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William H. Anger

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**LIABILITIES OF AN OWNER UNDER
THE SCAFFOLD ACT—THE STATUTE’S
“HAVING CHARGE OF” LANGUAGE PRODUCES
INCONSISTENCY—NORTON v. WAGGONER
EQUIPMENT RENTAL & EXCAVATING CO.***

For the purpose of enhancing the safety of workers in the construction industry, in 1907 the Illinois Legislature enacted the Structural Work Act,¹ commonly called the Scaffold Act. To effectuate this purpose, the Illinois Legislature worded the statute so as to impose liability upon any owner, contractor, architect or other person “having charge of” the construction who willfully² violates the statute’s terms. During the past three decades the Illinois Supreme Court has wrestled with the proper interpretation of the liability-imposing “having charge of” language. *Norton v. Waggoner Equipment Rental and Excavating Co.*³ is the court’s most recent expression of an owner’s liability under the Scaffold Act. After rehearing and over a vigorous dissent, the Illinois Supreme Court applied a liberal construction of the Scaffold Act’s “having charge of” language and found a school district as owner liable for violation of the Act.

* This casenote is dedicated to the memory of Jack B. Anger.

1. ILL. REV. STAT. ch. 48, §§ 60-69 (1977). The Scaffold Act requires that all scaffolding or other mechanical contrivances used in construction projects must be built in a safe manner and constructed to provide adequate protection for those working on the construction site. *Id.* § 60. Section 69 of the Act, which determines liability states:

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

. . . .
For any injury to person or property, occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby

The full title of The Structural Work Act, which reflects the Act’s purpose, is: “An act providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts, and other structures and to provide for the enforcement thereof.” Purpose statement, ILL. REV. STAT. ch. 48, § 60 (1907).

2. ILL. REV. STAT. ch. 48, § 69 (1977). In Structural Work Act cases the Illinois Supreme Court has defined “willful” as “knowing.” The supreme court has further construed this to mean actual or constructive knowledge. *See Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 501, 336 N.E.2d 881, 885 (1975) (defendant is held to know that which he or she reasonably should have known); *Juliano v. Oravec*, 53 Ill. 2d 566, 571, 293 N.E.2d 897, 900 (1973) (defendant is deemed to know that which he or she reasonably should have known, which includes the applicable statutory requirements); *Schultz v. Henry Ericsson Co.*, 264 Ill. 156, 166, 106 N.E. 236, 240 (1941) (defendant “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 known to him”).

3. 76 Ill. 2d 481, 394 N.E.2d 403 (1979).

In its opinions the Illinois Supreme Court often has reiterated its belief that the Scaffold Act should be construed liberally to effectuate the statute's purpose.⁴ Nevertheless, throughout the history of the Act, the supreme court has rendered both liberal and conservative interpretations of the statute's "having charge of" language, which determines an owner's civil liability⁵ under the Structural Work Act.⁶ Just four years ago, in *McGovern v. Standish*,⁷ the Illinois Supreme Court espoused a narrow construction of the term "having charge of" in section 69.⁸ Faced with a factual situation similar to that of *McGovern*, the supreme court now has reached an opposite result in *Norton*.

This Note traces the Illinois Supreme Court's construction of the Scaffold Act's "having charge of" language. The court's decision in *Norton* is analyzed and the shortcomings of its reasoning are disclosed. In addition, the *Norton* decision's impact on Structural Work Act law is examined. It is concluded that to resolve the present confusion evident in judicial construction of the Act's crucial language, legislative revision of the statute is appropriate. Because legislative action is unlikely, an alternative interpretation of the present "having charge of" language is discussed.

THE FACTS OF *NORTON*

Irwin Norton, an employee of the general contractor,⁹ was injured while working on the construction of a new school building for the Collinsville School District.¹⁰ At the time of the injury, Norton was releasing bundles

4. *E.g.*, *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d at 501, 336 N.E.2d at 885 (statutory requirement of willful violation construed to encompass knowing violation); *Halberstadt v. Harris Trust & Sav. Bank*, 55 Ill. 2d 121, 127-28, 302 N.E.2d 64, 67-68 (1973) (washing windows is qualitatively comparable to repairing or painting a structure, therefore window washers fall within the scope of the Act); *Louis v. Barenfanger*, 39 Ill. 2d 445, 449, 236 N.E.2d 724, 726 (1968) (failure to provide a scaffold is actionable under the statute).

5. In addition to providing civil remedies, the Scaffold Act is also penal in nature. Section 69 of the Act provides that any person in charge of the construction who willfully violates any of the statute's provisions is guilty of a Class A misdemeanor. ILL. REV. STAT. ch. 48, § 69 (1977). Historically the Act's penal section has been seldom, if ever, used. As a result, the criminal provision of the Structural Work Act has never been at issue in the Illinois Appellate Court. *See* Comment, *The Illinois Structural Work Act*, 1975 U. ILL. L.F. 393, 416 [hereinafter cited as Comment].

6. *See* notes 32-54 and accompanying text *infra*.

7. 65 Ill. 2d 54, 357 N.E.2d 1134 (1976).

8. For an explanation of *McGovern*'s narrow construction of the Act, see notes 45-49 and accompanying text *infra*.

9. Waggoner Equipment Rental & Excavating Co. was the general contractor on the project.

10. A more complete summary of the facts is found in the appellate court's decision. *Norton v. Waggoner Equip. Rental & Excavating Co.*, 52 Ill. App. 3d 442, 443-44, 367 N.E.2d 516, 517 (5th Dist. 1977).

of roofing material from bar joists located at the top of the building.¹¹ Because no scaffolding was near the bar joists,¹² Norton would crawl onto the bar joists when releasing the bundles of roofing material. Norton was injured when the crane operator, acting on relay signals, accidentally lowered a hook and a "headache ball," which were attached to the crane, onto Norton's back.¹³

William Delaney, "clerk of works" for the construction, handled the project on behalf of the school district. According to trial testimony,¹⁴ Delaney was to make sure that the contractors' work met all the contract specifications. He recorded the progress of the construction, inspected the construction, and acted as a liaison between the architect and general contractors. Delaney had an office at the construction site where he was present for a short time each day. He held weekly meetings with the contractor, architect, and subcontractor, and any changes that Delaney felt were necessary had to be reported to the architect. Delaney had neither the power to stop the work immediately if it was not conforming to the contract nor the power to terminate the employment of any of the workers on the project.¹⁵

The contract between the school district and contractor placed upon the contractor the responsibility for the safety of the construction work and the appointment of a safety superintendent.¹⁶ The contract imparted to the

11. *Id.* A crane was used to lift bundles of roofing materials to the bar joists located at the top of the building. The bundles were attached to the crane by hoisting straps that were looped around a 8" to 10" hook located immediately beneath a steel headache ball. Norton would release the bundles from the hoisting straps to allow the bundles to fall to the ground. *Id.*

12. *Id.* The bar joists were the only surface that Norton could stand on when releasing the bundles from the hoisting straps and throwing them to the ground. Each joist was about three to four inches in width and ran the entire length of the building spaced three and one-half to four feet apart from each other. *Id.*

13. As a result of the mishap, Norton, in 1971, underwent a spinal operation. During the next year Norton was readmitted to the hospital after aggravating his back condition through other mishaps at work. *Id.*

14. A summary of the testimony of William Delaney and Jack Olsen (the representative of the architect) is set out in the supreme court opinion, 76 Ill. 2d at 488-87, 394 N.E.2d 405-06, and the appellate court decision, 52 Ill. App. 3d 442, 446-47, 367 N.E.2d 516, 519-20 (1977).

15. 76 Ill. 2d at 486-87, 394 N.E.2d at 405.

16. *Id.* at 495-96, 394 N.E.2d at 410 (Ryan, J., dissenting). The contractor agreed to comply with the construction industry's standard safety manual. The following is the applicable section of the contract:

The Contractor alone shall be responsible for the safety, efficiency, and adequacy of his plant, appliances, and methods, and for any damage which may result from their failure or their improper construction maintenance, or operation.'

'The Contractor shall employ methods of construction or erection, and hoists, rigging, forms, scaffolding . . . etc., at the site of the work which satisfy or exceed the requirements of . . . State and Federal safety laws, and building codes, including but not limited to the 'Structural Work Act'. . . .'

