DePaul Law Review

Volume 13
Issue 2 *Spring-Summer 1964*

Article 7

Master and Servant - Effect of Intent upon Liability under the Illinois Structural Work Act

Richard Loritz

apparently feels that civil antitrust cases may still require special treatment, while the American Bar Association believes that these cases should be treated no differently from other antitrust cases. The question will probably be decided by liberal-conservative debate in Congress. It should be remembered, however, that the present section 1 of the Expediting Act has fallen into disuse because of the pressure applied by the federal judiciary against creating greater burdens on already crowded dockets. In view of the Supreme Court's attitude that antitrust cases should be reviewed by the Courts of Appeal, it can be inferred that the certification procedure contained in the Eastland Bill would also fall into disuse. A wiser path would be to adopt the pragmatic approach presented by the Johnston Bill.

CONCLUSION

The Expediting Act was passed at a time when antitrust law was in its formative years, and the Courts of Appeal had not yet achieved their present position as the major avenue of appeal. Since most present-day antitrust cases involve complex factual issues but only rarely novel legal questions, the Expediting Act is an anachronism and should be modified or repealed. The Supreme Court, the Department of Justice, and the American Bar Association have indicated their positions that change is necessary. The two bills which have been introduced to effect these changes differ only in their approach to the question of whether civil antitrust appeals should be placed on precisely the same footing as other antitrust litigation. In view of the expressed opinion of the Supreme Court that the Courts of Appeal can provide valuable assistance in reviewing the complicated factual situations involved, it is believed that the Johnston Bill, which would completely eliminate direct appeals in civil antitrust cases, provides the most satisfactory procedure. The profession would do well to strongly support passage of this sorely needed legislation.

H. Laurance Fuller

MASTER AND SERVANT–EFFECT OF INTENT UPON LIABILITY UNDER THE ILLINOIS STRUCTURAL WORK ACT

Illinois maintains a Structural Work Act[1] of long standing. Its purpose is to preserve a right of recovery for an employee who suffers injury

[1] ILL. REV. STAT., chap. 48, §§ 60–69 (1963). The substance of the act provides that all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm, or corporation for use in the erection,

while engaged in the dangerous activities which are necessarily involved in the construction, alteration, removal or repair of buildings, bridges, and other structures. Due to a recent revival of this remedy, as a substitute for actions under the Illinois Workmen's Compensation provisions,[2] the act is of marked current interest to the practicing field.

Many aspects of the Structural Work Act are subject to careful consideration, such as tests to determine exactly when a person is in charge of the work; the extent to which practicality dictates what is a safe, suitable and proper erection; and whether unauthorized use by a third person will release liability, especially when this use is not foreseeable. These topics are the concern of our discussion. Since an increasing percentage of litigation under the statute is being brought under section sixty, it becomes legally significant to determine the meaning of "scaffold, hoist, crane, stay, support, or other mechanical device" within the provisions of the act. More precisely, can intent that an object be or not be a scaffold induce or preclude liability where the object itself does not possess the attributes natural to a scaffold?

This is, of course, but one of many questions which have arisen with the increased use of the Work Act. Therefore, a helpful prerequisite to this discussion is a rudimentary knowledge of the background developments in Illinois courts as the act in its present meaning evolved.[3]

GENERAL HISTORY

Since its original passage in 1907, the Illinois legislature has continually reenacted the Structural Work Act provisions without substantial change. On the average, the number of appeals has been less than one per year. Since 1957, however, thirty-four appeals have been perfected to either the Appellate or Supreme Court with twenty of these being filed within the last three years. This sudden upsurge may be attributed solely to the hold-

---

repairing, alteration, removal, or painting of any house, building, bridge, viaduct, or other structure, shall be erected in a safe, suitable and proper manner.

Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building within the provisions of this act, shall comply with all the terms thereof.

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 should accrue to the party injured.

[2] ILL. REV. STAT., chap. 48, § 138.5 (1963).

