DePaul Law Review

Volume 10
Issue 1 *Fall-Winter 1960*

Article 12

The Problem of Liability under the Illinois Structural Work Act

DePaul College of Law

THE PROBLEM OF LIABILITY UNDER THE ILLINOIS STRUCTURAL WORK ACT

INTRODUCTION

Before the enactment of the Illinois Structural Work Act,[1] an owner having work done on his premises by an independent contractor was held not to be liable for an injury caused by the negligence of the independent contractor.[2] The Structural Work Act passed in 1907 changed this situation by providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges and other structures.[3] This act provided:

> That all 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. . . .
>
> 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, for any direct damages sustained thereby. . . .[4]

The actual liability placed upon an owner by this act is still in doubt, for the courts seem to be in disagreement as to whether the owner must actually be in charge of the operation before he is liable under this statute.

HISTORY

The first case to be decided under this act was *Claffy v. Chicago Dock & Canal Co.*[5] Recovery was allowed against the owner of the property for the death of a laborer employed by the independent contractor. In this case recovery was based on a violation of section 7 of the act, in which the legislature placed upon the owner the duty to cause shafts or openings in each floor to be enclosed or fenced in where such openings

[1] ILL. REV. STAT. Ch. 48, §§ 60–69 (1959).

[2] Jefferson v. Jameson & Morse Co., 165 Ill. 138, 46 N.E. 272 (1896); Hale v. Johnson, 80 Ill. 185 (1875); Pfau v. Williamson, 63 Ill. 16 (1872); Scammon v. City of Chicago, 25 Ill. 361 (1861).

[3] Claffy v. Chicago Dock and Canal Co., 249 Ill. 210, 94 N.E. 551 (1911).

[4] ILL. REV. STAT. ch. 48, §§ 60, 69 (1959). (Empsasis added.)

[5] 249 Ill. 210, 94 N.E. 551 (1911).

or shafts existed because of the use of elevating machines or hoists. While working on the premises, the deceased fell into one of these openings and was killed.

In this case the court did not specifically concern itself with the language of the act imposing liability on those contractors, owners, and others "having charge of" the work being done. The court stated:

> In our opinion it was intended by Section 7 to, and said Section 7 does, impose upon both the contractor and the owner the duty of complying with the provisions of said section so far as civil liability is concerned. . . .[6]

However, the court did mention that as a matter of fact the owner in this case was actually in charge of the work being done through its agent, an architect, who had supervised the work.

This decision was affirmed in *O'Donnell v. Riter-Conley Mfg. Co.*[7] However, six years later in *Breton v. Levinson*,[8] the court, in a partially reported decision, seems to have held contra to the *Claffy* case. In *Breton*, a bricklayer in the employ of an independent contractor who was engaged in the construction of a wall, was killed as a result of a defective scaffold. The owner was held not liable in that he exercised no control over the operation.

In *Johns Griffiths & Son v. National Fireproofing*,[9] the court reaffirmed its position in the *Claffy* case, namely that the owner need not be in charge of the operation in order to be liable under the act. The court stated:

> Since the enactment of this law the owner of the property and every contractor and subcontractor are equally bound by the act to comply with its provisions, and in case of willful failure are liable to the party injured for any direct damages sustained by reason of such failure.[10]

In this case, the court compares the owner's liability under the statute with that of a municipality. It states that a city is under an obligation to maintain its streets in a reasonably safe condition, and that if it permitted other parties to render the streets unsafe, then the city would be liable to third persons who sustained injuries due to these unsafe conditions.

> The statute has imposed upon the owner and the contractor, who were under no liability whatever at common law in a case like the present, the same kind of liability which rests upon a municipality, and they cannot escape it.[11]

[6] *Id.* at 222, 94 N.E. at 555.

[7] 172 Ill. App. 601 (1912).

[8] 207 Ill. App. 406 (1917).

[9] 310 Ill. 331, 141 N.E. 739 (1923).

[10] *Id.* at 335, 141 N.E. at 740.

[11] *Id.* at 340, 141 N.E. at 742.