'The Contractor shall designate a responsible representative at the job site as a Safety Superintendent who shall be responsible for the promotion of safety and prevention of accidents. . . .'

school district-owner the right to access and inspection of the work, as well as the delayed right to terminate the work if the contractor committed contract violations.¹⁷ In addition, the owner's written approval was required before changes could be made in the work, and the owner could also order extra work or require work to be redone.¹⁸

In order to recover damages for the injuries he sustained, Norton sued the owner,¹⁹ the architect,²⁰ and the general contractor²¹ for violations of the Structural Work Act.²² During the trial the suits against the architect and general contractor were dismissed without prejudice by the plaintiff.²³ A jury trial in the Circuit Court of Madison County awarded plaintiff a verdict of \$175,000 on the grounds that the school district, as owner, was liable under the Act as a person having charge of the construction.²⁴

The Fifth District of the Appellate Court of Illinois reversed the verdict and judgment in favor of the plaintiff.²⁵ The court reasoned that holding the school district accountable for Norton's injury would be imposing liability by virtue of mere ownership.²⁶ Thus, the court ruled that because the defendant was not in charge of the construction activity that resulted in Norton's injury, judgment n.o.v. for the defendant was appropriate.²⁷ The Illinois Supreme Court affirmed this result,²⁸ but later reversed after granting the plaintiff a rehearing.²⁹

In reversing the judgment of the appellate court, the Illinois Supreme Court held that the school district was sufficiently in charge of the construc-

17. *Id.* at 496, 394 N.E.2d at 410.

18. *Id.* In its petition for rehearing, the school district disputed the majority's contention that the owner had the contractual authority to order changes in the work. See note 73 and accompanying text *infra*.

19. The owner was Collinsville Community Unit District No. 10.

20. Architectural Associates Inc. was the architectural firm that drafted plans and specifications for the construction.

21. The general contractor was Waggoner Equipment Rental & Excavating Co.

22. 76 Ill. 2d at 484, 394 N.E.2d at 404. Plaintiff contended that the school district violated the Act by failing to provide scaffolding when, under the circumstances, scaffolding was necessary to protect workers from injury. "The implication from the evidence being that if a supporting device had been provided, the plaintiff would not have had to climb onto the load to remove the strap and accordingly would not have exposed himself to the risk of injury from the crane's ball." Norton v. Waggoner Equip. Rental & Excavating Co., 52 Ill. App. 3d at 444, 367 N.E.2d at 517.

23. 76 Ill. 2d at 484, 394 N.E.2d at 404.

24. *Id.*

25. Norton v. Waggoner Equip. Rental & Excavating Co., 52 Ill. App. 3d 442, 367 N.E.2d 516 (5th Dist. 1977).

26. *Id.* at 448, 367 N.E.2d at 520. See Cannon v. Chicago, Milwaukee St. Paul & Pac. Ry. Co., 22 Ill. 2d 305, 321, 175 N.E.2d 785, 793 (1961) (establishing the rule that mere ownership of the premises is insufficient to establish liability under the Scaffold Act).

27. 52 Ill. App. 3d at 447-48, 367 N.E.2d at 520.

28. Norton v. Waggoner Equip. Rental & Excavating Co., Docket No. 50066 (Sup. Ct. Ill. Dec. 6, 1978).

29. 76 Ill. 2d 481, 394 N.E.2d 403 (1979).

tion to be held responsible for violations of the Structural Work Act. The *Norton* majority noted that the defendant exercised more than mere ownership powers over the construction, and thus the question of who had charge of the work was a factual issue for the jury to determine.³⁰ The court reasoned that the evidence demonstrated sufficient retention of supervision and control of the construction by the school district to justify a finding of liability.³¹

PRE-NORTON ILLINOIS SUPREME COURT INTERPRETATIONS
OF THE "HAVING CHARGE OF" LANGUAGE

Divergent Illinois Supreme Court interpretations have articulated a presently confused definition of the Scaffold Act's "having charge of" language. This confusion has evolved from vague and sometimes inconsistent reasoning set forth in supreme court opinions over the past three decades. While the wording of the statute has remained virtually unchanged, the Illinois Supreme Court has continually restricted and expanded the scope of liability under the Act. Thus, the supreme court has been unsuccessful in rendering a workable interpretation of the nebulous "having charge of" wording.

The first Illinois Supreme Court case to consider an owner's liability under section 69 of the Scaffold Act was *Kennerly v. Shell Oil Co.*³² In *Kennerly*, the court impliedly held that all owners who willfully violate the Act are liable per se regardless of whether or not the owner is in charge of the construction.³³ Three years later, in *Gannon v. Chicago, Milwaukee, St.*

30. *Id.* at 491-92, 394 N.E.2d at 408.

31. *Id.* at 491, 394 N.E.2d at 408.

32. 13 Ill. 2d 431, 150 N.E.2d 134 (1958). In this case, the plaintiff was injured when he fell from a scaffold while welding a waterline. The scaffold was built by employees of plaintiff's employer, Foster Wheeler Corporation, an independent contractor on the construction project. The injured employee was able to recover against the owner of the construction for the owners willful violations of the Structural Work Act. *Id.* at 433, 150 N.E.2d at 136. For a good discussion of *Kennerly*, see Strodel, *Illinois Scaffold Act Liability*, 50 ILL. B.J. 1092, 1093-95 (1962) [hereinafter cited as Strodel I].

Two districts of the Illinois Appellate Court had decided the issue of an owner's liability under § 69 of the Structural Work Act prior to the *Kennerly* decision. Both courts held that an owner must be in charge of the construction before liability can be imposed for violation of the Act. *Taber v. Defenbaugh*, 9 Ill. App. 2d 169, 132 N.E.2d 454 (3d Dist. 1956); *Brenton v. Levinson*, 207 Ill. App. 406 (1st Dist. 1917).

33. The *Kennerly* court never expressly stated that an owner is liable per se under the Act. The supreme court, however, by failing to require that the owner be in charge of the construction before imposing liability, effectively created a nondelegable duty upon the owner with its holding. To support its construction, the *Kennerly* court relied on language from the first Illinois case decided under the Structural Work Act, *Claffy v. Chicago Dock & Canal Co.*, 249 Ill. 210, *aff'd* 228 U.S. 680 (1911). As the *Kennerly* court perceived it, the *Claffy* court interpreted § 67 of the Scaffold Act as imposing an absolute duty upon the owner to comply with this section of the Act. *Kennerly v. Shell Oil Co.*, 13 Ill. 2d at 434, 150 N.E.2d at 136. Section 67 of the Scaffold Act, however, is absent the "in charge of" language that is found in section 69. See ILL. REV. STAT. ch. 48, § 67 (1977). Thus, because plaintiff's suit in *Claffy* concerned § 67 violations of the Scaffold Act, the *Claffy* opinion is improper precedent for actions based upon § 69.

Paul & Pacific Railroad,³⁴ the Illinois Supreme Court reached a more restrictive result concerning an owner's liability under section 69. The *Gannon* court unequivocally rejected the notion that an owner is liable for a willful violation of the Act irrespective of control and held that section 69 of the Scaffold Act does not create nondelegable duties; according to *Gannon*, only those who are in charge of the construction work can be held liable under section 69.³⁵ The court stated that liability under section 69 could only be imposed for willful violations, which under the Scaffold Act means knowing violations.³⁶ In addition, the court stated that willful violations could be perpetrated only by persons directly connected with the operation, and not by those who merely own the premises.³⁷

The Supreme Court next liberalized the *Gannon* reading of "having charge of" in *Larson v. Commonwealth Edison Co.*,³⁸ emphasizing that a liberal construction of the term "having charge of" is necessary to ensure that the Act's purpose be effectuated.³⁹ The *Larson* court expressly rejected the trial court's jury instruction requiring proof of retention of supervision and control before the defendant-owner could be deemed in charge of the construction. The court reasoned that the definition of "having charge of" may include supervision and control, but that "having charge of," although requiring a direct relation to the work, is not limited to supervision and control.⁴⁰ The *Larson* court cryptically stated that "[t]he term 'having charge of' is one of common usage and understanding and it is our opinion that further attempt[s] at definition can only lead to confusion and error."⁴¹

34. 22 Ill. 2d 305, 175 N.E.2d 785 (1961).