[3] This comment does not purport to encompass all litigated questions, but is restricted to points of major development. For further reading on the Illinois act see Note, ILL. L. FORUM 745 (winter, 1961); Strodel, *Illinois Scaffold Act Liability*, 50 ILL. B.J. 1092 (1961); Comment, 10 DE PAUL L. REV. 145 (1960); *cf.* Annots., 38 A.L.R. 559 (1923) and 87 A.L.R. 2d 973 (1961).

ings in *Pankey v. Hiram Walker & Sons, Inc.*,[4] *Kennerly v. Shell Oil Co.*,[5] and *Gannon v. Chicago, M., St. P., & Pac. Ry.*[6] In these cases the holdings indicate that although suit against an employer will be superseded by Workmen's Compensation where applicable,[7] the injured employee is not prevented from foregoing this in favor of possible recovery against other persons. Since in a suit under the Scaffold Act damages are not limited, attorneys have revitalized this once dormant section for the purpose of obtaining more substantial recoveries on behalf of injured employees.

A perennial problem under the act is the question of the owner's and other person's liability, and this issue turns upon the words "having charge of." Early cases contend that the owner is in all respects always the person in charge, and therefore absolutely liable for any injuries suffered under the act's prohibitions.[8]

For a long period, few suits were brought under the act, and the harsh doctrine of absolute owner liability lay unquestioned. But then came three cogent views, one from the federal district court,[9] and two from Illinois judicatures.[10] Each held in substance that the Legislature intended not absolute owner liability, but wished to place responsibility directly and solely upon the person "having charge of the erection." This view is being adopted and endorsed by the Illinois Appellate Court.[11] It must be pointed out, however, that the Illinois Supreme Court has not yet made this express finding. This presents the anomalous circumstances of an appellate court overruling the views of their judicial superior's in *Kennerly v. Shell Oil Co.*[12] The facts in that case, however, clearly show that the owner was actually controlling and directing the activities. It is likely that the appellate court, under the doctrine that a rule is only applicable to its facts, has seen fit to make the rule express.

During this revival period, other issues are also reaching solution. In

[4] 167 F. Supp. 609 (N.D. Ill. 1958).

[5] 13 Ill. 2d 431, 150 N.E.2d 134 (1958).

[6] 25 Ill. App. 2d 272, 167 N.E.2d 5 (1960).

[7] Ill. Rev. Stat., ch. 48, § 138.5 (1963).

[8] Griffiths & Son v. National Fireproofing, 310 Ill. 331, 141 N.E. 739 (1924); O'Donnell v. Riter-Conley Mfg. Co., 172 Ill. App. 601 (1912); Claffy v. Chicago Dock & Canal Co., 249 Ill. 210, 94 N.E. 551 (1911).

[9] Schmid v. United States, 154 F. Supp. 81 (N.D. Ill. 1957).

[10] Gannon v. Chicago, M. St. P., & Pac. Ry., 25 Ill. App. 2d 272, 167 N.E.2d 5 (1960); Kennerly v. Shell Oil Co., 13 Ill.2d 431, 150 N.E.2d 134 (1958).

[11] Lane v. Warren, 41 Ill. App. 2d 377, 190 N.E.2d 622 (1963); Loveless v. American Tel. & Tel. Co., 40 Ill. App. 2d 347, 189 N.E.2d 679 (1963); Melvin v. Thompson, 39 Ill. App. 2d 413, 188 N.E.2d 497 (1963); cf. New York, Davis v. Caristo Const. Corp., 13 App. Div.2d 382, 216 N.Y.S.2d 765 (1961).

[12] 13 Ill.2d 431, 150 N.E.2d 134 (1958).

light of the legislature's intent that the act is for the protection of persons dangerously employed, findings that neither contributory negligence nor assumption of risk will serve as defenses to actions are present under the act.[13] Also successfully argued before the bench is the proposition that *wilful* violations as stated in section sixty-nine are synonymous with *knowing* violations,[14] making the test that of the reasonable man. Since under the previously noted proposition, a person must be in charge to be liable, it becomes necessary to determine when a person will be deemed "*in charge*." To this end it is sufficient that the party against whom liability is sought merely furnish the device or make it available.[15]