This view seems to have been sustained until *Taber v. Defenbaugh.*[12] The court denied recovery on the basis that for the owner to be held liable, proof must be made as to all essential elements under the statute, and the court flatly asserted that one of these necessary elements is the fact that the owner is actually in charge of the construction of the building. It must be pointed out, however, that in this case the person injured on the premises was not a third party, but was the independent contractor himself.

In 1957, the United States District Court for the Eastern District of Illinois in *Schmid v. United States*[13] view the Illinois statute and stated:

> The court is of the opinion that the legislature did not intend that the words "*having charge of*" should be idle words but should control the liability provided for in the Scaffolding Act and place the liability upon the person "*having charge of*" the erection. . . . That it did not intend to impose the liability upon the owner to the exclusion of all other considerations as set forth in the Scaffolding Act.[14]

The Supreme Court of Illinois in *Kennerly v. Shell Oil Co.*[15] seems to have sustained once again the decision rendered in the *Claffy* case. Here, defendant hired an independent contractor to construct a distillation unit for The Shell Oil Co. An employee of the contractor was injured when he fell from a scaffold built by other employees of the contractor. Recovery was allowed under the statute against the owner of the property. Facts existed in that case which clearly showed a violation of the Structural Work Act and also that the owner had control of the work. However, the court in its decision never referred to the fact of the owner's control.

> The Scaffold Act deals with highly dangerous activities. It has been regarded from the outset as intended to fix an independent, nondelegable duty of compliance upon the owner of the property and upon each contractor and sub-contractor engaged in the work. Neither this court not the Appellate Court has deviated from this construction of the statute, first announced almost fifty years ago. In the face of this construction, the General Assembly has re-enacted the section without changing the language that imposes the liability here involved. We are not at liberty to change the meaning of that language now.[16]

The above statement of the court seems strange in view of the *Breton* and *Taber* cases. The conclusion must be drawn, therefore, that the court did not consider these cases as holding that the owners need be in charge of the work in order to become liable under the statute. The dissent in

[12] 9 Ill. App. 2d 169, 132 N.E. 2d 454 (1956).

[13] 154 F. Supp. 81 (E.D. Ill. 1957).

[14] *Id.* at 89. (Emphasis added.)

[15] 13 Ill. 2d 431, 150 N.E. 2d 134 (1958).

[16] *Id.* at 435–36, 150 N.E. 2d at 137.

the *Kennerly* case further points to the fact that the court did not consider this a necessary element to liability. Judge Klingbiel in his dissent stated that he could not agree with the construction of the statute adopted by the majority of the court:

> It seems evident to me that only those owners "having charge" of the work are subjected to the detailed requirements as to its performance prescribed by the various sections of the act.[17]

The interpretation of the statute by the dissenting judge in *Kennerly* was shared by the United States District Court for the Southern District of Illinois in *Pankey v. Hiram Walker & Sons*.[18] In that case, plaintiff was an employee of a contractor hired by the defendant to build a structure on the defendant's property. While plaintiff was working on a scaffold constructed by the employees of the contractor, one of the boards tilted and caused him to fall to the ground. The court in this case allowed recovery against the owner under the Illinois Structural Work Act. In its decision, the court discussed the various cases which have involved the act, and concluded that the controlling factors guiding the decision in those cases are the public policy basis of the statute and the seriousness of the hazards which the statute was designed to prevent, adding that "faced with these considerations, the Illinois courts have construed the statute as one imposing absolute liability in civil cases upon each of the persons to whom it is expressly applicable. Control of the structural activities is not a relevant factor."[19]

The theory that liability under the act does not depend upon the owners having charge of the work was reasserted in the recent case of *Braden v. Shell Oil Co.*[20] In discussing the *Kennerly* case, the *Braden* court interpreted that decision as placing liability on the owner under the act whether he retains the right of control or not:

> Thus it is clear that despite the hiring of the independent contractor, for the purposes of the Act, the defendant was "*in charge*" of the work even though it in fact gave complete charge and control of the premises to the independent contractor.[21]

It would appear from the *Kennerly* decision and the cases following that the question as to the interpretation of the act is fairly well settled. However, in view of a recent case, *Gannon v. Chicago, M., St. P. & Pac. Ry.*,[22] such cannot be construed as the existing view. In this case, a ladder was placed against a scaffold without being nailed thereto. As a

[17] *Id.* at 441, 150 N.E. 2d at 140.