35. *Id.* at 319-20, 175 N.E.2d at 792-93. The court agreed with the *Kennerly* opinion that the Act's purpose is to reduce the hazards of construction to the utmost extent, but stated, "the recognition of this purpose cannot justify deleting unambiguous words from the statute." *Id.* at 322, 175 N.E.2d at 794. The court was referring to the words "having charge of" in § 69. See *Warren v. Meeker*, 55 Ill. 2d 108, 111, 302 N.E.2d 54, 56 (1973); *Kiszkar v. Texas Co.*, 22 Ill. 2d 326, 329, 175 N.E.2d 401, 402 (1961).

36. 22 Ill. 2d at 321, 175 N.E.2d at 793. A willful or knowing violation presumes a connection with work beyond mere ownership. *Id.* See Note, *Property Owner Liable Under Illinois Scaffold Act Only if He Is Person "Having Charge,"* 1961 U. ILL. L.F. 745, 749. The author states that *Gannon* provides a justifiable limitation on the Scaffold Act, and that a nondelegable interpretation of the Act distorts the plain meaning of willful under the Act. See note 2 *supra*.

37. 22 Ill. 2d at 321, 175 N.E.2d at 793.

38. 33 Ill. 2d 316, 211 N.E.2d 247 (1965). Plaintiff sued Commonwealth Edison, the owner of the construction, for injuries he received when the scaffold on which he was working broke. The jury returned a verdict for Commonwealth Edison, maintaining that the owner was not in charge. The Illinois Supreme Court reversed and remanded the jury verdict, holding as erroneous a jury instruction that required proof of retention of supervision and control of the work before determining that the owner was "in charge of" the construction.

39. *Id.* at 321-22, 211 N.E.2d at 251. The *Larson* court liberalized the result in *Gannon* by not requiring proof of supervision and control as a prerequisite to a determination that one is in charge of the work. See note 4 and accompanying text *supra*.

40. 33 Ill. 2d at 321-22, 211 N.E.2d at 251.

41. *Id.* at 323, 211 N.E.2d at 252. The court, however, reiterated the *Gannon* holding, noting that "an owner must have some direct connection with the operations, over and above mere ownership or the employment of an independent contractor." *Id.* at 321-22, 211 N.E.2d at 251.

Thus, while the effect of the *Gannon* decision was to absolve many owners from liability under section 69 actions,⁴² the *Larson* opinion, by liberalizing the interpretation of the "having charge of" language made owners much more susceptible to liability.⁴³

Almost a decade later, in *Carruthers v. B.C. Christopher & Co.*⁴⁴ and *McGovern v. Standish*,⁴⁵ the Illinois Supreme Court again restricted the scope of an owner's liability under the Scaffold Act. In both cases, in addition to requiring a direct connection with the work, the court held that "an owner is not liable under the Scaffold Act unless he had charge of the *particular* operation which was a violation of the Act and caused the injury."⁴⁶

Recently, the Illinois Supreme Court has reaffirmed the holding that a person must be in charge of the particular operation before liability may be imposed under the Act.⁴⁷ The addition of the word "particular" to the

42. See *Melvin v. Thompson*, 39 Ill. App. 2d 413, 188 N.E.2d 497 (1st Dist. 1963) (owner's action of inspecting the work and threatening to stop the work if it was being done improperly was only an effort to insure contract compliance; thus, reasonable men could not consider the owner to be in charge of the work as required for liability to arise under the Scaffold Act); *Loveless v. American Tel. & Tel. Co.*, 40 Ill. App. 2d 347, 189 N.E.2d 679 (3d Dist. 1963) (defendant's right to stop the work if a statutory violation was taking place by the contractor was insufficient to hold that the owner was in charge of the work); *Kobus v. Formfit Co.*, 56 Ill. App. 2d 449, 206 N.E.2d 477 (1st Dist. 1965), *rev'd*, 35 Ill. 2d 533, 221 N.E.2d 633 (1966) (appellate court affirmed summary judgment in favor of the owner). After the *Larson* decision, *Kobus* was reviewed by the supreme court, which reversed and remanded the appellate court decision. The supreme court held that there was a question of fact as to whether defendant owner was in charge of the work and that summary judgment in favor of the owner therefore was improper. *Kobus v. Formfit Co.*, 35 Ill. 2d 533, 221 N.E.2d 633 (1966). For a discussion of these three cases, see Strodel, *The Illinois Scaffold Act in Perspective*, 54 ILL. B.J. 624, 625-28 (1966) [hereinafter cited as Strodel II].

43. See Comment, *supra* note 5, at 403. See, e.g., *Kobus v. Formfit Co.*, 35 Ill. 2d 533, 221 N.E.2d 633 (1966) (supreme court reversed summary judgment in favor of the owner because question of fact existed as to whether owner was in charge of the construction where owner had contractual right to inspect and order changes in the work); *Carlson v. Metropolitan Sanitary Dist.*, 64 Ill. App. 2d 331, 213 N.E.2d 129 (1st Dist. 1965) (owner held to be "in charge of" the work where owner retained right to control manner and method of work but did not control minutiae of detail involved in the construction).

With respect to owners in possession of the premises, the supreme court never implemented the rule that normal indices of ownership are insufficient to uphold liability under the Scaffold Act. Comment, *supra* note 5, at 405. The supreme court, however, upheld a summary judgment in favor of an owner who was not in possession of the premises at the time of the accident in *Warren v. Meeker*, 55 Ill. 2d 108, 302 N.E.2d 54 (1973).

44. 57 Ill. 2d 376, 313 N.E.2d 457 (1974) (plaintiff sued defendant, who leased and operated a grain elevator on the property on which plaintiff was injured, for violation of Scaffold Act).

45. 65 Ill. 2d 54, 357 N.E.2d 1134 (1976) (injured plaintiff sued architect on construction project for violation of the Structural Work Act).

46. *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d at 378, 313 N.E.2d at 458-59 (emphasis added); *McGovern v. Standish*, 65 Ill. 2d at 67, 357 N.E.2d at 1141. Compare the language used in *Warren v. Meeker*, 55 Ill. 2d at 111, 302 N.E.2d at 56 (1973), which both *Carruthers* and *McGovern* relied on for support of their holding: "[T]o establish liability under the Act an owner or other person must have been in charge of the operation which involved the violation from which the injury arises."

47. See, e.g., *Norton v. Waggoner Equip. Rental & Excavating Co.*, 76 Ill. 2d at 489-90, 394 N.E.2d at 407; *Crothers v. LaSalle Inst.*, 68 Ill. 2d 399, 370 N.E.2d 213 (1977).

"having charge of" language had been subject, however, to the criticism that such an interpretation defeated the purpose of the Act and shielded owners and architects from liability.⁴⁸ It was noted that while an owner may be in charge of the overall construction, he or she usually does not supervise the particular operation from which the injury arose.⁴⁹ These critics have noted that the employee's employer is usually the person directly in charge of the particular operation that caused the injury.⁵⁰ Because the exclusive remedies clause of the Workmen's Compensation Act⁵¹ precludes an employee from suing his or her employer, the employee is left with statutory compensation as the sole remedy for injuries sustained on the job.

The Illinois Supreme Court responded to such criticism by clarifying the holding of *McGovern* in *Emberton v. State Farm Mutual Automobile Insurance Co.*⁵² The court stated that *McGovern* correctly states the law if *McGovern* was intended to mean that a person may be determined to be "in charge of" the particular operation that was the violation of the Act and caused the injury "either by proof that he exercised control, or that the right to control the work existed whether exercised or not . . ."⁵³ The *Emberton* court, in finding the defendant liable under the Act, also expressly rejected the contention that the evidence must prove that the defendant had the

48. In his concurring opinion in *Crothers v. LaSalle Inst.*, 68 Ill. 2d at 413-19, 370 N.E.2d at 220-23, Justice Dooley emphatically objected to the *McGovern* court's interpretation of the statutory words "in charge of." Justice Dooley complained that such an interpretation violates the principle that more than one person can be in charge of the work. He quoted the Illinois Pattern Jury Instructions to support his argument:

Under the statute I have just read to you, it is possible for more than one person to "have charge of" the work. One or more persons can have charge of the overall work, and other persons can have charge of the phase of the work in connection with which an injury occurs. In that event, all of them would "have charge of" the work within the meaning of the statute.

