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Article 11

# Limitations on the Structural Work Act - Tenenbaum v. City of Chicago

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# NOTES

## LIMITATIONS ON THE STRUCTURAL WORK ACT—*TENENBAUM v. CITY OF CHICAGO*

The Illinois Structural Work Act[1] was enacted in 1907 to provide protection for structural workers engaged in ultrahazardous activities.[2] Two advantages accrue to injured workers who bring actions under the statute. Many of the difficulties inherent in a common law negligence suit are avoided.[3] In addition, third parties[4] such as owners,[5] contrac-

1. ILL. REV. STAT. ch. 48, §§ 60-69 (1973). This Note deals specifically with sections 60 and 69, the applicable parts which provide:

Section 60

> [A]ll scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

Section 69

> Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all the terms thereof, and any . . . person violating any of the provisions of this act shall be guilty of a Class A misdemeanor.
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> . . . .
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> For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children; or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives.

2. *See, e.g.*, Schultz v. Henry Ericsson Co., 264 Ill. 156, 106 N.E. 236 (1914); Claffy v. Chicago Dock & Canal Co., 249 Ill. 210, 94 N.E. 551 (1911); Bruen v. Burton Auto Spring Corp., 130 Ill.App.2d 477, 266 N.E.2d 176 (1st Dist. 1970).

3. In common law actions, defendants are held to a standard of ordinary and reasonable care; contributory negligence, assumption of risk, and the fellow servant rule are defenses. Gannon v. Chicago, M., St. P. & P. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961). These are not defenses to an action brought under the Structural Work Act. Schmid v. United

tors,[6] and architects[7] can be held liable for injuries resulting from violations of the Act.[8]

Illinois courts have traditionally construed the Act liberally in order to effectuate the legislative goal of providing a safe working area.[9] In interpreting the legislative intent, the courts have considered the evil which the Act is designed to remedy,[10] as well as the words of the statute. Key terms such as "scaffold,"[11] "structure,"[12] "wilful violation,"[13] and

States, 273 F.2d 172 (7th Cir. 1959); Lindsey v. Harlan E. Moore & Co., 11 Ill.App.3d 432, 297 N.E.2d 8 (4th Dist. 1973); Pantaleo v. Gamm, 106 Ill.App.2d 116, 245 N.E.2d 618 (1st Dist. 1969); Palier v. Dreis & Krump Mfg. Co., 81 Ill. App.2d 1, 225 N.E. 2d 67 (1st Dist. 1967).

4. Originally, the Structural Work Act was designed to hold employers criminally and civilly liable for violations of its standards. However, the Workmen's Compensation Act exempted employers from such liability. *See* ILL. REV. STAT. ch. 48, §§ 138 *et seq.* (1973). The Structural Work Act has thus become an instrument for imposing liability on third parties.

5. *See, e.g.*, Schmid v. United States, 273 F.2d 172 (7th Cir. 1959); Pankey v. Hiram Walker & Sons, Inc., 167 F. Supp. 609 (S.D. Ill. 1958); Gannon v. Chicago, M., St. P. & P. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961); John Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 141 N.E. 739 (1923).

6. *See,e.g.*, Pankey v. Hiram Walker & Sons, Inc., 167 F. Supp. 609 (S.D. Ill. 1958); Pantaleo v. Gamm, 106 Ill.App.2d 116, 245 N.E.2d 618 (1st Dist. 1969); Yankey v. Oscar Bohlin & Son, Inc., 37 Ill.App.2d 457, 186 N.E.2d 57 (1st Dist. 1962); Oldham v. Kubinski, 37 Ill.App.2d 65, 185 N.E.2d 270 (2d Dist. 1962) (subcontractor).

7. *See, e.g.*, Wheeler v. Aetna Cas. & Sur. Co., 57 Ill. 2d 184, 311 N.E.2d 134 (1974); Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); Holt v. A.L. Salzman & Sons, 88 Ill.App.2d 306, 232 N.E.2d 537 (1st Dist. 1967).

8. The Act does not impose absolute liability but requires that the defendant have charge of the work. Gannon v. Chicago, M., St. P. & P. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961). The phrase "having charge of" is not limited to supervision and control of the scaffold, but is a broad concept to be used to afford maximum protection for workmen's injuries. Larson v. Commonwealth Edison Co., 33 Ill. 2d 316, 211 N.E.2d 247 (1965).

