet we can also agree that the architect is not an expert in worker safety. The proliferation of detailed governmental safety regulations makes even more compelling the argument that primary responsibility in this area should belong to the contractor.

We can also agree that the architect owes allegiance to the owner, by whom the architect is retained and paid. The American architect is supposed to be a neutral judge in matters of interpretation and performance of the plans and specifications, but the principal function of the architect is to obtain for the owner what has been promised. However, the architect's responsibility to the owner might not be satisfied solely by the performance of this principal function. Owners do not want their projects soaked with the blood of construction workers. Even cold and uncaring owners do not wish to see the project stopped by public officials because of safety violations. Finally, worker injuries usually result in claims against the owner, with these claims having ever increasing chances of success. An owner who may be liable for worker injuries is concerned with worker safety and may not want a passive architect who sees but does nothing.

A. The Architect Contends

The architect is not paid to protect workers, and her contract with the owner is not intended to benefit workers. Numerous cases hold that workers and others in the construction process are not intended beneficiaries of such a contract. Also, if her obligation to workers

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127 2 AMERICAN INSTITUTE OF ARCHITECTS, ARCHITECT'S HANDBOOK OF PROFESSIONAL PRACTICE Document A201, subpara. 1.5.4 (1976 ed.).
128 Id., subpara. 1.1.3, defines "Work" as "the completed construction required by the Contract Documents and includes all labor necessary to produce such construction . . . ."
130 A.R. Moyer, Inc. v. Graham, 285 So. 2d 397 (Fla. 1973) (but tort action allowed);
exceeds her contract commitments to the owner, she has legal responsibilities for which she has not been paid. As a contracting party, she should be able to determine the scope of her potential liability.

The architect's powers during the construction process, such as issuing payment certificates and ordering that work be uncovered or corrected, are tied to her basic function—to see that the owner gets the project promised by the contractor. Her power to stop the work, to the extent it may still exist, does not relate to safety but solely to work which deviates from quality and quantity requirements. The owner and public officials usually look not to architects but to contractors, principally the prime, for worker safety. Architect intervention in matters which are the primary responsibility of the contractor will cause administrative confusion and may generate contractor claims against the owner and even the architect.

Also, placing even secondary responsibility on the architect may make the contractor more careless. The employing contractor, and perhaps also the contractor next up on the chain, cannot be sued because of the immunity given by workers' compensation laws. An architect saddled with a secondary duty to workers may contractually further reduce her own supervisory role during the construction process and deprive the owner of needed protection.


See note 58 supra.


An architect-engineer was not liable under the Occupational Safety & Health Act (OSHA). Skidmore, Owings & Merrill, Occupational Safety & Health Review Commission No. 2165 (August 26, 1977), reported in 1 Constr. Contractor ¶ 281 (1977). But the prime generally is not held responsible for the safety violations of the subcontractors. The law here is just developing. See Annot., 27 A.L.R. Fed. 943, 953-59 (1976).

See note 125 supra.
Finally, imposition of an additional duty will expand liability and raise insurance premiums. These increases will drive small, marginal practitioners out of business, causing an undesirable concentration of design work in a few large firms.

The worker will not be remediless if he cannot sue the architect. First, the worker is entitled to workers' compensation, and second, in many instances the owner is an institutional owner unable to take advantage of the independent contractor rule because of the owner's comprehensive involvement in the project. Also, placing a duty on the architect will eventually make her an insurer, despite judicial assurances to the contrary. She should not bear responsibility for an inadequate workers' compensation system or an independent contractor rule that does not allocate responsibility to the enterprise which benefits most from the project. Finally, third party subrogation recoveries are unjustified windfalls for the workers' compensation carrier as they are not reflected in lower rates.

Even if the architect is exonerated, third-party actions are complicated and costly to defend and should not be encouraged. Construction workers have much more ready access to third-party suits than their industrial counterparts, a differentiation difficult to justify and not worthy of further expansion, even if construction work is more hazardous.

Finally, attacks on her profession made by commentators and occasionally sustained by the courts want to make the architect liable for everything that goes wrong in a construction project. She has been victimized by the legal system. Placing on her a duty to workers is another unjustified intrusion into her professional work.