Who had charge of the work under the particular facts of this case is for you to decide.

Id. at 417-18, 370 N.E.2d at 222 (Dooley, J., concurring), quoting ILLINOIS PATTERN JURY INSTRUCTIONS § 180.02 (2d ed. 1971). See Ring, *The Scaffold Act: Its Past, Present and Future*, 64 ILL. B.J. 666, 679-80 (1976) [hereinafter cited as Ring].

49. *Crothers v. LaSalle Inst.*, 68 Ill. 2d at 418, 370 N.E.2d at 222 (Dooley, J., concurring). See Ring, *supra* note 48, at 680 n.94, where the author states, "indeed, only in the most major of construction projects is the owner directly involved in the construction activities"; Note, *The Problem of Liability Under the Structural Work Act*, 10 DEPAUL L. REV. 145, 150 (1960) (author favors a nondelegable owner's duty because the owner is in control of the construction in relatively few cases).

50. See *Crothers v. LaSalle Inst.*, 68 Ill. 2d 418-19, 370 N.E.2d at 222-23; Comment, *supra* note 7, at 417.

51. ILL. REV. STAT. ch. 138.5, § 5(a) (1977).

52. 71 Ill. 2d 111, 373 N.E.2d 1348 (1978). Plaintiff, who was injured while moving a portable scaffold during the construction, sued the owner for violation of the Scaffold Act. The supreme court held that the evidence supported the jury finding that the owner was "in charge of" the work.

53. *Id.* at 119, 373 N.E.2d at 1351.

right to control or direct the manner or methods in which the construction would be accomplished.⁵⁴

ANALYSIS OF NORTON

Upon first review of *Norton*,⁵⁵ a majority of the Illinois Supreme Court found that the school district's degree of involvement in construction was insufficient to create a question of fact concerning whether it was "in charge of" the work. The court reasoned that the owner must have been in a position to protect the workmen from dangerous conditions before liability could be imposed.⁵⁶ The court noted that the school district's delayed right to stop the work was "not the type of retained authority which an owner must have to prevent injury to the workers or to protect them from hazardous construction practices."⁵⁷ The supreme court ultimately concluded that the school district possessed no more than normal ownership rights over the work and to impose liability upon the school district would not further the purpose of the Act.⁵⁸

After rehearing *Norton*, the Illinois Supreme Court reversed its earlier decision.⁵⁹ The new *Norton* majority emphasized that the issue of "having charge of" is one of fact. Thus, to overturn the jury verdict in favor of Norton, the evidence, when viewed in the light most favorable to the plaintiff, must so overwhelmingly favor the school district that no contrary verdict based on that evidence could ever stand.⁶⁰ In its reasoning, the court followed the familiar guidelines established in *Gannon v. Chicago, Milwaukee, St. Paul & Pacific Railroad*⁶¹ and *Larson v. Commonwealth Edison Co.*⁶² for determin-

54. *Id.* at 118-19, 373 N.E.2d at 1350-51.

55. Docket No. 50066, at 10 (Sup. Ct. Ill., Dec. 8, 1978). The author of the first opinion was Justice Ryan, who wrote the dissenting opinion after rehearing. See text accompanying notes 84-96 *infra*.

56. *Id.* at 8. The court further stated that the term "having charge of" should in some way relate to the safety of the construction in order to accomplish the purpose of the Act. Drawing support from an Oregon court's interpretation of a similar act, the court stated:

In *Wilson v. Portland General Electric Co.*, (1968) 252 Ore. 385, 448 P.2d 562, the court noted that the purpose of the Oregon act is to provide maximum protection to the workmen engaged in hazardous occupations. Therefore, before the retained right of control by an owner should give rise to liability, that retained right of control should bear some relation to the creator of risk of danger to the workman resulting from dangerous working conditions.

Id. at 10 [citation omitted].

57. *Id.* at 11.

58. *Id.* at 12. The court further stated that ownership alone cannot establish that one is in charge of the construction. See note 37 and accompanying text *supra*.

59. *Norton v. Waggoner Equip. Rental & Excavating Co.*, 76 Ill. 2d 481, 394 N.E.2d 403 (1979).

60. 76 Ill. 2d at 485-86, 394 N.E.2d at 405. The court established this rule in *Pedrick v. Peoria & E.R.R.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967).

61. 22 Ill. 2d 305, 175 N.E.2d 785 (1968). See notes 34-37 and accompanying text *supra*.

62. 33 Ill. 2d 316, 211 N.E.2d 247 (1965). See notes 38-41 and accompanying text *supra*.

ing an owner's liability under the Scaffold Act. The court reiterated that while an owner is not per se liable for willful violations under the Act, neither is retention of supervision and control of the work by the owner necessary for a finding of liability.⁶³

Applying this rule to the facts of *Norton*, the majority concluded that an evaluation of the "totality of the circumstances"⁶⁴ revealed that the school district retained enough authority and supervision for a jury justifiably to find that it was in charge of the construction and, therefore, liable for violations of the Scaffold Act.⁶⁵ In so holding the court impliedly determined

63. 76 Ill. 2d at 488, 394 N.E.2d at 406. The court then cited the often quoted language of *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 321-22, 211 N.E.2d 247, 251 (1965), defining the parameters of "having charge of":

The term "having charge of" is a generic term of broad import, and although it may include supervision and control, it is not confined to it. As was said of the word "charge" in *People v. Gould*, 345 Ill. 288, 323, [178 N.E. 133, 148 (1931)]: "The word does not necessarily include custody, control, or restraint, and its meaning must be determined by the associations and circumstances surrounding its use. 'To have charge of' does not necessarily imply more than to care for or to have the care of." . . . [C]onsistent with its beneficent purpose of preventing injury to person employed in the extra-hazardous occupation of structural work, the thrust of the statute is not confined to those who perform, or supervise, or control, or who retain the right to supervise and control, the actual work from which the injury arises, but, to insure maximum protection, is made to extend to owners and others who have charge of the erection or alteration of any building or structure.

76 Ill. 2d at 488-89, 394 N.E.2d at 406-07.

64. In *McGovern v. Standish*, 65 Ill. 2d 54, 68, 357 N.E.2d 1134, 1141 (1976), the Illinois Supreme Court held that the issue of "having charge" must be determined through an assessment of all circumstances. The majority in *McGovern* distinguished *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967), which appeared to hold that an architect's right to stop the work established that he was in charge of the construction. The *Miller* court stated: "We also believe that what we have heretofore said regarding the architect's right to stop the work if it were being done in a dangerous manner makes them persons 'having charge' within the meaning of the Act." *Id.* at 286, 226 N.E.2d at 639. The *McGovern* court explained that the language of *Miller* has to be considered in terms of the factual setting of that case. Accordingly, the *McGovern* court stated, "[i]n *Miller* we were called upon to determine whether sufficient evidence had been presented to create a jury question on the allegations made by plaintiffs. This Court found a sufficient quantum of evidence and, in so doing, stressed the right afforded the defendants to stop the work." 65 Ill. 2d at 68, 357 N.E.2d at 1141. The majority in *McGovern* refused to adopt a narrow interpretation of the language in *Miller* and therefore did not interpret *Miller* as holding that the right to stop work always establishes that one is in charge of the work.