9. Bounougias v. Republic Steel Corp., 277 F.2d 726 (7th Cir. 1960); Halberstadt v. Harris Trust & Sav. Bank, 55 Ill. 2d 121, 302 N.E.2d 64 (1973); Bruen v. Burton Auto Spring Corp., 130 Ill.App.2d 477, 266 N.E.2d 176 (1st Dist. 1970).

10. Gannon v. Chicago, M., St. P. & P. Ry., 22 Ill. 2d 305, 175 N.E.2d 785 (1961); Brackett v. Osborne, 44 Ill.App.2d 441, 195 N.E.2d 8 (2d Dist. 1963).

11. The courts have found the Act applicable to various devices by finding them to be "scaffolds . . . or other mechanical contrivances," and thus covered by the Act. *See* Bounougias v. Republic Steel Corp., 277 F.2d 726 (7th Cir. 1960) (drum of an overhead crane); Oldham v. Kubinski, 37 Ill.App.2d 65, 185 N.E.2d 270 (2d Dist. 1962) (Drott skid shovel). In this Note the term "scaffold" refers to any device which will invoke the safeguards of section 60.

12. In Warren v. Meeker, 55 Ill. 2d 108, 302 N.E.2d 54 (1973), the court held that a grain bin was a "structure" under the Act. A trench for a sewer system was held to be a structure in Navlyt v. Kalinich, 53 Ill. 2d 137, 290 N.E.2d 219 (1972). Courts have refused to extend the status of structure to movable personal property. *See* Juenger v. Bucyrus-Erie Co., 286 F. Supp. 286 (E.D. Ill. 1968) (world record size shovel); Farley v. Marion Power Shovel Co., 60 Ill. 2d 432, 328 N.E.2d 318 (1975) (strip mining shovel).

13. Wilful violations are not necessarily knowing, intentional or even reckless. A person

"having charge of"[14] have been broadly defined. In this manner the Illinois judiciary has molded the Structural Work Act into a significant instrument for the redress of injuries to workmen.

Although the legislature used the term "scaffold" in section 60[15] it did not define what instrumentalities would constitute safe scaffolding.[16] Wielding the liberal construction maxim, however, the courts have applied the Act to items ranging from a plank to a skid shovel when they were temporarily used to support workmen.[17] Nevertheless, the Illinois courts were hesitant to find that a permanent part of the structure being erected was a "scaffold" or "support" under the statute, even when a workman stood on it to perform his duties.[18] They insisted that a scaffold was, by common definition, a device of a temporary nature.[19] When faced with this issue in *Louis v. Barenfanger*,[20] the Illinois Supreme

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can be held liable for a condition which he should have discovered by exercising reasonable care. *See* Schmid v. United States, 273 F.2d 172 (7th Cir. 1959); Juliano v. Oravec, 53 Ill. 2d 566, 293 N.E.2d 897 (1973); Jones v. S.S. & E. Corp., 112 Ill.App.2d 79, 250 N.E.2d 829 (1st Dist. 1969); Braden v. Shell Oil Co., 24 Ill.App.2d 252, 164 N.E.2d 235 (4th Dist. 1960).

14. *See* cases cited in note 8 *supra*.

15. Structural Work Act, ILL. REV. STAT. ch. 48, § 60 (1973), *partially quoted in* note 1 *supra*.

16. Schultz v. Henry Ericsson Co., 264 Ill. 156, 106 N.E. 236 (1914) (what constitutes a safe, suitable scaffold is a question of fact for the jury to determine based on the particular circumstances). *See* Karris v. Goldman, 118 Ill.App.2d 85, 254 N.E.2d 605 (1st Dist. 1969) (test of safety of scaffold is not limited to sturdiness or structural integrity, but it must be of a size suitable for anticipated equipment; a question for the jury).

17. *See* cases cited in note 11 *supra*; Frick v. O'Hare-Chicago Corp., 70 Ill.App.2d 303, 217 N.E.2d 552 (1st Dist. 1966) (plank on top of wooden concrete form held to be scaffold since it was intended to be and was used as one).

18. *See* Bohannon v. Joseph T. Ryerson & Son, Inc., 72 Ill.App.2d 397, 219 N.E.2d 627 (1st Dist. 1966) (injuries sustained in fall from strut not compensable because strut was permanent part of ceiling being built); Parizon v. Granite City Steel Co., 71 Ill.App.2d 53, 218 N.E.2d 27 (5th Dist. 1966) (roof temporarily used for support not covered by the Act); Thon v. Johnson, 30 Ill.App.2d 317, 174 N.E.2d 400 (2d Dist. 1961) (form constructed to hold concrete for stairway landing was not a "scaffold" as required by the Act).

