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## Protection against Liability for Scaffolding Accidents

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parties,<sup>31</sup> Illinois included,<sup>32</sup> with the few minority decisions being somewhat weakened by the influence of wartime shortages and rationing.<sup>33</sup> It certainly seems to be well established that the actual payment for the ride need not originate from the injured party transported so, if the driver receives payment or direct benefit from another, the transportation is not gratuitous and a guest relationship is excluded.<sup>34</sup>

Since only a minority of the guest statutes subscribe to the "sheltered niche" approach with respect to infants of tender age, it would appear reasonable to conclude that no special consideration should be shown to minors who choose to ride in automobiles. But the instant case should serve as a warning to parents that the saving of time and expense in transporting children to school via a car pool may turn out to be something other than a blessing in disguise.

R. J. SCHLAKE

#### PROTECTION AGAINST LIABILITY FOR SCAFFOLDING ACCIDENTS

Back in 1894, at a time when he was leaving the home of John Carlson, Charles Elliott stepped or fell from a platform which was not protected by a railing and he was seriously injured. Elliott sued Carlson in a common law tort action for damages. There was a judgment for the defendant in the trial court and, on appeal, the Appellate Court of Illinois affirmed the decision.<sup>1</sup> The high court, following the rule set forth in *Chapin & Gore v. Walsh*,<sup>2</sup> indicated that as the exposure was open, undisguised and patent to view, if the plaintiff did not want to incur the obvious risk, he should not have used the platform. In much the same way, others who came upon a real property owner's premises and were injured when they

<sup>31</sup> Huebotter v. Follett, 27 Cal. (2d) 765, 167 P. (2d) 193 (1946); Ott v. Perrin, 116 Ind. App. 315, 63 N. E. (2d) 163 (1945); Sparks v. Getz, 170 Kan. 287, 225 P. (2d) 106 (1950); Coerver v. Haab, 23 Wash. (2d) 481, 161 P. (2d) 194 (1945). See also annotation in 161 A. L. R. 909.

<sup>32</sup> Kenney v. Kraml Dairy, Inc., 20 Ill. App. (2d) 531, 156 N. E. (2d) 623 (1959).

<sup>33</sup> Everett v. Burg, 301 Mich. 734, 4 N. W. (2d) 63 (1942); Miller v. Fairley, 9 Ohio Supp. 209, 47 N. E. (2d) 243 (1942).

<sup>34</sup> Davis v. Woodcock, 101 Cal. App. (2d) 618, 225 P. (2d) 918 (1951); Elliott v. Behner, 146 Kan. 827, 73 P. (2d) 116 (1937); McGuire v. Armstrong, 268 Mich. 152, 255 N. W. 745 (1934); Wendel v. Shaw, 361 Mo. 416, 235 S. W. (2d) 266 (1950); Sprenger v. Braker, 71 Ohio App. 349, 49 N. E. (2d) 958 (1942); and Blanchette v. Sargent, 87 N. H. 15, 173 A. 333 (1934), applying the Vermont statute.

<sup>1</sup> Elliott v. Carlson, 54 Ill. App. 470 (1894).

<sup>2</sup> 37 Ill. App. 526 (1890). In that case, at p. 529, the court said: "The owner or occupant of land who, by invitation, expressed or implied, induces or leads others to come upon his premises for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was *known to him* and not to them, and was negligently suffered to exist *without timely notice* to the public or those likely to act upon such invitation." Italics added.

fell from a defective scaffold, ladder or the like, must have been denied recovery, for the common law rule with respect to a property owner's liability for the use of platforms and scaffolding erected on his premises was that, where work was done under such circumstances as to constitute the person doing the work an independent contractor, the owner was not liable for any injury caused by the negligence of such contractor.<sup>3</sup>