65. 76 Ill. 2d at 491, 394 N.E.2d at 408. The Illinois Supreme Court compared *Norton* with *Voss v. Kingdon & Naven, Inc.*, 60 Ill. 2d 520, 328 N.E.2d 297 (1975) (owner was held to be in charge of the construction where he could fire workers and immediately stop the work), and *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (architect was held not to be in charge of the work where he only had rights to supervise, inspect, and terminate the work upon ten days' notice). The *Norton* majority found that the school district did not have as much control over the construction as the owner in *Voss*. The supreme court then reasoned that the architect's duties in *McGovern* were only to insure that the general contractor complied with the contract. The *Norton* court deduced that "the school district's authority may not have been as expansive as in *Voss*, . . . but it was much more so than this court found in *McGovern*, where evidence showed the defendant never exercised control over the work." 76 Ill. 2d at 489-90, 394 N.E.2d at 407.

that the school district's control over the construction went beyond mere ownership. In support of its conclusion the court noted that the school district made daily inspections of the site.⁶⁶ Moreover, it possessed the contractual power to have work redone at its direction, and, according to the record, the school district did have work redone at its direction.⁶⁷ The court further stated that because Delaney was experienced in the construction field and was familiar with the bar joists,⁶⁸ Delaney should have "either at his direction or through the architect" remedied the unsafe working conditions.⁶⁹

Criticism of the Majority Opinion

The Illinois Supreme Court never expressly addressed its reversal of its first opinion rendered in *Norton*. One factor upon which the court apparently relied heavily to support its determination that the school district could be found to have been "in charge of" the construction was that work allegedly had been redone at Delaney's direction. At three different stages of the opinion the court reiterated that Delaney was contractually able to and did order work to be redone.⁷⁰ Facially, this argument offers strong support for the conclusion that the school district was "in charge of" the construction. Yet, the court never goes beyond a statement of the fact to an examination of its significance. The court disposes of the issue in a one sentence paragraph: "[T]estimony by others shows Delaney had significant supervisory input into the construction, such as having work redone at its direction."⁷¹ For such an important factual point, the court offered little

66. 76 Ill. 2d at 491, 394 N.E.2d at 408.

67. *Id.* at 490-91, 394 N.E.2d at 407-08.

68. By his own admission, Delaney stated that he had been on the bar joists of the construction site 35 to 40 times, and also had been on the bar joists on which plaintiff was injured a few times. *Id.* at 486-87, 394 N.E.2d at 405-06.

69. *Id.* at 491, 394 N.E.2d at 408.

70. *Id.* at 487, 394 N.E.2d at 406 (testimony by others shows Delaney had significant supervisory input into the construction such as having work redone at its direction), *id.* at 491, 394 N.E.2d at 408 ("the school district . . . could order changes; had to approve changes; ordered, through Delaney, that certain work had to be redone"), *id.* at 492, 394 N.E.2d at 408 ("Delaney daily made inspections and had work redone").

71. *Id.* at 487, 394 N.E.2d at 406. *But see* Petition for Rehearing for Defendant, where the school district argues that "only the testimony of Ellsworth Hellman deals with Delaney ordering work to be redone." Mr. Hellman did testify that Mr. Delaney had required an area of subgrade to be redone; but Mr. Hellman also testified that he had no knowledge concerning any authority that Mr. Delaney might have had and that Mr. Delaney never gave any labor crews directions concerning the manner in which work was to be done. Nor did Mr. Hellman explain any procedure that Mr. Delaney may have followed before the work was redone or whether the final work order may have come from the architect. In fact, according to Mr. Olsen's testimony, as a matter of practical interpretation of the contractual provisions involved in this construction contract, the architect was the only party concerned with this construction who could have work redone. Petition for Rehearing for Defendant, *Norton v. Waggoner Equip. Rental & Excavating Co.*, 76 Ill. 2d 481, 394 N.E.2d 403 (1979).

analysis. The *Norton* majority even failed to mention that the work that Delaney ordered the general contractor to repeat involved subgrade cement.⁷² In requiring subgrade work to be redone, Delaney was only demanding contract compliance, a right arguably conferred by mere ownership.

The appellate court on the other hand, while recognizing that some concrete work that was substandard was redone at the direction of the architect and owner, stated that Delaney never "told anyone how or when to perform any part of the construction work."⁷³ The appellate court implied that the substandard work that was redone at Delaney's request did not support a finding that the school district was in charge of the construction. Delaney's request to the contractor that subgrade work be redone is indeed un compelling evidence that the school was "in charge of" the construction.

The weakest aspect of the majority opinion in *Norton* was its treatment of *McGovern*.⁷⁴ The *Norton* majority was compelled to analyze *McGovern* because the *McGovern* facts closely resembled those of *Norton*. In its attempt to distinguish the cases, the supreme court concluded that the school district in *Norton* possessed more control over the construction of the new school than the architect exercised over the construction of a new hospital in *McGovern*.⁷⁵ The *Norton* majority attempted to differentiate the undistinguishable however, in its examination of *McGovern*. Both Delaney—the clerk of works in *Norton*—and Standish—the architect in *McGovern*—were to observe the construction as it proceeded, to discuss the construction with the general contractor, and to see generally that the construction met the specifications of the contract. Further, much of the school district's authority in *Norton* was subject to the approval of the architect,⁷⁶ whereas the decision of the architect in *McGovern* was subject to arbitration.⁷⁷

72. See 52 Ill. App. 3d at 447, 367 N.E.2d at 520 (5th Dist. 1977).

73. *Id.* In addition, the appellate court contended that the school district did not possess any special powers such as the right to fire employees of the contractor working on the construction. *Id.*

74. See note 46 and accompanying text *supra*.

75. 76 Ill. 2d at 490, 394 N.E.2d at 407.

76. See Justice Ryan's dissenting opinion in *Norton* where he stated:

The contract between the school district and the architect provides that the architect shall make decisions on all claims of the owner (school district) and the contractor and on all matters relating to the execution and the progress of the work, or the interpretation of the contract documents. . . . [T]he owner shall observe the procedure of issuing orders to contractors only through the architect, and that if the owner observes, or becomes aware of any defect in the project, he shall give prompt written notice thereof to the architect.

76 Ill. 2d at 493, 394 N.E.2d at 409 (Ryan, J., dissenting). The testimony of the architect, Jack Olson, in *Norton* also supported this contention. Olson said, "The clerk would be the first to know of any deviations and would report them to the architect." *Id.* at 487, 394 N.E.2d at 406.

77. The contract between the architect and the owner in *McGovern* under the heading architect's decisions stated:

(a) It shall be the responsibility of the Architect to make written decisions in regard to all claims of the Owner or Contractor and to interpret the Contract

The contractual rights given the school district in *Norton* paralleled the contractual authority over the construction given the architect in *McGovern*. The contract in *McGovern* gave the architect the right to inspect⁷⁸ and supervise⁷⁹ the work. The architect also could terminate the work after ten days' notice upon any substantial violation of the contract by the contractor.⁸⁰ Further, the contract allowed the architect "to reject defective material and workmanship or to require its correction."⁸¹ The contract in *Norton* gave the school district the right to access and inspection of the work. The school district also was given a delayed right to stop the work for contract violations committed by the general contractor. Finally, all desired changes in the work were subject to the owner's written approval.⁸²

Because the school district's authority over the contractor in *Norton* mirrored the architect's authority in *McGovern*, the supreme court cannot rationally justify reaching opposite results. If a present majority of the Illinois Supreme Court supported a more liberal application of the Scaffold Act, it should have announced that *McGovern* was too restrictive an interpretation of the Act and overruled it rather than have distinguished the indistinguishable in order to pay lip service to precedent.

Justice Ryan's Dissenting Opinion

Justice Ryan, in his dissenting opinion,⁸³ contended that liability should not be imposed under the Scaffold Act unless an owner is in a position to promote the safety of construction workers on the site.⁸⁴ The dissenting justice concluded that the school district was not in a position to foster the safety of the construction workers during the building of the new school, and for this reason could not be in charge of the construction within the meaning of the Act. The dissenting opinion, by focusing on the issue of whether the

Documents on all questions arising in connection with the execution of the work.

(b) Except as otherwise specified, all the Architect's decisions or interpretations of contract requirements are subject to arbitration.

65 Ill. 2d at 63-64, 357 N.E.2d at 1139.

78. *Id.* at 65, 357 N.E.2d at 1140.

79. *Id.* at 63, 357 N.E.2d at 1139.

80. *Id.* at 64, 357 N.E.2d at 1139.

81. *Id.* at 65, 357 N.E.2d at 1140.

82. For a discussion of the contractual authority given to the school district in *Norton*, see notes 20-23 and accompanying text *supra*.