19. *See, e.g.*, Parizon v. Granite City Steel Co., 71 Ill.App.2d 53, 218 N.E.2d 27 (5th Dist. 1966). The court refused to use the liberal construction doctrine to enlarge the scope of the statute. It felt that if exclusion of a permanent part of the structure was a defect in the Act, it would have to be remedied by the legislature. The dissenting opinion argued that temporary use of the roof as a support was contemplated by the parties and that the legislative intent required extension of the Act to such situations. Two years later, the Illinois Supreme Court followed the reasoning of the *Parizon* dissent in Louis v. Barenfanger, 39 Ill. 2d 445, 236 N.E.2d 724 (1968).

20. 39 Ill. 2d 445, 236 N.E.2d 724 (1968), *criticized in* Note, 73 DICK. L. REV. 533 (1968-1969). Until *Barenfanger*, failure to provide scaffolding was not actionable under the Structural Work Act. It was thought that the Act came into play only after scaffolding

Court held that there was a duty to provide scaffolding and that a permanent part of a structure could come within the definition of a scaffold.

However, in its recent decision in *Tenenbaum v. City of Chicago*,[21] the Illinois Supreme Court has indicated that this trend of liberal construction may not be continued. *Tenenbaum* rejected the broad definition of "scaffold" allowed by the appellate court[22] and attempted to clarify the requirements for designating a permanent part of a structure as a scaffold. In addition, the court enunciated a requirement that the injury sustained must be related to the hazardous nature of the instrumentality causing it. As a result, the scope of the Structural Work Act has apparently been narrowed and the protection potentially available to workmen has been decreased. This Note will discuss these two aspects of *Tenenbaum* and their probable impact on the coverage afforded by section 60.

In *Tenenbaum* the plaintiff fell from a permanent part of an underground water treatment plant which was under construction. The structure was composed of three levels—a roof at ground level, an intermediate level, and a basement. At the east end of the structure a nine-foot opening was left in the intermediate level to form a chamber. This chamber was a part of the permanent structure and was to be used to "baffle" water.[23] Tenenbaum was walking on the intermediate level checking for debris and wood[24] when he dropped his flashlight.[25] While searching for it, he took a few steps forward and tripped into the baffle

had been used. Morck v. Nicosia, 91 Ill.App.2d 327, 235 N.E.2d 287 (1st Dist. 1968); Bradley v. Metropolitan Sanitary Dist., 56 Ill.App.2d 482, 206 N.E.2d 276 (1st Dist. 1965).

21. 60 Ill. 2d 363, 325 N.E.2d 607 (1975).

22. Tenenbaum v. City of Chicago, 11 Ill.App.3d 987, 297 N.E.2d 716 (1st Dist. 1973). The appellate court had interpreted Louis v. Barenfanger, 39 Ill. 2d 445, 236 N.E.2d 724 (1968), to allow coverage under section 60. It held that the intermediate level from which Tenebaum fell was being used in the performance of duties within the purview of his employment, and was a scaffold or support covered by the Act. For a presentation of the facts upon which this holding was based, *see* notes 23-27 and accompanying text *infra*. The appellate court opinion is discussed in notes 28-30 and accompanying text *infra*.

23. Upon completion, the entire structure was to be filled with water. The baffle chamber was to be used to "baffle" water back and forth as part of the mixing process. During construction, materials and equipment were hoisted through this chamber. 60 Ill. 2d at 367, 371, 325 N.E.2d at 610, 613.

24. Tenenbaum had sent two men to remove debris and wood, but was told by a city engineer that the clean-up operation was not satisfactory. He therefore went to inspect the area himself. *Id.* at 367, 325 N.E.2d at 610-11.

25. No provision had been made for permanent lighting because the structure was to be under water. The temporary lights did not work so Tenenbaum used his flashlight. As he neared the baffle chamber, something hit his arm and he dropped the flashlight. *Id.* at 367, 325 N.E.2d at 611.

chamber. Tenenbaum testified that he felt the edge of a ladder, tried to balance himself, but fell to the concrete floor of the basement. He brought suit under the Structural Work Act[26] against the City of Chicago, as owner of the premises, and a contractor working on the structure.[27]

On appeal from a jury verdict in favor of Tenenbaum, the defendants contended that the Structural Work Act was not applicable to the facts presented.[28] The appellate court held that section 60 was applicable, but reversed on other grounds.[29] Two theories were advanced for holding section 60 applicable. First, the court concluded that the level was being used as a scaffold within the meaning of *Barenfanger*, and that the jury could find that the placement of the ladder made the "scaffold" unsafe. Under the second theory, the jury could find that the ladder itself was a protected instrumentality which had been placed in a dangerous manner.[30] The Illinois Supreme Court rejected both appellate court theories,

26. The original complaint was based on common law negligence. Tenenbaum filed an amended complaint prior to trial containing an additional count charging wilful violations of sections 60 and 66 of the Structural Work Act. A third count alleged wilful violations of the Safeguards During Construction Ordinance of the City of Chicago. CHICAGO, ILL., MUNICIPAL CODE ch. 75, §§ 1 *et seq.* (1974). Count I was dismissed prior to trial, and the case went to the jury on Counts II and III.