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134 J. Sweet, supra note 1, at 714-19.
136 See S. Riesenfeld, Report on the Re-examination of the Hawaii State Worker's Compensation System II-13 (June 1977), where the author states: "[R]ecoveryes under subrogation principles are usually not reflected in the underwriting experience controlling the insurance rates."
137 See Comment, Architect Tort Liability in Preparation of Plans and Specifications, 55 Cal. L. Rev. 1861 (1967) (arguing for holding that the architect impliedly warrants the fitness of plans); Comment, Design Professionals—Recognizing a Duty to Inform, 30 Hastings L.J. 729 (1979) (arguing that the architect must inform the client of design risks so that the client can make informed choices).
B. The Worker Responds

Architects are not entitled to special treatment. The discarded privity requirement for tort liability should not be reinstalled by finding that no duty exists. A finding that no duty exists unjustly absolves the architect even when the worker can show she was negligent, something difficult enough to show in these cases. Similarly, the timeworn rule that persons need not come to the aid of those in peril has itself been severely criticized by commentators and limited by courts.\(^{138}\) When immunities are being eliminated, why give architects immunity? Are they any different from governmental entities, charitable organizations, or manufacturers of goods, whose status or privity immunities are being discarded?

In 1976 almost one-half million recorded injuries and illnesses, including 750 deaths, occurred in the construction industry.\(^{139}\) The economically risky nature of the business makes it likely that contractors will not take the necessary steps to make the work reasonably safe.\(^{140}\) Even though architects may not be as skilled or expert in safety matters as contractors, construction accidents often result from practices which anyone involved in construction would recognize as obviously unsafe and illegal. For example, many of the cases involve failure to shore an excavation or failure to require that an exposed opening be closed. It does not take technical skill to recognize that these practices are dangerous. The site architect's presence at the work site makes her an appropriate person to take some responsibility for safety. Also, as seen in Erhart, often architects do in fact step in and show their concern for worker safety.

Workers' compensation does not adequately compensate injured workers or survivors of those who are killed on the job.\(^{141}\) Thus, third-party actions will exist even if architects are immune. In any event, such actions have been encouraged by courts\(^{142}\) and legisla-

\(^{138}\) See 2 F. Harper & F. James, The Law of Torts, § 18.6 (1956); W. Prosser, supra note 2, § 56, at 340-41.


\(^{140}\) See Philo, supra note 122.

\(^{141}\) Workers' compensation was never designed to fully compensate. See J. Sweet, supra note 1, at 662 n.51. Congress has been considering some federal control over the state laws because many states grant inadequate awards.

\(^{142}\) S. Riesenfeld, supra note 136. Two of the many cases cited by Riesenfeld are
Even when recoveries in third-party actions are obtained, a large part must be shared with the worker's attorney. To receive anything resembling adequate compensation, a worker needs as many solvent defendants as possible.

The architect is protected by requiring the worker to prove a violation of the professional standard of conduct. The architect is not held "strictly" liable. Also, when the architect's conduct was clearly reasonable, a court can so rule as a matter of law, particularly when the scope of her duty is specifically stated in the relevant contracts. Finally, the architect may obtain indemnification from the contractor through the owner-contractor agreement.

Contracts between owner and architect are often determined by the American Institute of Architects. Contracts between owners and contractors are also largely controlled by the AIA through its forms. Making these contracts conclusive on the issue of the existence of a duty gives excessive power to the AIA and allows architects to immunize themselves from legitimate legal responsibility to third parties.


See note 123 supra.

See id.

A contract can be conclusive on a third party if the latter claims as an intended beneficiary, Hrushka v. State, 117 N.H. 1022, 381 A.2d 326 (1977) (employee's claim against owner based on owner's powers during construction as exercised by its engineer unsuccessful because contract negated third-party rights). Suppose the employee in Hrushka had asserted a tort claim? Even if there is no sovereign immunity, a contract claim is sometimes easier to
Finally, administrative confusion on the site is a false issue. It need not occur if the architect respects the construction industry's organizational system when she observes unsafe practices.

C. The Architect Replies

Proof of the professional standard of conduct does not require expert testimony in matters sufficiently simple for lay judgment, as is often the case in worker injuries, and thus provides little protection. Also, indemnification does not work well. Indemnification clauses are interpreted narrowly against the indemnitee and in some instances have been invalidated by statute. The indemnification clause already obtained by the AIA for the architect from the contractor has not significantly reduced the ultimate pay-out by architects' insurers in worker accident cases.