83. Justice Ryan incorporated his Dec. 6, 1978, supreme court opinion originally rendered in *Norton* into his dissent.

84. 76 Ill. 2d at 500-03, 394 N.E.2d at 413-14 (Ryan, J., dissenting). One commentator who supports such an interpretation has stated that: "This interpretation has the advantage of incorporating a fault standard into the 'having charge' concept. . . . Corporations as large as Commonwealth Edison would still be responsible for accidents during structured projects because of their presumed expertise in matters of safety." Comment, *supra* note 5, at 406.

school district was able to enhance the safety of the workers at the construction site, however, failed to clarify the ambiguous "having charge of" language.

The dissent noted that where the owner has operated as a general contractor on the construction, the supreme court has supported a jury finding that the owner was in charge of the work.⁸⁵ Justice Ryan added that where large construction projects are involved, and the owner is a large corporation that maintains a separate department with employees and is involved in the planning and construction of the company's projects, such owners have been held to be in charge of the construction.⁸⁶ Ryan argued that such owners are sufficiently involved with the ongoing construction activities to be able to enhance the safety of the construction workers.⁸⁷

Justice Ryan also recognized that the ability to stop the work is an important factor in determining if an owner is in charge of the construction.⁸⁸ The

85. 76 Ill. 2d at 503, 394 N.E.2d at 413-14 (Ryan, J., dissenting). *See, e.g.*, *McInerney v. Hasbrook Constr. Co.*, 62 Ill. 2d 93, 338 N.E.2d 868 (1975) (owner held to be in charge of the work where owner acted as general contractor, possessed contractual right to supervise, correct and alter work, and engaged architect who coordinated the work and selected subcontractors); *Born v. Malloy*, 64 Ill. App. 3d 181, 381 N.E.2d 52 (1st Dist. 1978) (summary judgment in favor of defendant part owner reversed where defendant did not hire general contractor but instead coordinated and directed the work of various contractors himself).

86. 76 Ill. 2d at 504, 394 N.E.2d at 414. *See, e.g.*, *Emberton v. State Farm Mut. Auto. Ins. Co.*, 71 Ill. 2d 111, 373 N.E.2d 1348 (1978) (employees of the owner's building and design department drafted the preliminary layout work for the construction, worked with the architect to arrive at a final design, and made frequent inspections of the site); *McNellis v. Combustion Eng'r Inc.*, 58 Ill. 2d 146, 317 N.E.2d 573 (1974) (several employees of the owner, including five or six engineers, were always present at the site to inspect the work); *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965) (six employees of the owner were always present at the construction to inspect and insure contract compliance). *But see* *Beebe v. Commonwealth Edison Co.*, 45 Ill. App. 3d 43, 358 N.E.2d 1343 (3d Dist. 1977), and *Kirbach v. Commonwealth Edison Co.*, 40 Ill. App. 3d 587, 352 N.E.2d 468 (5th Dist. 1976), where Commonwealth Edison, as owner, was determined not to be in charge of the construction. In both of these cases the owner had the contractual power to inspect the work, to order unsatisfactory work to be redone, to fire persons working on the construction, and to stop the work if done in an unsafe or improper manner. In *Beebe* employees of the owner were never present at the construction and in *Kirbach* although the employees were sometimes present at the work site, they did not perform any detailed inspection of the construction.

87. 76 Ill. 2d at 504, 394 N.E.2d at 414.

88. *Id.* at 506, 394 N.E.2d at 415. *See, e.g.*, *Emberton v. State Farm Mut. Auto. Ins. Co.*, 71 Ill. 2d 111, 373 N.E.2d 1348 (1978) (architect was determined to be in charge where he, upon his reasonable opinion, possessed contractual authority to order contractor to stop the work to insure proper performance of the contract); *Voss v. Kingdon & Naven, Inc.*, 60 Ill. 2d 520, 328 N.E.2d 297 (1975) (owner held to be in charge where contract provided him prerogative to stop the work if, in his opinion, conditions were unfavorable to the proper running of the construction); *McNellis v. Combustion Eng'r Inc.*, 58 Ill. 2d 146, 317 N.E.2d 573 (1974) (owner found in charge where his representatives on project could stop work if the construction were effected in an unsafe manner); *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967) (architect determined in charge of work where he could suspend work to insure contract compliance). *But see, e.g.*, *Kirbach v. Commonwealth Edison Co.*, 40 Ill. App. 3d 587, 352 N.E.2d 468 (5th Dist. 1976) (owner held not to be in charge of the construction even though, under the contract, the owner could terminate the work if done in an unsafe or improper manner).

owner with such authority can promote the safety of the workers by stopping the work when a dangerous condition is noticed. Justice Ryan distinguished, however, an immediate right to terminate the work from a delayed right to stop the construction. He noted that the hoisting of the roofing materials onto the bar joists lasted only a few days.⁸⁹ Considering that under the contract in *Norton*, unsafe working conditions could continue on the project for at least ten days after the owner had given notice to the contractor that safety violations existed,⁹⁰ the dissenting justice concluded that the school district's delayed right to stop the work did not enable the owner to promote the safety of the workers.⁹¹

To further support the contention that the school district was not "in charge of" the work, the dissenting opinion stated that the school district, through the clerk of works and the architect, did not commit itself to the safety facets of the construction.⁹² This argument is unconvincing. The Illinois Supreme Court has stated that the actual participation in a construction project is not what is important to the issue of liability but rather what control over the project the owner *could have exercised*.⁹³ It is immaterial that Delaney never had read the contractual provisions pertaining to safety. Delaney, acting on behalf of the school district, was knowledgeable about construction methods. He therefore could not plead ignorance as to knowledge of safety procedures to escape liability.

Additionally, Justice Ryan argued that Delaney's function on the project was mainly to insure that the construction was conforming to the provisions of the contract.⁹⁴ Although Delaney inspected the work, was at the site daily, and held weekly meetings with the architect and contractor, Justice Ryan asserted that Delaney's ongoing activities with the construction were insufficient to influence the safety of the construction.⁹⁵ The dissent con-

89. 76 Ill. 2d at 506, 394 N.E.2d at 415 (Ryan, J., dissenting).

90. *Id.* Ryan further argued that after Delaney observed a safety violation, he was required to first notify the architect who then determined whether or not a violation actually existed. The clause in the contract relating to the owner's delayed right to terminate the work does not, however, support Justice Ryan's contention that the architect is the final judge as to whether or not a violation exists. *See* note 76 *supra*.

91. *Id.* at 506-07, 394 N.E.2d at 415 (Ryan, J., dissenting).

92. *Id.* at 507, 394 N.E.2d at 415 (Ryan, J., dissenting).

93. *See Emberton v. State Farm Mut. Auto. Ins. Co.*, 71 Ill. 2d 111, 373 N.E.2d 1348 (1978) (emphasis added) (court stated that a person may be proven to be in charge of the work if evidence demonstrates that the defendant either exercised actual control over or possessed the right to control the construction); *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965) (a right to control the work whether exercised or not is sufficient to establish that a defendant is in charge of the construction); *accord*, *Scrimager v. Cabot Corp.*, 23 Ill. App. 3d 193, 318 N.E.2d 521 (4th Dist. 1974) (a person who has a duty under the statute cannot escape liability by failing to exercise the control he has authority to exercise).

94. *Id.* at 508, 394 N.E.2d at 416 (Ryan, J., dissenting).

95. *Id.* In distinguishing the school district in *Norton* from the owner in *Emberton*, Justice Ryan strongly implied that the owner in *Emberton* could stop the work. The architect in *Emberton* was the only person who had the authority to stop the work. The owner, however, was

cluded that as a matter of law the evidence was insufficient to support the jury's verdict in favor of Norton: the school district was not in charge of the construction.⁹⁶

Although Justice Ryan offered more detailed reasoning than the majority, his discussion failed to alleviate the vagueness of the "having charge of" language. The dissenting justice, while reaching a different conclusion than the majority, unfortunately relied on the same precedent followed by the majority opinion. Thus, Scaffold Act litigation would remain confused under Justice Ryan's approach because he failed to alter the existing vague supreme court interpretation of "having charge of."