27. The defendant contractor was O'Neil Construction Company. The City of Chicago, as owner, had contracted with several prime contractors for construction of the water-treatment plant, including co-defendant O'Neil. O'Neil was the first contractor on the job, and had erected the structure. Tenenbaum was a labor foreman for Link Belt Corp., prime contractor for installation of chemical mixing and scraping equipment. There was no contractual relationship between Link Belt and O'Neil.

28. 11 Ill.App.3d 987, 297 N.E.2d 716 (1st Dist. 1973).

29. The appellate court reversed on trial errors, remanded for a new trial, and thereafter issued a certificate of importance. 60 Ill. 2d at 365, 325 N.E.2d at 610.

30. 11 Ill.App.3d 987, 297 N.E.2d 716 (1st Dist. 1973). The appellate court also held that the defendants could be found liable under section 66 for failure to barricade an opening that had been used for hoisting construction materials. The requirement of barricading was not limited to the time hoisting was in progress, but was interpreted to extend to any period when there was danger of a workman falling into the opening.

Justice Egan, in a Special Concurrence, upheld the reversal on trial errors and also found the Structural Work Act inapplicable. He maintained that it was immaterial whether the intermediate level was a scaffold, since the plaintiff did not make that allegation. It was the ladder which allegedly brought the Act into play. However, for Tenenbaum's injury to be covered by the Act, it must have occurred when the ladder was used as a ladder. If not, the Act would be applicable to any injury as long as one of the devices named in the statute was used. Justice Egan offered the illustration of a workman tripping over a ladder placed against a wall; covering such an injury would strain the interpretation of the Act. The Justice maintained that the ladder was not being used as a ladder in the instant case, and section 60 was therefore inapplicable. He also felt that the duty to

and held that section 60 was not applicable to the facts of *Tenenbaum*.[31]

### THE DEFINITION OF "SCAFFOLD"

The court first dealt with the contention that the intermediate level from which Tenenbaum fell was a "scaffold." It held that the level was not a "scaffold" since it was not being used as a platform or scaffold to complete construction but was, in fact, a completed floor. To reach this conclusion, *Barenfanger* and the major post-*Barenfanger* decisions were distinguished.[32] After noting that *Barenfanger* had been decided on the pleadings, the *Tenenbaum* court explained the rationale of this landmark case. When there is a failure to provide scaffolding and a part of the structure is used temporarily for support in lieu of a scaffold, that part of the structure is a "scaffold" within the meaning of the Act. Applying this reading of *Barenfanger* to the facts of *Tenenbaum*, the justices found no showing of a "need for, or failure to provide . . . a scaffold"[33] and determined that the level was not being used as a scaffold.

Thus, the *Tenenbaum* court has clarified the requirements which must be fulfilled to classify a permanent part of a structure as a "scaffold." A finding of a failure to provide scaffolding must be coupled with temporary use of a part of the structure as a substitute for the missing scaffold. An examination of other decisions applying *Barenfanger* re-

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barricade no longer existed. Therefore, Justice Egan wanted to reverse without remanding. *Id.* at 1010, 297 N.E.2d at 731.

Justice Adesko dissented. He felt that the case was within the Structural Work Act, that it had been properly tried, and that the trial court's decision should be affirmed. *Id.* at 1019, 297 N.E.2d at 737.

31. 60 Ill. 2d 363, 325 N.E.2d 607 (1975). The supreme court did affirm the appellate court's decision that section 66 of the Act was applicable. It held that the duty to barricade did not terminate when hoisting operations ended but continued as long as there was a danger that workmen would fall into the opening. Justice Ryan, who dissented from this view, maintained that section 66 required barricades only when hoisting was in progress, or after hoisting if the opening was temporary in nature. *Id.* at 376, 325 N.E.2d at 615.

The supreme court reversed and remanded for errors in the trial of Count III. The trial judge had instructed the jury that violations of the city ordinance imposed liability on defendants without regard to issues of negligence and contributory negligence. The supreme court found that the instruction was prejudicial error.