INTENT AND LIABILITY

Three sister states, New York, Missouri, and Oregon, also maintain employee safety acts.[16] They are substantially identical to the Illinois provisions and will be treated as representative in the discussion of the effect of intent upon liability under the Illinois Act. Their value, based upon their similarity, lies in the application of judicial reasoning from these jurisdictions. It should also be noted on the outset that the liability intent test can apply only where the defendant is already in charge of the work, that is, has the direct ability to control the manner of the work. Whether or not an owner, not-in-charge, intends a structure to be a scaffold makes absolutely no difference.[17] The owner must not only intend the scaffold; he must have direct responsibility for it.[18]

Certain items are clearly within the purview of the section: such as simple scaffolding or temporary work platforms in a tall foyer. But there are many instrumentalities used in construction, maintenance or repair which may well serve two or more objective ends, either by their nature, the intent of the owner or supplier, or the intent of the user.

The question of what will constitute a scaffold within the meaning of

[13] Bryntesen v. Carroll Const. Co., 36 Ill. App. 2d 167, 184 N.E.2d 129 (1962); Schmid v. United States, 154 F. Supp. 81 (N.D.Ill. 1957); Fetterman v. Production Steel Co., 4 Ill. App. 2d 403, 124 N.E.2d 637 (1954).

[14] Burger v. Van Severin, 39 Ill. App. 2d 205, 188 N.E.2d 373 (1963); Gundich v. Emerson-Comstock Co., 21 Ill.2d 117, 171 N.E.2d 60 (1961); Gannon v. Chicago, M., St. P., & Pac. Ry. 25 Ill. App. 2d 272, 167 N.E.2d 5 (1960).

[15] Oldham v. Kubinski, 37 Ill. App. 2d 65, 185 N.E.2d 270 (1962); Bounougias v. Republic Steel Corp., 277 F.2d 726 (7th Cir. 1960).

[16] New York, Labor Laws, §§ 240, 241, 256 (1961); Mo. STAT., ch. 292, § 292.090 (1963); Oregon, Laws, ch. 654, § 654.305 (1959).

[17] Loveless v. American Tel. & Tel. Co., 40 Ill. App. 2d 347, 189 N.E.2d 679 (1963); Melvin v. Thompson, 39 Ill. App. 2d 413, 188 N.E.2d 497 (1963).

[18] Miller v. B. F. Goodrich, 295 F.2d 667 (7th Cir. 1961); Gannon v. Chicago M., St. P., & Pac. Ry., 25 Ill. App. 2d 272, 167 N.E.2d 5 (1960).

the act has been directly raised in Illinois on only three occasions, and since most current Scaffold Act cases are being brought under section sixty, the determination of the scope of that section presents a formidable hurdle. As a general statement, it may be safely presumed that any planks or boards laid across supports constitute a scaffold, so long as they are not the work product but rather the means by which workmen are able to perform their jobs.[19]

The issue of the owner's or supplier's intent was first met squarely in *Bounougias v. Republic Steel Corporation*,[20] decided in 1960. In that case the building-owner defendant contracted to paint a manufacturing plant. In order to perform some of the interior work, the defendant's agent instructed certain painters to employ the drum of an overhead crane as a platform for reaching any high places. The drum was inadvertently turned while a painter was using it for that purpose, and he was thrown to the floor.

While a crane is specifically named in the act as an instrumentality which must be made safe, the court held it to be improperly placed and operated not as a crane but as an *unsafe scaffold!* The crane became a scaffold on the bases that: a) it was moveable; b) it was not a permanent part of the building and could be easily removed without damage to the building; c) it was furnished as a support; and d) it was temporarily positioned, as any ordinary scaffold, for a definite purpose.

The apparent question was the intent of the party furnishing the device, and it was found that the defendant's agent intended that the crane be used as a scaffold. Thus, by irrefutable logic, any device, no matter what its natural characteristics, will become a crane, stay, scaffold, or support according to the intent of the party sought to be charged. By this rationale, any person who furnishes an object for use as a scaffold will be no less liable for an unsafe substitute than if he provides an unsafe, ordinary scaffold.