RAMIFICATIONS OF THE *NORTON* DECISION

Broad Definition Promotes Inconsistency

The *Norton* decision signals the Illinois Supreme Court's return to a very liberal interpretation⁹⁷ of the Scaffold Act. This present posture is adopted in the wake of the more restrictive approach of the mid-1970's. The *Norton* court provided, aside from this liberal policy shift, however, little guidance to direct lower courts in applying Structural Work Act law. Scaffold Act cases therefore will continue to turn on arbitrary interpretations of particular factual situations. The Illinois Supreme Court, by establishing the boundaries of an owner's "having charge of" as between something more than normal ownership rights yet less than requiring actual supervision and control of the construction, has inadvertently fostered inconsistent results in decisions of the lower courts. With such a broad definition, a jury or an appellate court, depending on its particular predilection, can justify almost any result and still remain within the scope of the court-created definition of "having charge of" the work. The disparity between the two supreme court opinions ren-

unable to terminate the construction. *Emberton v. State Farm Mut. Auto. Ins. Co.*, 71 Ill. 2d at 122-24, 373 N.E.2d at 1352-53.

96. 76 Ill. 2d at 513, 394 N.E.2d at 418 (Ryan, J., dissenting).

97. The recent supreme court decision, *Emberton v. State Farm Mut. Auto. Ins. Co.*, 71 Ill. 2d 111, 373 N.E.2d 1398 (1978), also exhibits this liberal trend. *Emberton* modified the restrictive language of *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 313 N.E.2d 457 (1974), and *McGovern v. Standish*, 65 Ill. 2d 54, 357 N.E.2d 1134 (1976), which required an owner to be in charge of the particular operations which was a violation of the Act which caused the injury before liability could be imposed. See note 49 and accompanying text *supra*. See also *Farley v. Marion Power Shovel*, 60 Ill. 2d 432, 328 N.E.2d 318 (1975), and *Tenenbaum v. City of Chicago*, 60 Ill. 2d 363, 325 N.E.2d 607 (1975). Both of these courts limited the scope of the term structure and scaffold as provided in § 60 of the Scaffold Act. In *Farley*, the court held that a mobile, self-propelled power shovel is not a structure within the meaning of the Scaffold Act. *Farley v. Marion Power Shovel*, 60 Ill. 2d at 437, 328 N.E.2d at 320. In *Tenenbaum*, the court limited recovery to the hazardous nature of the device itself. Therefore, if someone trips over a ladder and is injured, that worker cannot recover under the Scaffold Act. *Tenenbaum v. City of Chicago*, 60 Ill. 2d at 370-71, 325 N.E.2d at 613 (1975). For a discussion of these two cases, see Note, *Scope of Structural Work Act Liability*, 1976 U. ILL. L.F. 333.

dered in *Norton* illustrates the dilemma created by the "having charge of" language of the Scaffold Act.⁹⁸ The divergent results in the factually similar *Norton* and *McGovern*⁹⁹ cases serve as a further example of this definitional problem.

The *Norton* majority also underscored this definitional ambiguity by neglecting to overrule the restrictive language used by the supreme court in *McGovern*. In *Emberton v. State Farm Mutual Automobile Insurance Co.*,¹⁰⁰ the Illinois Supreme Court partially had erased the restrictive effect of the *McGovern* rule requiring a defendant's control over the particular operations.¹⁰¹ Yet the *Emberton* court's interpretation of the *McGovern* rule is still inadequate. Under a liberal interpretation of the statutory "having charge of" language, a person deemed to be in charge of the overall operation because of factors¹⁰² such as the right to supervise,¹⁰³ stop the work,¹⁰⁴ fire and hire employees,¹⁰⁵ also will have the right to control all of the particular operations under the project. The majority in *Norton* allowed ambiguity to remain by reiterating the *Emberton* court's interpretation of *McGovern*'s rule. As a result, juries and appellate courts are given too much latitude in interpreting the language addressing an owner's liability.¹⁰⁶

98. The definition of "having charge of" has become so broad through various supreme court interpretations that the *Norton* court first was able to decide that the school district was not in charge and then later hold that the school district was in charge of the work, and both times stay within the definition of having charge.

99. 65 Ill. 2d 54, 357 N.E.2d at 1134 (1976). See notes 74-82 and accompanying text *supra*.

100. 71 Ill. 2d 111, 373 N.E.2d at 1348 (1978).

101. *Id.* at 114-15, 373 N.E.2d at 1350-51. The *Emberton* majority interpreted *McGovern* as holding that in order to impose liability under the Scaffold Act, it must be shown that the person was in charge of the particular operation which involved the violation from which the injury arose either by proof that the defendant actually exercised control or that he had the right to exercise authority over the operations. *Id.* See note 53 and accompanying text *supra*.

102. For a discussion of the factors relevant to the issue of whether a defendant is in charge of the work, see Ring, *supra* note 48, at 668-69; Strodel II, *supra* note 42, at 629-30.

103. *Kobus v. Formfit Co.*, 35 Ill. 2d 533, 221 N.E.2d 633 (1966) (right of supervision by owner was one factor that created factual issue as to whether owner was in charge of work); *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965) (right to supervise, although not conclusive, may be germane to issue of having charge of the construction); *McInerney v. Hasbrook Constr. Co.*, 16 Ill. App. 3d 464, 326 N.E.2d 619 (1st Dist. 1974) (owner's supervision over the construction indicated that owner was directly connected with construction).

104. See note 88 *supra*.

105. *Carlson v. Metropolitan Sanitary Dist.*, 64 Ill. App. 2d 331, 213 N.E.2d 129 (1965).

106. The court's diffuse definition of "having charge of" has increased the number of lawsuits under the Act. Strodel II, *supra* note 42, at 638; see Comment, *supra* note 5, at 410. Scaffold Act litigation involves a complex number of factual and legal issues and, as a result, great sums of money are expended resolving them. Since outcomes in Scaffold Act litigation have varied, an injured plaintiff often sues any person even remotely connected with the construction to increase his odds of recovery. See Comment, *supra* note 5, at 419. As a result of its vague interpretation of "having charge of," the Illinois Supreme Court has encouraged a tremendous amount of unnecessary, economically wasteful litigation.

Liability of the Passive Wrongdoer

Justice Ryan expressed concern that the liberal statutory construction adopted in *Norton* may allocate the entire burden of plaintiff's injury on a passive tortfeasor who is only technically at fault. Prior to 1971, the school district could have avoided liability simply by drafting a precise indemnity¹⁰⁷ agreement imposing all liability for construction-related injuries upon the general contractor.¹⁰⁸ In 1971, however, the legislature passed a statute voiding any contractual indemnity agreements as against public policy.¹⁰⁹ In *Davis v. Commonwealth Edison Co.*,¹¹⁰ the Illinois Supreme Court interpreted this statute and held that indemnification agreements under the Structural Work Act are void because they are against public policy.¹¹¹ Thus, an owner, who is usually only passively negligent, can no longer enter into a written indemnity agreement that shifts liability from the owner to another who has more control over the construction, such as the contractor.

Illinois appellate courts have allowed indemnification, however, under an active-passive theory in Structural Work Act cases, even absent an express agreement.¹¹² Under an active-passive theory of indemnification, an owner held responsible under the Structural Work Act may maintain a third party suit for indemnity as long as that owner is not guilty of active misconduct.¹¹³ Justice Ryan, however, stated in his *Norton* dissent, that "[l]ogic would seem to require that if it is against public policy to shift the burden of a Structural Work Act violation by an express agreement it must also be against public policy to do so by virtue of active-passive negligence."¹¹⁴ He

107. Indemnity involves the shifting of liability from one held legally accountable to another. See BLACK'S LAW DICTIONARY 692 (5th ed. 1979).

108. See Strodel, *The Structural Work Act* 1967 U. ILL. L.F. 72, 84-95; Sorenson, *Strategy and Proof Under the Illinois Structural Work Act*, 59 ILL. B.J. 550, 560 (1971) [hereinafter cited as Sorenson].

109. ILL. REV. STAT. ch. 29, § 61 (1977).

110. 61 Ill. 2d 494, 336 N.E.2d 881 (1975).

111. *Id.* at 502, 336 N.E.2d at 886.

112. *McInerney v. Hasbrook Constr. Co.*, 62 Ill. 2d 93, 338 N.E.2d 868 (1975) (contractor allowed indemnification from subcontractor); *Miller v. DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630 (1967) (architect held liable under the statute was able to maintain third party indemnity action against general contractor).