32. *See* notes 36-38 and accompanying text *infra* for the *Tenenbaum* court's interpretation of St. John v. R.R. Donnelley & Sons Co., 54 Ill. 2d 271, 296 N.E.2d 740 (1973). *See* note 34 *infra* for the court's treatment of Halberstadt v. Harris Trust & Sav. Bank, 55 Ill. 2d 121, 302 N.E.2d 64 (1973). Juliano v. Oravec, 53 Ill. 2d 566, 293 N.E.2d 897 (1973), involved a workman whose foot went through the subflooring upon which he was walking. The opinion contained language which stated that the subflooring was a stay or support. The *Tenenbaum* court disregarded that dicta because the holding of the case was based on a violation of section 63 of the Act.

33. 60 Ill. 2d at 370, 325 N.E.2d at 612.

veals that the importance of both elements had not been previously recognized. Courts allowing recovery have consistently found a temporary use of part of the structure as a scaffold; they have not consistently found a failure to provide scaffolding.[34] In past cases in which highly dangerous and unsuitable supports such as poles or columns were used, the failure to provide scaffolding may have been implied from the facts.[35] In future cases involving such devices, the obvious dangers they present may be used to support the required finding of failure to provide a suitable scaffold. However, when a workman is on a floor or level of the building the obvious danger is less. Proving a failure to provide scaffolding in such instances will be correspondingly more difficult as the danger becomes less obvious.

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34. Schroeder v. C.F. Braun & Co., 502 F.2d 235 (7th Cir. 1974), explicitly found a failure to provide protective scaffolding and held that beams, though permanent parts of the structure, were within the purview of the Act.

In Carruthers v. B.C. Christopher & Co., 13 Ill.App.3d 108, 300 N.E.2d 1 (5th Dist. 1973), *rev'd on other grounds*, 57 Ill. 2d 376, 313 N.E.2d 457 (1974), the court held that a jury could find an implicit agreement that plaintiff would stand on top of the grain bin to perform his work. A basis for this finding was testimony that a scaffold could have been built but was not. However, this case centered on the issue of whether the defendant had charge of the work, not whether the grain bin was a scaffold. The complaint in Halberstadt v. Harris Trust & Sav. Bank, 55 Ill. 2d 121, 302 N.E.2d 64 (1973), charged that as a result of the failure to provide a safe scaffold plaintiff's husband was required to use corroded hooks on a building as support for his safety belt. On the major question presented, the court held that a window washer could be protected by the Structural Work Act. The opinion noted that under the *Barenfanger* rationale a workman using the window ledge and hooks could be protected. The decision did not specifically find a failure to provide scaffolding, though it was alleged in the complaint and could be inferred from the facts. The *Tenenbaum* court did not feel that *Halberstadt* made section 60 applicable to the case at hand.

Wood v. Commonwealth Edison Co., 343 F. Supp. 1270 (N.D. Ill. 1972), involved a wooden utility pole used temporarily as a scaffold. The court followed *Barenfanger* but made no mention of a failure to provide scaffolding. Similarly, in Spiezio v. Commonwealth Edison Co., 91 Ill.App.2d 392, 235 N.E.2d 323 (1st Dist. 1968), the court found that a steel column came within the Act when it was intended to be, and was, put to temporary use as a support. There was no explicit finding of a failure to provide scaffolding.

*Barenfanger* was extended to a roof in St. John v. R. R. Donnelley & Sons Co., 54 Ill. 2d 271, 296 N.E.2d 740 (1973) without finding a failure to provide scaffolding. In Mundt v. Ragnar Benson Inc., 18 Ill.App.3d 758, 310 N.E.2d 633 (1st Dist. 1974), *aff'd* No. 46752 (Ill. Sup. Ct. June 2, 1975), *rehearing docketed* (September 1975), plaintiff fell through a hole while walking on wooden flooring that was to be covered with concrete. The court, following *Barenfanger*, stated that the structure on which plaintiff was working was a scaffold, yet did not find a failure to provide scaffolding. This was dicta, however, because they affirmed the lower court's refusal to allow an amended complaint adding a count under the Structural Work Act.

35. *See* Wood v. Commonwealth Edison Co., 343 F. Supp. 1270 (N.D. Ill. 1972); Spiezio v. Commonwealth Edison Co., 91 Ill.App.2d 392, 235 N.E.2d 323 (1st Dist. 1968), both discussed in note 34 *supra*.