Reasonableness of conduct and sometimes even the precise nature of the obligation, unlike the existence of a duty, are traditionally jury issues. Few judges will rule as a matter of law on these issues. Even where it is clear that the architect acted reasonably, a sum-

establish because all that must be proven is breach; no showing of negligence is needed. On the other hand, the contract's existence may avoid the sovereign immunity bar and form the basis of a tort duty. In that case, negligence would have to be shown.

Incidentally, has the AIA sought to preclude the architect from owing a duty to workers? 2 American Institute of Architects, Architect's Handbook of Professional Practice Document B141, subpara. 1.5.5 (1977 ed.), states that the architect has no control over or charge of construction methods of safety. Neither is he responsible for these functions or "for the acts or omissions of the Contractor, subcontractors or any other persons performing any of the Work . . . ." Similar language is found in 2 American Institute of Architects, Architect's Handbook of Professional Practice Document A201, subpara. 2.2.4 (1976 ed.). Does this deny the existence of a duty to workers? Does it seek to preclude vicarious liability based on the negligence of other participants? If so, are third parties bound by this language? Alternatively, does this tell the other party to the contract, the owner, that it cannot look to the architect when improper construction techniques or unsafe practices are employed by the contractor or others?

149 See note 144 supra and accompanying text.

150 J. Sweet. supra note 1, at 757-60.

151 Id. at 756-57.

152 In 1975 the AIA sought to broaden the indemnity clause to require the contractor to indemnify the architect if the claim against the architect was based on a work-related accident, without regard to the negligence of the indemnitee-architect or the indemnitor-contractor. One reason given for the attempt was the ineffectiveness of the existing indemnity clause, which contained exceptions and required a comparison of negligence. 2 American Institute of Architects, Architect's Handbook of Professional Practice Document A201, para. 4.18 (1976 ed.). Objection by contractors' liability carriers scuttled the proposal.
mary judgment in favor of the architect risks a reversal. In the end, the standard of reasonableness would give the worker an "assured" recovery against the architect from pro-plaintiff juries.

V. THE PROPOSAL

An architect who has contracted to perform traditional site services owes a duty to construction workers. This duty does not depend upon the architect's having particularly broad powers, such as the power to supervise, direct or stop the work, an emphasis mistakenly employed in some of the seminal cases. Nor can the duty be completely negated by the architect's contract. The duty arises from the simple fact that architects and construction workers are coparticipants in a dangerous enterprise. They are both physically on the site, often at the same time. Each would expect the other to act when danger surfaces. They are not strangers.

I choose the status relationship of architect-worker rather than a weighing of factors as a duty determinant. Prosser's general discussion of duty notes that courts tend to weigh certain factors consciously or unconsciously when deciding whether a duty exists.

Some courts, particularly in California, have attempted explicitly to include construction managers with site architects. They are construction experts, usually architects or contractors, brought in at the design phase to advise the owner or architect on costs, construction organization, and building methods. They continue providing this service during construction, performing some of the contract administration services customarily performed by architects. Sometimes they also perform construction work with their own work forces.

Architect and contractor associations have been battling over who should be performing these services. One arena has been the publication of competing standard forms by the AIA and the Associated General Contractors.

W. Prosser, supra note 1, § 53, at 326-27.

California cases have created a "series of factors" standard. To trace this development in chronological sequence, see: Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1951); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), cert. denied, 368 U.S. 912 (1962); Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (adding effect on housing and housing costs, number of builders in market); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (introducing insurance as a factor); and Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975) (adding "the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall," id. at 46, 539 P.2d at 39, 123 Cal. Rptr. at 471, as well as informing us that though duty is a question of law, the foreseeability upon which it is based is a fact question for the jury).

True, factors can vary depending upon the transaction, the circumstances, and the type
to weigh an ever increasing number of criteria to determine duty.\footnote{158} But replacing rigid privity with flexible "criteria" has only created confusion and made the process of prediction treacherous. As unsatisfactory alternatives in the architect-worker context, we have seen sterile language-parsing and futile case comparisons used to determine whether a duty exists and its nature. We need a rule of law clearly stating that the duty exists.