Apparently dissatisfied with the operation of this doctrine in the period prior to the adoption of a general scheme for Workmen's Compensation,<sup>4</sup> the Illinois Legislature in 1907 enacted a statute, commonly called the Scaffolding Act,<sup>5</sup> which required that all scaffolds<sup>6</sup> or other mechanical contrivances constructed for use in the erection, repair, alteration, removal or painting of any structure should be "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." It then made it the duty of the owner, contractor, subcontractor, foreman or other person having charge of the work to comply with all the terms of the statute or, failing in this duty, to suffer penalty by way of fine, imprisonment or both.<sup>7</sup> In addition, provision was there made for a civil recovery in the event damages were sustained by an injured party but, unlike most other statutory causes of action,<sup>8</sup> no restrictions were imposed on the measure of recovery. The object of the statute, as interpreted by the courts, has been to prevent injury to persons employed in extra hazardous occupations where the danger might well prove fatal.<sup>9</sup> The effect of the existence of the statute, whether so defined or not, has been to impose upon the owner of land,<sup>10</sup>

<sup>3</sup> *Griffiths & Son Co. v. National Fire Proofing Co.*, 310 Ill. 331, 141 N. E. 739 (1923). See also, *Jefferson v. Jameson & Morse Company*, 165 Ill. 138, 46 N. E. 272 (1897); *Pfau v. Williamson*, 63 Ill. 16 (1872); *Scammon v. City of Chicago*, 25 Ill. 361 (1861).

<sup>4</sup> Illinois first adopted a workmen's compensation statute in 1913. See Laws 1913, p. 335, replaced by Ill. Rev. Stat. 1957, Vol. 1, Ch. 48, § 138 et seq.

<sup>5</sup> Laws 1907, p. 312; Ill. Rev. Stat. 1957, Vol. 1, Ch. 48, § 360 et seq.

<sup>6</sup> As a result of the decision in *Rimmke v. Gierich*, 335 Ill. App. 125, 81 N. E. (2d) 221 (1948), the term "scaffold" includes the placing of planks on saw horses.

<sup>7</sup> Ill. Rev. Stat. 1957, Vol. 1, Ch. 48, § 369.

<sup>8</sup> See, for example, Ill. Rev. Stat. 1957, Ch. 70, § 1 et seq., for precise limitations on wrongful death actions, or *ibid.*, Ch. 43, § 135, in relation to dram shop cases.

<sup>9</sup> *Schultz v. Henry Ericsson Co.*, 264 Ill. 156, 106 N. E. 236 (1914); *Fetterman v. Production Steel Co. of Illinois*, 4 Ill. App. (2d) 403, 124 N. E. (2d) 637 (1954).

<sup>10</sup> In *Claffy v. Chicago Dock & Canal Co.*, 249 Ill. 210, 94 N. E. 551 (1911), the Supreme Court said that the act was intended to impose the duty of compliance on both the contractor and the land owner. See also *Griffiths & Son Co. v. National Fire Proofing Co.*, 310 Ill. 331, 141 N. E. 739 (1923). The later decision in *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 13 Ill. (2d) 460, 150 N. E. (2d) 141 (1958), however, held that the Workmen's Compensation Act, particularly Ill. Rev. Stat. 1957, Ch. 48, § 138.5(a), was exclusive, hence an employee, if covered under the act, no longer has a right of action against his own employer under the Scaffolding Act.

the duty of compliance and, in case of willful failure,<sup>11</sup> to make him liable to persons injured for any damage sustained by reason of non-compliance.

Sharp emphasis has been added to these concepts by recent decisions in Illinois and elsewhere. One such case is that of *Pankey v. Hiram Walker & Sons, Inc.*,<sup>12</sup> wherein the plaintiff working at Peoria was injured when a scaffold constructed on the defendant's property tilted so as to cause him to fall to the ground and become seriously injured. The Federal District Court, following a long line of earlier cases, sustained a motion to strike a series of affirmative defenses<sup>13</sup> when it held that the owner of property who, in the exercise of reasonable care, should have known that the scaffold was unsafe, was in willful violation of the statute in question. The court seems to have concluded that the owner of property appears to have a nearly absolute duty to inspect any scaffold erected on his premises<sup>14</sup> so that, if the same is shown to be unsafe, the owner will be held liable for all injuries sustained. The result there attained was probably aided by the action of a majority of the Illinois Supreme Court in the recent case of *Kennerly v. Shell Oil Company*,<sup>15</sup> the opinion of which contains an extended discussion of the earlier holdings. Sharp contrast

<sup>11</sup> In *Kennerly v. Shell Oil Company*, 13 Ill. (2d) 431, 150 N. E. (2d) 134 (1958), the word "wilfully" was determined to be synonymous with "knowingly" and so, to constitute a wilful violation of the statute, it was not necessary that there should be a reckless disregard of its provisions. The land owner is, therefore, liable not only for the dangerous conditions which he creates or which are actually known to him to be present but is also liable for the existence of such dangerous conditions as, by the exercise of reasonable care, could have been discovered.