The *Tenenbaum* decision provides limited guidelines for predicting what fact situations involving permanent structures will fulfill the *Barenfanger* requirements. The court focuses on the stage of completion of the level and whether it is being used as a scaffold. These two factors now appear to be essential considerations in determining when flooring will be labeled a "scaffold." Unfortunately, the definitions and perimeters of these concepts are not clarified in *Tenenbaum*.

This problem can be highlighted by comparing *Tenenbaum* with the Supreme Court's earlier decision in *St. John v. R. R. Donnelley & Sons Co.*[36] In the latter case, the decedent had been working on the roof of a plant under construction, removing debris and stacking runways, when he fell through an opening which was later to be filled with heating, ventilating, and lighting equipment. The *Barenfanger* rationale was extended to hold that a rooftop being put to temporary use as a scaffold was within the Act; it was irrelevant that the rooftop was intended to be a permanent part of the building.[37] The *Tenenbaum* court, however, decided that *St. John* dealt with a "narrow question" when it rejected the contention that a "roof, with openings to be later closed, could not, as a matter of law, be considered a temporary platform or support."[38]

The facts in *St. John* and *Tenenbaum* are very close, and the attempt to make meaningful distinctions between them gives little assistance in determining when a level will be covered by the Act. The court may be focusing on the fact that in *St. John* the openings in the roof were to be filled; the level could therefore be considered incomplete. In contrast, the *Tenenbaum* decision stresses that the level in question had been completed.[39] This emphasis on completion may create some confusion in the future because the point at which a level will be considered complete remains indefinite. In *Tenenbaum* the court determined that the level was complete with reference to section 60, but admitted that dangers to workmen continued under other sections of the Act.[40] More-

36. 54 Ill. 2d 271, 296 N.E.2d 740 (1973).

37. *Id.* at 274, 296 N.E.2d at 741-42. It should be noted that *St. John* does not mention a failure to provide scaffolding. *See* note 34 *supra*.

38. 60 Ill. 2d at 370, 325 N.E.2d at 612. In his Special Concurrence to *St. John*, Justice Davis pointed out that the majority's holding was far from narrow. He suggested that the rule that a roof temporarily being used as a platform falls under the Act was too broad and not warranted by *Barenfanger*. Justice Davis warned that the holding implied that every place a workman stood was a scaffold. His position was that at some point a structure ceased to be a scaffold and became a building. However, he concluded that the Act was applicable to *St. John* because the roof was not complete and was being used as a scaffold for insertion of equipment in the openings. 54 Ill. 2d at 276, 296 N.E.2d at 743.

39. 60 Ill. 2d at 370, 325 N.E.2d at 612.

40. Section 66 of the Act was applicable to the facts since the jury could find that

over, the stage of completion had not advanced far enough to preclude the jury from finding that the defendants were still in charge of the work.[41]

Comparing *St. John* with *Tenenbaum* suggests that the line determining completeness may be drawn when the level is physically constructed, but before clean-up operations are necessarily finished. This would put such activities outside the protection of the Act if done after completion. For example, if the openings in the *St. John* roof had been filled, would it have been a completed level? If so, the victim's clean-up activities would have been outside the Act.

The issue of completeness raises another question. Can a completed level ever be classified as a scaffold?[42] Fact situations can be envisioned in which a completed floor could be used as a temporary support for other work. Protection may be afforded in such cases by reliance on another concept suggested in the decision—use of the area as a scaffold.[43] For example, a worker might stand on a completed level in order to perform work on an uncompleted part of the structure. If the worker is found to be using the level as a scaffold, he may still be under the protective umbrella of section 60.

Unfortunately, the definition of "use as a scaffold" is ambiguous. In comparing the facts of *Tenenbaum* with those of *St. John*, the Illinois Supreme Court said that Tenenbaum was using the area as a floor, while the injured party in *St. John* was using the area as a scaffold.[44] If "use as a scaffold" refers to the type of work being performed by the individual, this comparison creates some confusion. In both *Tenenbaum* and *St. John* the party injured was searching for debris.[45] The term may also relate to the individual's work in the larger context. For example, the

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dangers continued in the area of the opening even though hoisting operations were completed. *See* note 31 *supra*.

41. 60 Ill. 2d at 374-75, 325 N.E.2d at 614. The defendant, O'Neil, argued that its work in the area had been completed and therefore it was not in charge of the work. The court noted that even if the contractor had left the baffle area temporarily, its work had not been accepted by the city. It was still required to make tests and patch leaks on the structure. Therefore, the jury could find that the defendant was in charge of the work and liable for the injuries suffered by Tenenbaum.