Architects have justifiably complained that they have been held liable for the negligence of contractors solely because of their status. I propose that their status creates a duty, but they breach that duty only if they do not act reasonably.

The first step in making a finding on the "reasonableness" question is to determine whether the architect knew or should have known of the unsafe conditions or practices which resulted in injury. As to actual knowledge we must consider the possibility that the architect may discover unsafe conditions or practices in activities unconnected with her contractual obligations to visit the site. For example, the site architect may hear of unsafe conditions or practices on her project at a cocktail party with contractor officials or during a lunchtime conversation with workers. She may receive an anonymous phone call credible enough to be checked on. She may learn about site practices while strolling past the project on her way to her office. The way in which she learns or should have learned, in the sense that she had reliable information which should have

\footnote{119} See, as an example in a negligent misrepresentation context, Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).
been investigated, is not relevant. Therefore, her contractual obligations, while often conclusive on the issue of her duty to search unsafe conditions or practices, do not limit her actual knowledge.

In addition to information actually acquired, the architect's contractual obligations—measured by her contract with the owner and often supplemented by the contract between the owner and contractor—may further determine what she should have known. If she is obligated to visit the site each Monday, she is responsible for what she would have seen on that day, whether or not she was actually present. But her contractual undertaking does not normally include acting as a safety inspector charged with uncovering latent unsafe conditions or practices. She is not absolutely responsible for how the contractor accomplishes the project requirements.

What should the architect do, if anything, once she discovers the unsafe conditions or practices? This is the second step in resolving the "reasonableness" question, and the answer depends on both the facts and her contractual powers. Perhaps she should notify the contractor's superintendent. Perhaps she should notify the owner and even make suggestions on how the matter should be handled. If she has the power to stop the work, perhaps she should do so. Perhaps she should even go to the extent of calling in a public official who has responsibility for construction safety.

The trier of fact should decide the questions of whether the architect knew or should have known of unsafe practices and of the reasonableness of any action or inaction to cure those practices. However, if the facts are so clear that submission to a jury is not needed, the court should not hesitate to use the tool of summary judgment.

The injured worker should be permitted tactical advantages that suing as an intended beneficiary of the owner-architect contract may give him. But it is not always easy to satisfy the requirements for recovery as an intended beneficiary.\(^5\)\(^7\) As a result, it is more likely that the claim would be based upon a negligent breach of the owner-architect contract.

Suppose the contract itself states that the architect need do

\(^{157}\) See notes 130 and 148 \textit{supra} and accompanying text.
nothing if unsafe practices are discovered. Unless such a clause were held invalid as against public policy, the architect’s failure to act would then not be a breach of the contract. Yet she should still be liable in tort to the injured worker. The contract between owner and architect merely established the duty; once the duty is established, the architect is liable in tort if she has not acted reasonably, even if she did not breach the contract.

We can allow the AIA through its forms to play a major role in structuring the architect-owner relationship. We can also allow the AIA a significant role in fleshing out details of that relationship which may help us determine whether the architect should have discovered unsafe practices and even what should have been done. But we cannot allow AIA forms to immunize the architect. This would reinstate the outmoded privity rule.

The architect should be able to transfer ultimate responsibility to the primarily responsible contractor by indemnification. To avoid costly trials judges should use summary procedures when there is no credible evidence of negligence.

VI. THE REASONS

The seminal cases discussed in section III B are in the main consistent with this proposal. All assumed that a duty existed. None would have granted an architect who had discovered unsafe practices immunity. However, the Miller case does not support this proposal in its entirety; the issue of the architect’s negligence was submitted to the jury when the architect neither knew of the unsafe practices nor could have been expected to know of them under the terms of his contract.

That this proposal is not entirely consistent with present case law, however, does not detract from its desirability. Some lines drawn in the present cases do not seem defensible. For example, why find the architect has a duty to nonworker third parties, as some courts have done? True, some nonworker claimants will not have workers’ compensation but others will. Similarly, why distinguish design

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negligence from supervision negligence?\textsuperscript{163} Calling the architect an independent contractor in her design role and an agent in her supervisory role\textsuperscript{164} may create election of remedies problems but does not determine the existence of a duty.\textsuperscript{162} That the architect is responsible for design while the contractor has primary responsibility for worker safety should not preclude an architect who does play a role in the construction process from having a duty to protect workers, particularly when the party primarily responsible for worker safety is immune from tort liability because of workers' compensation laws. These legal distinctions notwithstanding, my proposal very likely would not change the result—as opposed to the theory—of most cases that have passed upon the issue of architect liability to injured workers.