113. *McInerney v. Hasbrook Constr. Co.*, 62 Ill. 2d at 104, 338 N.E.2d at 874; *Miller v. DeWitt*, 37 Ill. 2d at 291, 226 N.E.2d at 641, where the court reasoned that persons "having charge of" the work who willfully violates the statute are not necessarily active wrongdoers. In *Rosencamp v. Central Constr. Co.*, 45 Ill. App. 2d 441, 195 N.E.2d 756 (1st Dist. 1964), the court stated that a "lesser delinquent," held to be in charge of the work and thus liable for the violations of the Act, may justifiably maintain an indemnity action against an "active delinquent." The court concluded that because neither tortfeasor could escape liability to the plaintiff, the purpose of the Act is achieved. *Id.* at 449, 195 N.E.2d at 760.

114. 76 Ill. 2d at 512, 394 N.E.2d at 418 (Ryan, J., dissenting).

noted that neither the legislature nor the *Davis* court limited their prohibition of indemnity agreements to those who were actively negligent.¹¹⁵

Justice Ryan is correct that if the court is going to apply such a liberal construction of the phrase "having charge of," then the court must continue to allow active-passive indemnity. If the court precludes active-passive indemnity in Scaffold Act cases, an active wrongdoer often will be shielded from liability while an owner who is only technically at fault will bear the entire burden of plaintiff injury.

Workable Standard for the Future

In its attempt to achieve a laudable goal the Illinois Supreme Court has created a confusing, overbroad civil remedy for injured workmen. The Illinois Legislature should revise the statute so as to define more precisely its terms,¹¹⁶ for throughout the Act's history the Illinois Supreme Court has unsuccessfully tried to establish a workable definition for "having charge of" the work. If the legislature intends the statute to apply liberally as to owners, then the legislature should eliminate the "having charge" requirement before liability can be imposed upon willful violators of the Act. Alternatively, if the legislature desires to narrow the scope of the statute, then it should clarify "having charge of" as necessitating direct control over the particular work being done.

This legislative action is necessary because the Illinois Supreme Court has been unsuccessful in maintaining consistent application of the statute as to civil liability.¹¹⁷ The court has provided a liberal interpretation of the "having charge of" language to promote its commendable policy goal of protecting workmen engaged in hazardous construction.¹¹⁸ The enactment of the

115. *Id.* at 511, 394 N.E.2d at 417. A major distinction exists, however, between an indemnity action based on an express agreement and an indemnity suit based on an active-passive theory. Under an express contract of indemnity an active tortfeasor could escape liability because no fault weighing is involved. See Strodel II, *supra* note 42, at 635; see also Sorenson, *supra* note 108, at 560. On the other hand, an active-passive theory of indemnity allows recovery only to passive tortfeasors against active wrongdoers. Liability under third party active-passive indemnity suits is a factual issue which is decided by a jury. *McInerney v. Hasbrook Constr. Co.*, 62 Ill. 2d at 104, 338 N.E.2d at 873 (1975); *Isabelli v. Cowles Chem. Co.*, 7 Ill. App. 3d 888, 899, 289 N.E.2d 12, 20 (1st Dist. 1972). The legislature's and *Davis* court's prohibition against express indemnity agreements could be reasonably interpreted as only prohibiting express agreements of indemnification. Justice Ryan assumes too much when he argues that the legislature's and supreme court's prohibition against express agreements of indemnity also precludes suits brought under an active-passive theory.

116. The New York Legislature redefined its Scaffold Act to place a nondelegable duty "upon all contractors and owners and their agents." Comment, *supra* note 5, at 422. The author also notes, however, that several attempts by the Illinois Legislature to more clearly define "having charge of" under the Scaffold Act has been unsuccessful. *Id.*

117. For a discussion of the various supreme court interpretations of "having charge of," see notes 32-54 and accompanying text *supra*.

118. See note 4 and accompanying text *supra*.

Workmen's Compensation Act¹¹⁹ has given the court further incentive for liberal construction of the phrase. Section 138.5¹²⁰ of the Workmen's Compensation Act precludes injured employees from suing their employers and thereby encourages litigation against owners and architects in Scaffold Act cases. At the same time, owners and architects can only be held liable under a liberal interpretation of the Scaffold Act.¹²¹ Therefore, the Illinois Supreme Court has rendered this liberal interpretation in order to provide an injured workman a common law remedy. It is unlikely, however, that the Illinois Legislature that originally passed the statute anticipated liability extending to owners such as the school district in *Norton*.¹²²

The supreme court, in light of its failure to provide proper guidance in defining liability under the Act, should adopt one of two workable definitions. One interpretation would place a nondelegable duty upon owners under the Act. Because the present wording of the statute does not allow such an interpretation,¹²³ this would require legislative action. The only other solution is for the court to require direct control and supervision over

119. Because the Workmen's Compensation statute prevents an injured employee from suing his employer and a restrictive interpretation of "having charge of" would absolve owners and architects, the injured employee would be left with the compensation from his employer provided under the Workmen's Compensation Act as his sole remedy. One author states that the amount recoverable under the Workmen's Compensation Act is much smaller than the damages potentially recoverable at common law. Comment, *The Supervising Architect: His Liabilities and His Remedies when a Worker Is Injured*, 64 NW. U.L. REV. 535, 536 (1969). The commentator notes that such noneconomic losses of pain and suffering, which are recoverable at common law, are not compensable under the Act. He further states that damages recoverable under Workmen's Compensation statutes "are computed by multiplying the estimated loss of earning power by a fixed percentage." The sum is further limited because Workmen's Compensation Acts usually set "weekly or monthly maximums beyond which the percentage of lost earnings cannot be recovered. There is also a maximum length of time for which lost earning power can be compensated." *Id.* Another commentator states that "Scaffold Act plaintiffs recover full common law damages, including pain and suffering and all out of pocket losses." Comment, *supra* note 5, at 412. He further notes that in *Scully v. Otis Elevator Co.*, 2 Ill. App. 3d 185, 275 N.E.2d 905 (1st Dist. 1971), the plaintiff recovered \$600,000 for the death of her husband which was more than 25 times greater than the maximum workman compensation benefits she was allowed to receive. *Id.*

120. ILL. REV. STAT. ch. 138.5, § 5(a) (1977).

121. Owners and architects usually don't control the particular details of the work that causes the injury. Thus, a liberal interpretation of "having charge of" is necessary for owners and architects to be held liable under § 69 of the Scaffold Act. See note 49 *supra*.

122. The year the Scaffold Act was instituted an injured employee was able to sue his employer. Four years later, the Workmen's Compensation Act was passed which prohibited an employee from suing both his employer and third party tortfeasors. ILL. REV. STAT. ch. 48, § 166 (1913). Scaffold Act litigation was held in virtual abeyance until 1952 when the Illinois Supreme Court held as unconstitutional section 29 of the Workmen's Compensation Act which prohibited injured employees from suing third party tortfeasors. *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952).

123. See the discussion of *Cannon v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, notes 34-37 and accompanying text *supra*.

the work being done before liability is imposed.¹²⁴ Unless the court adopts this latter approach, inconsistency will continue to characterize Scaffold Act law.

CONCLUSION

Since the early 1960's, the Illinois Supreme Court has unsuccessfully tried to straddle the definition of "having charge of" between requiring a direct connection with the work but not actual supervision and control. Unfortunately, the *Norton* decision still leaves the definition of "having charge of" between these two extremes. The favorable policy goal of providing safe working conditions for construction projects is worthy,¹²⁵ but such a policy does not justify the arbitrary interpretations of a vague statute by Illinois courts in order to impose liability in cases such as *Norton*. Because the Illinois Scaffold Act does not as presently worded impose a nondelegable duty upon the owner, the supreme court should require that the owner exercise direct control and supervision over the work before it imposes liability. Because the Scaffold Act's unclear "having charge of" language encourages inconsistent results, the best solution would be for the legislature to revise or repeal the statute.

William H. Anger

124. This approach would eliminate the inconsistent results that have plagued Scaffold Act litigation in the past. This interpretation would more clearly reflect the legislature's intention for "having charge of" when the statute was enacted.

125. For a discussion of the necessity of drafting this policy goal into the state's laws, see Philo, *Revoke the Legal License to Kill Construction Workers*, 19 DEPAUL L. REV 1 (1969).