42. The answer to this question is crucial. The statute applies to "repairing, alterations, removal or painting of any . . . structure." ILL. REV. STAT. ch. 48, § 60 (1973). *See* note 1 *supra*. If completed levels are totally excluded as scaffolds, any of the above work performed on such a level will be unprotected.

43. 60 Ill. 2d at 370, 325 N.E.2d at 612.

44. *Id.*

45. A distinction may be found in the fact that Tenenbaum was inspecting the area for the debris but not picking it up. St. John was physically moving the debris. If this is the crucial distinction, it further highlights the definitional problem.

court notes that Tenenbaum's employer was assembling pedestals and infers that they were not using the level as a scaffold in furtherance of construction.[46] While it is unclear which activity was determinative in *Tenenbaum*, the decision suggests that the work of the individual, the employer, or both, are proper subjects for examination. Where the court chooses to concentrate its attention may be a crucial factor in determining the applicability of section 60.[47]

The concept of "use as a scaffold" may also be employed to exclude certain activities from coverage. It seems that traditional scaffolds could be used for a variety of activities, including walking and transporting materials. However, the decision indicates that the court may be looking primarily for activity which can be characterized as constructing. If this approach is continued, only activities which are construction-oriented would constitute "use as a scaffold" and, therefore, be protected. This may occur only when the level is completed.[48] However, "use as a scaffold" might also be applied to exclude activities performed on an uncompleted level.[49]

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46. 60 Ill. 2d at 370, 325 N.E.2d at 612. Link Belt was preparing pedestals on which machinery would be mounted. The *Tenenbaum* court did not compare Link Belt's activities with those of St. John's employer. The latter was general contractor for building a new plant. The majority opinion found that at the time of St. John's accident the roof was being covered with felt, tar, and gravel. 54 Ill. 2d at 272, 296 N.E.2d at 741 (1973). However, Justice Davis concurred with the majority because "the roof was being used as a scaffold for the purpose of inserting integral parts of the roof's structure." 54 Ill. 2d at 276, 296 N.E.2d at 743. We must assume that Justice Davis was talking about the work of the employer, though it is unclear exactly what work they were directly engaged in at the time of the accident. It is important to note, however, that the majority found that St. John and Edwards, his co-worker, were using the roof as a "scaffold" and *their* immediate work was collecting debris and stacking runways.

47. Consider the following examples:

A. Employer is assembling equipment while the employee is inserting the equipment into the walls of the structure.

B. Employer is inserting equipment into openings in the structure while the employee is examining the area for debris.

In example A, the employer would be using the level as a floor according to *Tenenbaum*, but the employee would be performing work analogous to what Justice Davis found to be "use as a scaffold" in *St. John*. In example B, the employer would be using the level as a scaffold according to Justice Davis, while the employee, like Tenenbaum, would be using the level as a floor. In each case protection will depend upon which activity the court focuses its attention.

48. If the completeness of the level does not automatically exclude the workman from the Act, the court may consider how the completed level is being used. For example, if it is used as a support to paint a neighboring structure, such an analysis probably would provide protection for the worker. *See* notes 42-43 and accompanying text *supra*.

49. When work is being performed on an incomplete level, the court may continue to follow *St. John* and hold that the level is being used as a scaffold. However, the court may

While the concepts discussed above are presently nebulous, they seem to be tools the court will use to establish new boundaries within which the Act will apply. *Barenfanger* and *St. John* extended section 60 to allow permanent levels of a structure to be classified as scaffolds. *Tenenbaum* establishes that not all such levels are covered under all circumstances.[50]

### THE INHERENT-DANGER REQUIREMENT

In addition to adding new dimensions to the definition of scaffold, *Tenenbaum* has independent significance for Structural Work Act claimants because it enunciates a standard for judging when a cause of action arises under the Act. After *Tenenbaum*, use of a device named in the Act is insufficient. The injury must have "some connection with the hazardous nature of one of the devices named in Section [60] of the Act."[51] Applying this rule to the case before it, the court made the observation that the inherent danger of a ladder is that workmen or materials may fall off or the ladder itself may fall. While acknowledging that the ladder may have contributed to Tenenbaum's injury, the court found that he could have suffered the same injury by tripping over some other object. Therefore, his was not an injury directly related to a particular hazard of working on a ladder.[52]

This inherent danger theory is similar to the position advocated by Justice Ryan's dissent in *McNellis v. Combustion Engineering, Inc.*[53] He

decide to examine the activity performed and exclude the workman if he is not using the level as a scaffold. For example, suppose Link Belt had been assembling pedestals on an incomplete floor when a workman fell into the baffle chamber. Would the court have allowed protection because the level was not complete or denied protection because the level was not being "used as a scaffold?" It seems that protection would be denied even though the level was incomplete, inasmuch as temporary use in lieu of a scaffold is required under *Barenfanger*. *See* text accompanying notes 33-36 *supra*.