My proposal is also supported by the not insignificant number of cases which permit third parties to transfer their economic losses to an architect who has negligently performed her contract.\textsuperscript{163} We accord greater protection to persons than to property or money.

The most persuasive reason for adopting this proposal is the undesirability of granting architects an immunity denied others. The duty strand which generally denies any duty to assist others is a slim reed upon which to grant architects immunity. The basic "no duty to act" rule is criticized by commentators and has been given a narrow reading by the courts.\textsuperscript{164} Legislatures have limited its scope directly by hit-and-run statutes and indirectly by Good Samaritan laws. Courts have limited this "no duty to act" rule indirectly by granting certain persons who have helped reimbursement for their services.\textsuperscript{165} Finally, public outcry when persons are attacked and...

\textsuperscript{162} See Annot., 59 A.L.R.2d 1081 (1958).
\textsuperscript{162} See Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962). But calling the architect an agent of the owner in site construction cases does not necessarily provide the worker with a valid claim against the owner-principal. See note 10 supra.
\textsuperscript{164} F. Harper & F. James, supra note 138, § 18.6; W. Prosser, supra note 1, § 56, at 339-40.
\textsuperscript{165} Restatement of Restitution § 116 (1937); accord, Peninsular & Orient Steam Navigation Co. v. Overseas Oil Carriers, Inc., 553 F.2d 830 (2d Cir.), cert. denied, 434 U.S. 859 (1977), which in effect stretched admiralty law in order to grant recovery to someone who saves a life. This case is noted in Comment, Restitution for Life Salvage at Sea in the Wake
bystanders refuse to assist shows that we do not like giving bystanders immunity when they could help. One reason we might justify a "no duty to act" rule is to avoid exposing the potential rescuer to danger. This does not apply here. We do not ask the architect to place herself in physical danger in order to rescue a site worker; we only ask that she act reasonably. This does not deviate from customary practices. An experienced architect, in a professional handbook, instructs that the site architect should not interfere with "methods of job safety," but he states that architects who do see "a hazardous condition" should in fact "tell the contractor or his superintendent at once." The modern duty cases express several other reasons why courts occasionally conclude that no duty exists. We seem to draw a "no duty" line to prevent courts from venturing into areas best left to others, to avoid unduly burdening those who perform useful services, to avoid false claims or difficult valuation problems, and to avoid placing unnecessary burdens on courts. None of these

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166 The Kitty Genovese incident in the 1960s aroused public indignation. The refusal of bystanders to help an attacked woman became a symbol of urban callousness.

That this can also happen in bucolic Montana is shown by an Associated Press release which appeared in the San Francisco Chronicle, Feb. 27, 1979, at 37, col. 5. The release reported, apparently with dismay, that a volunteer private fire brigade association withdrew its men from a burning home when it found out the owner was not an association member and that the house was not registered with the association. When he found this out, the chief stated: "We pulled our men off the fire and watched it burn." Id. at col. 5 (quoting Fire Chief Kenny Gilbertson). After the incident was reported, the adjacent town, Bozeman, Montana, had its fire department flooded with angry calls from all over the country. Even under the common law rules, however, there may be liability because of an assumption of the obligation to assist. But perhaps the private association will claim the property owner is no worse off, since their starting to help did not cause the owner to lose other potential helpers, and thus the association should not be burdened with a duty to continue its assistance. See generally W. Prosser, supra note 1, § 56, at 347-48.

The moral versus legal dichotomy—and I think the two are moving closer together—is not the only explanation for the common law rule. Establishing the existence of a duty may raise causation problems. Had the defendant helped, would his aid have averted the loss? This can be a problem in the architect-worker cases also.

167 M. Slama, Construction Inspection Manual 12 (3d ed. 1977). Similarly, Slama tells inspectors not to interfere with construction means, methods, techniques, sequences, or procedures, but to report hazards to the superintendent. In an emergency the inspector is told to "contact the architect and governing authorities." Id. at 16-17. Slama also says that safety is everyone's business. Id. at 18.