The second case is that of *Oldham v. Kubinski*,[21] where the hoist of defendant's tractor was being used by his servant to lift a worker in order to dislodge some high piping. The defendant knew of this practice and allowed it to continue. In its finding, the court construed a hoist employed in this manner to be a scaffold because "the instrument had been literally erected and constructed (furnished) for the work being done."[22] Following the court in the previous case, stress was placed upon the factors of

[19] Feldman v. Robert E. Mackey Co., 174 App. Div. 848, 161 N.Y.S. 449 (1916); Nixon v. Thompson-Starrett Co., 131 App. Div. 152, 115 N.Y.S. 130 (1909).

[20] 277 F.2d 726 (7th Cir. 1960).

[21] 37 Ill. App. 2d 65, 185 N.E.2d 270 (1962).

[22] *Id.* at 85, 185 N.E.2d at 278.

the hoist's moveability, impermanence, and temporary positioning for a purpose.

An additional indicator of intent, however, was interjected in this case, namely, the defendant's acquiescence in such use. Here the court did not feel it necessary that the defendant actively instruct the tractor hoist to be used as a scaffold. Rather, his intent was implied from his knowledge of such previous use on other occasions and his tacit endorsement thereof.

Other jurisdictions support the view that the object's momentary purpose is sufficient to identify the object as one within the prohibitions of safety statutes, and to impose liability upon the one who intended that use. In one case where the device consisted of a type of platform supported by poles on one end and from chains at the other, the court stated that in this instance, "It was built for the purpose of supporting workmen in removing concrete forms."[23] In another, a purposeful intent was construed concerning a railroad spur track on a trestle because the owner had offered it for use as a scaffold and had intended such use in the construction of a power plant.[24] Any device, then, intended for use as a scaffold will constitute a scaffold within the purview of section sixty.

Since a defendant intending a device to be used as a scaffold will generally be liable for injury sustained thereon, the necessary converse is that where he did not intend a device to be used as scaffolding, then no liability can attach. The third case, *Thon v. Johnson*,[25] discussed this point of view. There the defendant positioned boarding around a hole in the floor, such boards being intended to serve as a form for the concrete repair of the hole. Plaintiff, an electrician, stepped upon the form to reach some work, it collapsed, and plunged the plaintiff into the hole. The court argued:

> We are aware that our statute should be liberally construed, but if the statute were construed so as to cover the concrete form involved in this case, such a construction would be equivalent to a holding that each and every place where a workman chooses to stand thereby becomes a scaffold. . . .[26]

Several New York cases have demonstrated the utility of the negative intent standard. One of these involved a concrete form similar to that around *Thon's* hole in the floor, and the court stated, "the form . . . was not intended, designed, or constructed for the purpose of supporting a workman in any event or on any occasion."[27] Another court paused to

[23] Most v. Goebel Construction Co., 199 Mo. App. 336, 203 S.W. 474 (1918).,

[24] Evans v. Portland Rwy., Light & Power Co., 66 Ore. 603, 135 Pac. 206 (1913).

[25] 30 Ill. App. 2d 317, 174 N.E.2d 400 (1961).

[26] *Id.* at 322, 174 N.E.2d at 402.

[27] Adelstein v. Roebling Construction Co., 159 N.Y.S. 36, 96 Misc. 125 (1916).

deliver the following excellent examination of the possibilities of positive and negative intent:

> In our opinion, the planks did constitute a scaffold. They were not a permanent part of the structure itself, sometimes adopted by the workmen for their support. They were not a part of the permanent flooring being placed in position. They were not a mold or form, such as a false arch, not intended to be used by workmen. Their object was but temporary. When the work to which they were an incident was done, they were to be removed. Except to make the work possible, they were useless.[28]

It may be concluded, therefore, that an established negative intent will preclude any asserted liability against the person in charge. In addition to this determination, note must be taken of the important corollary rule implied in that statement, that the intent of the workman to use any object as a scaffold is not conclusive to the imposition of liability against other persons.[29]

Whether the owner or supplier's intent be positive or negative, the holdings seem to indicate that he is bound by it. It does not appear that a person responsible for a device that is a scaffold can escape liability where the facts show use by a person not intended to make use of the device. This rule may be illustrated by two cases. One example of non-intended employees are those persons who according to the custom and usages of the industry might be expected to go upon the scaffolding, such as inspectors, architects, and other licensees or invitees.[30] In the other case, the sub-contractor has been held liable even where he did not at all intend or expect that the prime contractor's workmen would find occasion to use the scaffold.[31] There are no cases searched where a non-trespassing third party going upon the scaffold with absolutely no purpose has been injured, but the clear inference is that where there is a scaffold, or a device intended to be a scaffold, it must be made safe.