50. Previous decisions have warned that overbroad expansion of definitions can bring about the result that any place a workman stands thereby becomes a scaffold within the meaning of the Act. St. John v. R. R. Donnelley & Sons Co., 54 Ill. 2d 271, 275, 296 N.E.2d 740, 742 (1973) (Davis, J., Special Concurrence); *accord*, Thon v. Johnson, 30 Ill.App.2d 317, 174 N.E.2d 400 (2d Dist. 1961); *cf.* Bradley v. Metropolitan Sanitary Dist., 56 Ill. App.2d 482, 206 N.E.2d 276 (1st Dist. 1965). The *Tenenbaum* decision may be a response to this caveat.

51. 60 Ill. 2d at 371, 325 N.E.2d at 613.

52. *Id.* at 370-71, 325 N.E.2d at 612-13. The court's argument here is reminiscent of the illustration given by Justice Egan in his Special Concurrence to *Tenenbaum*. *See* note 30 *supra*.

53. 58 Ill. 2d 146, 317 N.E.2d 573 (1974). In *McNellis*, plaintiff's husband was fatally injured while unloading a railroad car, without using the available cranes. The court held that the unloading was an integral part of the erection of a generator located on a construc-

maintained that for an injury to be covered by the Act it must be connected with the dangers inherent in a specific activity listed in the statute. In his separate opinion in *Tenenbaum*, Justice Ryan noted that the court had applied this analysis to section 60.[54] The court's willingness to adopt the concept may indicate that its view of section 60 has narrowed.

The inherent danger theory will probably be used as an instrument of limitation. Injuries will be excluded if they are not derived from a particular hazard of a device enumerated in the statute. *Tenenbaum* indicates that the present justices of the supreme court view the legislative intent conservatively. Therefore, their future decisions will probably define these hazards narrowly. Ironically, past courts which have viewed the legislative intent liberally have also focused on the inherent danger, which they have labeled the "evils to be remedied."[55] These evils were broadly defined and used as a rationale for expansion of the Act.

## CONCLUSION

The majority of the Illinois Supreme Court appears to be following the philosophy of Justice Ryan in interpreting section 60 of the Structural Work Act. Justice Ryan has asserted that the protection afforded by the statute does not extend to all construction activities.[56] The limitations set up in *Tenenbaum* will prevent the section from being used as a panacea for many of the injuries suffered by workmen.

The applicability of section 60 has been circumscribed by the *Tenenbaum* decision. It is possible that other sections of the Act will be used to afford protection in its stead.[57] However, Justice Ryan has also objected to the expansion of other sections of the Act.[58] If his views

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tion site away from the unloading platform. This decision was based on the contract between the parties which stated that the unloading was part of the construction work.

54. 60 Ill. 2d at 376, 325 N.E.2d at 615. Justice Ryan focused on inherent danger in his dissent from the application of section 66 to *Tenenbaum*. He maintained that the legislature intended to provide protection only for the "special hazards" created by openings when they were used for hoisting materials. The hazard of falling into a permanent opening after hoisting operations had ceased was not, in his opinion, covered by the Act. *See* note 31 *supra*.

55. *See* cases cited in note 10 *supra*.

56. Tenenbaum v. City of Chicago, 60 Ill. 2d 363, 376, 325 N.E.2d 607, 615 (1975)(Ryan, J., concurring in part and dissenting in part); McNellis v. Combustion Eng'r Inc., 58 Ill. 2d 146, 152, 317 N.E.2d 573, 576 (1974)(Ryan, J., dissenting).

57. For example, Tenenbaum received protection under section 66. However, section 66 is only applicable when an opening is used for hoisting materials, thereby limiting its usefulness as a remedy.

58. Tenenbaum v. City of Chicago, 60 Ill. 2d 363, 376, 325 N.E.2d 607, 615 (1975)(Ryan, J., dissenting).

continue to influence the majority of the court, the coverage afforded by the Act will be significantly restricted. Legislative action will be required to provide protection for workmen whose injuries are thus excluded from the Structural Work Act. Absent legislative action, workmen will be in the difficult position of having to prove an action under common law negligence theory.

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