168 Courts have used the duty concept to deny recovery for educational malpractice. See, e.g., Peter W. v. San Francisco School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976); Donahue v. Copiaque Union Free School Dist., 64 App. Div. 2d 29, 407 N.Y. 2d 874 (1978),
reasons, however, applies with sufficient cogency to absolutely and completely immunize architects when they are sued by site workers.

Finally, even if we eliminated architects as defendants in worker-third-party actions, these actions will still proliferate since there are other persons against whom such claims can be made. And while attacks have been made on these actions, legislative and judicial response has supported them. If courts are willing to rule as a matter of law when it is clear there has been no negligence, this proposal will not unjustifiably burden either the architect or the judicial system. Some courts may not be willing to use summary

aff'd, 47 N.Y.2d 440, 391 N.E.2d 1352, 418 N.Y.S.2d 375 (1979). But see Hoffman v. Board of Educ., 64 App. Div. 2d 369, 410 N.Y.S.2d 99 (1978) (child negligently placed in retarded class had a cause of action). Drawing a line in these cases may be based upon a reluctance to interfere with educational decision making or a fear of placing crushing liability on an already beleaguered public school system.

Where the duty of landlords to prevent third parties' wrongful acts from harming their tenants is an issue, courts may be reluctant to extend the social insurance aspects of tort law because it may carry enterprise liability to absurd lengths or may unduly increase rent and reduce housing. See Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979). See also Musgrave v. Ambrose Properties, 87 Cal. App. 3d 44, 150 Cal. Rptr. 722 (1978) (duty owed by commercial landlord to control others while on the commercial property). Similarly, courts may find psychiatrists have no duty when their patients threaten to kill third parties. But see Tarasoff v. Regents, 17 Cal. 2d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), or themselves. See Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978). This line may be drawn because of the need to protect from excessive liability those who must treat persons who make such threats.

Another duty frontier relates to claims based upon emotional distress. Duty may be used to draw a line because courts are fearful of false claims, worried about the burden on the administration of justice or concerned over the crude tools available to measure recovery. See Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (recovery permitted for emotional distress, but duty narrowly circumscribed). See also Hoyem v. Manhattan Beach School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978) (parents not permitted to recover from school for negligent supervision of their child). Finally, duty may be used to protect professionals such as accountants whose conduct can affect a large number of third parties. See Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. Ct. App. 1973). Courts may consider that important services cannot be performed properly when the spectre of immense liability looms so large.

Some of these cases also demonstrate one reason why there is confusion in the worker versus architect cases. We do not doubt that schools owe a duty to children, that landlords owe a duty to tenants, and that psychiatrists owe a duty to patients. But the issue in these cases is the exact nature of that duty. Does it include educating them properly, protecting them from rapists, or protecting third parties from threats by patients?


170 See notes 142-43 supra and accompanying text.
procedures when they should. This will make a marginal increase in the architect's exposure, but not enough to justify granting the architect absolute immunity from liability to workers whose injuries could have been prevented.

VII. Conclusion

The site architect's status should create a duty to construction workers. The architect should take reasonable steps, as judged by his contract, to discover unsafe practices and contract deviations which expose workers to an unreasonable risk of harm. If dangerous practices are or should have been discovered, under the standards described above, the architect should act reasonably to avoid harm to the worker.171

This proposal will rid us of an extraneous issue that has confused the courts. It will also eliminate the inhumane conclusion that architects can shut their eyes to workers in danger. Finally, such a rule should encourage architects to use their skills to reduce worker injuries. Architects and workers participate together in a dangerous enterprise.172 Each must concern himself or herself with the safety of the other. Neither can say that the other's safety is not his or her business.

171 This view is supported in Note, Architectural Malpractice: A Contract-Based Approach, 92 Harv. L. Rev. 1075, 1094-98 (1979).
172 The court in Davidson & Jones, Inc. v. County of New Hanover, 41 N.C. App. 661, 255 S.E.2d 530 (1979), allowed the prime contractor to sue the architect for negligence. The opinion emphasized the "community of interest" and the working relationship that exist among participants in the construction process. Language in the opinion indicates that this reasoning would also be applied in a claim by a worker against a site architect, although, in fairness, the major cases denying the existence of a duty were never cited and were probably not even brought to the attention of the court. See M. Shapo, supra note 17, at 69-73, which also supports the proposal I have put forth.