A final observation of some weight impels itself into the discussion at this point. When determining the reasonableness of protective measures, Illinois employs the test of balancing the social good to be obtained against the difficulties in securing that good. Since the Illinois Structural Work Act is to be liberally construed,[32] might not the court be equally at

[28] Ross v. Delaware, L. & W., R.R., 231 N.Y. 335, 337, 132 N.E. 108, 110 (1921).

[29] Thon v. Johnson, 30 Ill. App. 2d 317, 174 N.E.2d 400 (1961); Gabbamonte v. 16-20 West 19th St., Inc., 14 App. Div.2d 518, 517 N.Y.S.2d 354 (1961); see also, Loehring v. Westlake Const. Co., 118 Mo. App. 163, 94 S.W. 747 (1906).

[30] Fetterman v. Production Steel Co., 4 Ill. App. 2d 403, 124 N.E.2d 637 (1954).

[31] Lawler v. Pepper Const. Co., 33 Ill. App. 2d 188, 178 N.E.2d 687 (1962).

[32] Thon v. Johnson, 30 Ill. App. 2d 317, 174 N.E.2d 400 (1961); Bonougias v. Republic Steel Corp., 217 F.2d 726 (7th Cir. 1960); Schultz v. Henry Ericson Co., 264 Ill. 156, 106 N.E. 236 (1914).

liberty to construe intent as negative, or hold the act inapplicable where evidence conflicts and the erection of the device with absolute safety would be oppressive or impractical? To put it another way, suppose that the erection of a device safe for scaffolding purposes would involve undue hardship. Would it not appear more equitable that the intent of the party sought to be charged should be presumed as negative with respect to construing that device as a scaffold? This is the consideration expressed in *Thon v. Johnson*,[33] wherein the court felt it would place too heavy a burden to mandate that anywhere a workman may stand be made safe.

Section sixty evidences this contemplation by the Legislature, at least in their consideration of suspended scaffolding: "Scaffold . . . swung or suspended from an overhead support . . . shall have, *where practicable*, a safety rail. . . ."[34] In an interpretation of this section concerning a float scaffold, the court decided that it was practical to make safe.[35] A single case from Missouri, *Klaber v. Fidelity Bldg. Co.*,[36] offers weight when this question is directly raised. In *Klaber*, the defendant provided a painter with a narrow beam to reach high places, a device both impractical to make safe and impractical for the job. The court awarded relief, reasoning that no other likely purpose existed for the statute than to demand safe provisions for workers. Oregon also subscribes to this more peremptory view, holding that the person in charge must make everything safe for its proposed use.[37]

By induction, the propositional rule derived from these cases is that where safety is totally impractical, that fact per se indicates, a) the device was not intended for scaffold use, or b) the party furnishing it was negligent in not procuring a device which could be made safe. Both inferences are pregnant with litigation. It would seem more seasonable that future Illinois decisions in this area will subscribe to the legislature's ultimate purpose to protect the workman and find the defendant negligent in not procuring and erecting a safe device. It is only in the most obvious circumstance that Illinois will declare that every single place a workman chooses to stand need not be made safe.

By way of summary and conclusion, the Illinois courts have and will continue to employ intent of the person in charge as a determinative factor of liability in cases arising under the Illinois Structural Work Act. Section sixty, in its enumeration of certain devices which are within its

[33] 30 Ill. App. 2d 317, 174 N.E.2d 400 (1961).

[34] ILL. REV. STAT., ch. 48, § 60 (2) (1963). (Emphasis added.)

[35] Byrntesen v. Carroll Const. Corp., 36 Ill. App. 2d 167, 184 N.E.2d 129 (1962).

[36] 19 S.W.2d 758 (Mo. 1929).

[37] Shelvin-Hixon Co. v. Smith, 165 F.2d 170 (9th Cir. 1947); Coomer v. Supply Inv. Co., 128 Ore. 224, 274 Pac. 302 (1929).