[18] 167 F. Supp. 609 (S.D. Ill. 1958).

[19] *Id.* at 613.

[20] 24 Ill. App. 2d 252, 164 N.E. 2d 235 (1960).

[21] *Id.* at 254, 164 N.E. 2d at 236. (Emphasis added.)

[22] 25 Ill. App. 2d 272, 167 N.E. 2d 5 (1960).

bricklayer employed by the independent contractor was about to step from the ladder to the scaffold, the ladder slipped on the ice upon which it had been placed. Here the owner was shown to have absolutely no control over the work. In its opinion, the appellate court decided that under the statute liability is imposed on the owner: (1) when he is in charge of the work, and (2) when he wilfully violates the act. In examining the *Kennerly* decision, this court interpreted it as holding that in order to be liable under the act, the owner must be in charge of the operation. The court pointed out that the facts clearly showed that the owner in *Kennerly* was actually in charge of the work, and even though the court in that case did not find it necessary to recite those facts, liability was placed on the owner because of his control over the work. The court declared that "a judicial opinion must be read as applicable only to the facts involved and is authority only for what is actually decided."[23] And the *Gannon* court reasoned, in words set out below, that the failure of the legislature to eliminate from the statute the phrase "having charge of the erection" was indicative of their intent not to make every owner liable in every situation:

> If the legislature had wanted to make all owners liable, whether they had charge of the work or not, it would have been a simple matter—and certainly the logical solution—to omit the qualifying phrase "*having charge of the erection*," etc. The use of the phrase suggests to us that the legislature reasoned that, under the requirements of this act, to hold liable any owner under all circumstances would be to place upon him an unconscionable, inequitable, and unrealistic burden. . . . We feel that the Scaffold Act, as interpreted in the Kennerly case, is applicable to an owner "*having charge of the erection. . . .*"[24]

SETTLED ISSUES UNDER THE ACT

While the interpretation of the phrase "having charge of the erection" is unsettled, this is not true as to other questions arising under the act. The courts of this state have determined that the act is superseded by the Workmen's Compensation Act,[25] and that contributory negligence and the assumption of risk doctrines are not available as defenses to a violation of the act.[26] Further, the meaning of "willful violation" of the act has been clarified in the *Kennerly* and *Gannon* opinions.[27]

[23] *Id.* at 278, 167 N.E. 2d at 8.

[24] *Id.* at 279–80, 167 N.E. 2d at 8. (Emphasis added.)

[25] ILL. REV. STAT. ch. 48, § 138.5, 5A (1959); Kennerly v. Shell Oil Co., 13 Ill. 2d 431, 150 N.E. 2d 134 (1958); Gannon v. Chicago, M., St. P. & Pac. Ry., 25 Ill. App. 2d 272, 167 N.E. 2d 5 (1960).

[26] Schmid v. United States, 154 F. Supp. 81 (E.D. Ill. 1957); Fetterman v. Production Steel Co., 4 Ill. App. 2d 403, 124 N.E. 2d 637 (1954).

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

In regard to the requirement of the act which makes persons liable thereunder only for willful violations, the court in *Kennerly* stated the accepted law as to what constitutes such a violation. The court considered a *willful* violation as being synonymous with a *knowing* violation, whereby an owner is liable not only when the dangerous conditions are known to him, but also when by the exercise of reasonable care, the existence of such dangerous conditions could have been discovered and become known to him.

CONCLUSION

In conclusion, it appears obvious that until the supreme court of this state clarifies its decision in the *Kennerly* case, the law will remain uncertain as to whether or not an owner who is not in charge of the work being done on his premises can be liable under the act. It would appear, however, that unless the court holds an owner liable under the act regardless of any control, the act would have very little meaning. This conclusion is based on the fact that if the injured party is an employee of the independent contractor he cannot bring action against his employer except as provided by the Workmen's Compensation Act; and if the owner is not liable unless he has control, which fact exists in relatively few cases, the employee has no remedy. This would seem to be contrary to the legislative intent that this is

an Act providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges and other structures, and to provide for the enforcement thereof.[28]

[28] ILL. REV. STAT. ch. 48, §§ 60–69 (1959).