<sup>12</sup> 167 F. Supp. 609 (1958).

<sup>13</sup> The defendant contended that (1) the plaintiff's sole remedy was against his immediate employer by way of workmen's compensation; (2) plaintiff had been guilty of contributory negligence; and (3) plaintiff had assumed the risk.

<sup>14</sup> The duty of the property owner appears to turn, to some degree, upon the amount of control which he has over the work being done. In *Taber v. Defenbaugh*, 9 Ill. App. (2d) 169, 132 N. E. (2d) 454 (1956), it was determined that, since the owner of the property had turned the construction of his home over to the injured party, he was not liable even though there was evidence that, to an extent, the owner had determined the manner of construction and the materials to be used. See also *Fetterman v. Protection Steel Co. of Illinois*, 4 Ill. App. (2d) 403, 124 N. E. (2d) 637 (1954). However, in *Claffy v. Chicago Dock & Canal Co.*, 249 Ill. 210, 94 N. E. 551 (1911), the owner of the property was deemed to have control over the construction of the building through an architect-agent. A similar instance of implied control through an architect may be found in *Kennerly v. Shell Oil Company*, 13 Ill. (2d) 431, 150 N. E. (2d) 134 (1958). This issue appears to have been skirted in prior cases but could well become a key to future decisions in the field.

<sup>15</sup> 13 Ill. (2d) 431, 150 N. E. (2d) 134 (1958). The Workmen's Compensation Act was there said not to be a bar to recovery under the Scaffolding Act because the latter statute was said to fix "its own standards of liability" which the owner could not avoid by claiming negligence on the part of the employee nor escape by pointing to the breach of another. Klingbiel, J., wrote a dissenting opinion in which he warned of the risk of danger to the home owner who hires a contractor to paint or repair his house. He expressed the belief that there should be no "departure from recognized bases of liability" in the absence of "clear and explicit statutory command," which he found to be lacking in the statute in question.

is offered, however, by the case of *Dillingham v. Smith-Douglass Company, Inc.*,<sup>16</sup> where recovery against a land owner in Virginia for damages sustained by a workman who fell from a defective scaffold erected in that state was denied when it appeared that the work was being done under the supervision of an independent contractor and the jurisdiction in question lacked a statute in any way comparable to the one found in Illinois.

As demonstrated, the Illinois courts have, since the enactment of the Scaffolding Act, been fairly consistent in finding that the burden is on the property owner so that the latter now appears to have been placed in a position amounting to one of liability without fault. While it is true that two or more parties, on occasion may be held under the statute,<sup>17</sup> the principal concern here is with the vicarious liability of the property owner. If, as the courts have indicated, the duty is one of non-delegable character, even though there is no actual control over the instrumentality which is the cause of the injury, a question arises as to whether or not it would be possible to shift the risk of loss to the person primarily responsible for the same. In the Griffiths case, while recognizing the general doctrine which defines contribution between joint tortfeasors, the court did say that "where one does the action which produces the injury and the other does not join in the action but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent, and the law will inquire into the real delinquency and place the ultimate liability upon him whose fault was the primary cause of the injury."<sup>18</sup> It would thus appear that the owner of property, who is in most instances no more than a passive tortfeasor, might have a cause of action over against the active tortfeasor who negligently installed the scaffold. But there is intimation in the Kennerly case,<sup>19</sup> that as the owner would have a non-delegable duty of compliance and as the employee would be denied the right to sue his employer because of the limitations imposed by the Workmen's Compensation Act<sup>20</sup> the courts might not, in the absence of agreement, allow this circuitous means of placing liability upon the party responsible for the faulty scaffolding. A still later Supreme Court case, that of *Bohannon v. Ryerson & Sons, Inc.*,<sup>21</sup> contains a dictum in relation to this problem which

<sup>16</sup> 261 F. (2d) 267 (1958).

<sup>17</sup> See note 10, ante.

<sup>18</sup> 310 Ill. 331 at 339, 141 N. E. 739 at 742. The court cited, in support of this view, the cases of *Union Stock Yards Co. v. Chicago, Burlington & Quincy R. R. Co.*, 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453 (1904); *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 16 S. Ct. 564, 40 L. Ed. 712 (1895); and *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324 (1873).

<sup>19</sup> 13 Ill. (2d) 431, 150 N. E. (2d) 134 (1958).

<sup>20</sup> See note 10, ante.

<sup>21</sup> 15 Ill. (2d) 470, 155 N. E. (2d) 585 (1959).

might be said to give lip service in support of a form of the comparative negligence rule, although in this state the full comparative negligence doctrine has failed to gain support.<sup>22</sup> It must be emphasized that the latter case is far from decisive.

Another possible solution to the problem of imposing liability in cases where there is no actual control over the scaffolding by the land owner may lie in the procuring of indemnification against loss in the form of a "hold harmless" agreement whereby the contractor would insure the owner against loss resulting from the acts or omissions of the contractor. In the Griffiths case, such an agreement was said not to be opposed to any contrary public policy,<sup>23</sup> so a contract of this nature could serve to place liability finally with the active tortfeasor. Unfortunately, such indemnification is used infrequently and then only in relation to substantial construction projects. To insist on the procurement of these agreements in all cases would impose an additional responsibility on every owner of property to be sure that all contractors and subcontractors have so agreed to hold him harmless.

If the suggestion should be made that the acquisition of owners' liability insurance would resolve all problems, the appropriate response would seem to be "how much insurance?" The true solution would seem to lie not in continued judicial interpretations of the present statute or in the wholesale use of "hold harmless" agreements but rather in legislative action to abolish, lessen or at least clarify the conditions in relation to the vicarious liability which is presently being imposed upon the land owner. Measures introduced in the 1959 session of the Illinois Legislature looking toward that end were defeated, perhaps because the proposed monetary limitation on liability was set at too low a figure. Yet the legislature acted promptly enough to curb the possibility of the imposition of excessive damages on school districts and other political organs of the state<sup>24</sup> upon learning of the decision of the Illinois Supreme Court which

<sup>22</sup> Carson Pirie, Scott & Co. v. Chicago Rys. Co., 309 Ill. 346, 141 N. E. 172 (1923); City of Macon v. Holcomb, 205 Ill. 643, 69 N. E. 79 (1903); West Chicago Street R. R. Co. v. Liderman, 187 Ill. 463, 58 N. E. 367 (1900).

<sup>23</sup> 310 Ill. 331 at 336, 141 N. E. 739 at 741-2. The court there said that "if the subcontractor's undertaking to indemnify the general contractor or the owner against the subcontractor's negligence is against public policy and void, because based upon the owner's or contractor's violation of law, the same objection would make void any policy of insurance against such loss . . . We do not assent to this claim . . . Where the relation of two persons to the performance of work is such that both may be liable to a third person for an injury resulting from the work, there is no public policy which prohibits either from indemnifying the other against loss arising from positive acts of negligence by the indemnitor."

<sup>24</sup> See, for example, the action taken on H. B. 1605 as to the Chicago Park District; on S. B. 1005 and S. B. 1006 as to park districts generally; and on H. B. 1615 as to public school districts and non-profit private schools.

reputedly reversed the holding of the Appellate Court for the Second District in the recent case of *Molitor v. Kaneland Community District No. 202* and thereby swept away an immunity from tort liability which had long been enjoyed.<sup>25</sup> If resort to workmen's compensation as a uniform scheme to cover the cost of all industrial accidents is not the appropriate way to solve this problem, might not the more hazardous tasks, such as those involving the use of scaffolds and the like, be handled by doubling, or in some way proportionately increasing, the standard rates of compensation. The property owner then, at least, would have some measure of protection against his present unrestricted liability.

R. F. STEPHENS, JR.

<sup>25</sup> The Appellate Court holding is reported at 20 Ill. App. (2d) 555, 155 N. E. (2d) 841 (1959). The Supreme Court decision has not yet been officially reported pending the disposition of petitions for rehearing.