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Lewis v. Barenfanger: Scaffold Act Extended to Include a Permanent Stell Beam

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LOUIS v. BARENFANGER: SCAFFOLD ACT EXTENDED TO INCLUDE A PERMANENT STEEL BEAM

Plaintiff Louis fell from a series of metal beams upon which he had been working during the construction of a school building and was injured. The beams were a permanent and integral part of the new building, and did not have plank scaffolding laid over them upon which plaintiff could walk. He brought suit against the general contractor, Barenfanger, under the Illinois Scaffold Act,[1] alleging that defendant permitted plaintiff to use these beams for support knowing that their component parts were spaced too far apart and were of insufficient width to give plaintiff proper footing and protection. Plaintiff contended that the beams were consequently not safe within the meaning of the Scaffold Act. Plaintiff also alleged violation of the Act by the fact that defendant had not placed plank scaffolding on the beams to support plaintiff.

A scaffold act sets forth mandatory standards of safety for scaffolding used in building construction, and it imposes liability upon a construction employer for injuries sustained by workmen as a result of an unsafe scaffold. The acts were passed to further protect employees who were not sufficiently covered because of limitations in the common law safe place rule. The court in *Louis v. Barenfanger*[2] held that the Scaffold Act imposed liability on the employer when an employee fell not from a scaffold but from permanent steel beams. It also held that the employer was liable under the Act for not placing a scaffold over those beams. These holdings appear to be contrary to the weight of authority. This Note will examine the approach of the courts,

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1. ILL. REV. STAT. ch. 48, §§ 60, 69 (1957). Section 60 reads:
That all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person, or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.
Section 69 reads in part:
For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby. . . .
2. 39 Ill. 2d 445, 236 N.E.2d 724 (1968).

both at common law and under the scaffold acts, when dealing with the question of an employer's duty to his employees engaged in construction, in order to determine the soundness of the *Louis* decision.

The Common Law Safe-Place Rule

In the absence of a statutory duty, common law requires an employer either to use reasonable care to provide a safe place to work and safe appliances for his employees, or to warn his employees of latent dangers of which they could not reasonably be aware.[3] These requirements have generally been designated as the safe-place rule. An employer is liable to an injured employee only if it can be shown that he has breached the duty that this rule imposes upon him.[4] However, the employer is not required to "stand by during the progress of the work to see when a danger arises. It is sufficient if he provides against such dangers as may possibly arise, and gives the workmen the means of protecting themselves."[5]

If the working conditions are reasonably safe, and there are no latent dangers, the duty of providing a safe-place is fulfilled. The risk of injury that is incident to the nature of the work itself is assumed by the employee.[6] Thus, a balance is created

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3. Restatement (Second) of Agency § 492 (1958):

> A master is subject to a duty that care be used either to provide working conditions which are reasonably safe for his servants and subservants, considering the nature of the employment, or to warn them of risks of unsafe conditions which he should realize they may not discover by the exercise of due care.

For other statements of the rule, see Big Creek Stone Co. v. Wolf, 138 Ind. 496, 38 N.E. 52 (1894) (employee killed in quarry); Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N.E. 380 (1887) (brakeman killed while coupling railroad cars); Dayharsh v. Hannibal & St. J.R. Co., 103 Mo. 570, 15 S.W. 554 (1891) (plaintiff hit by engine while shoveling ashes from a roundhouse); Durst v. Carnegie Steel Co., 173 Pa. 162, 33 A. 1102 (1895) (workman killed in excavation cave-in).

4. *See* Durst v. Carnegie Steel Co., 173 Pa. 162, 33 A. 1102 (1895).

5. *Id.* at 1103. At 1104 the court states: "But the employer is not an insurer. In such a case he is only bound to reasonable care. He is not to provide against danger that an ordinarily prudent man would not anticipate." *See* Brown v. People's Gaslight Co., 81 Vt. 477, 71 A. 204, 206 (1908) (workman injured in cave-in of a ditch). "But it seems to us that the master has fully complied with the safe place rule when he has provided against such dangers as may reasonably be apprehended by furnishing the servant with the means of protecting himself."

6. Restatement (Second) of Agency § 499 (1958): "A master who has performed his duties of care is not liable to a servant harmed by a risk incident to the nature of the work." *See* Anderson v. Smith, 35 App. D.C. 93 (1910) (decedent killed when heavy door fell on him during demolition work); Lee v. Pate, 198 Ark. 123, 131 S.W.2d 8 (1939) (workman tripped over rod on ground); Brown v. People's Gaslight Co., 81 Vt. 477, 71 A. 204 (1908) (workman injured in cave-in of a ditch). *See also* Big Creek Stone Co. v. Wolf, 138 Ind. 496, 38 N.E. 52 (1894) (quarry employee killed; "Where the danger is equally known or open to both the master and the servant, there is no liability on the part of the master."); Weber v. Terminal R.R. Ass'n of St. Louis, 20 S.W.2d 601 (Mo. 1929) (deceased fell

between an employer's duty and an employee's assumption of risk. Once the employer has reasonably provided for a safe working place, the employees "should look out for . . . dangers and use the means provided"[7] for their protection.

One way an employer can breach his safe-place duty is by failing to supply a scaffold from which the employee can work, provided the employer can foresee a danger to the employee working without it.[8] In *Smith v. Rich*[9] the employer had instructed a workman not to build a scaffold under a window, while attaching storm sheathing, but to work instead from the window ledge, eight feet above the ground. To work from this position the employee had to hold onto the window with one hand and nail with the other. The employee lost an eye when a nail glanced from the work and struck him. The court reasoned that in this situation the employer should have known a risk of injury existed. Under the circumstances, by failing to provide a scaffold, he had not provided a safe place for his employee to work. The rationale is that by failing to provide a scaffold, the employer did not take the due regard for his employee's safety that a prudent employer in similar circumstances would take. Presumably, in the *Smith* case, if a scaffold had been provided, the employer's reasonable duty would have been fulfilled. If a nail had then glanced and injured the workman, no liability would have attached to the employer.

Failure to supply a scaffold on high construction beams would not be a breach of the safe-place rule, however, for there is an exception made to the rule in construction or demolition work, where the conditions of the work are constantly changing.[10] Thus

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from unsafe scaffold: assumption of risk stated, but defendant did not sustain burden of proof); Jakopac v. Newport Mining Co., 153 Wis. 176, 140 N.W. 1060 (1913) (plaintiff injured in mine cave-in; rule stated, but plaintiff did not assume risk of a non-obvious danger).

7. Durst v. Carnegie Steel Co., 173 Pa. 162, 33 A. 1102, 1103 (1895).

8. Smith v. Rich, 196 N.C. 72, 144 S.W. 537 (1928); Deckert v. Chicago & Eastern Illinois R.R. Co., 4 Ill. App. 2d 483, 124 N.E.2d 372 (1955) (workman fell from pipes he was cutting and on which he had to lie to work; the court states that under common-law rules an employer could be held liable for his failure to furnish "an instrumentality such as a scaffold, where the employer ought to have anticipated that the calamity would result from the employee's working without the appliance").

9. 196 N.C. 72, 144 S.W. 537 (1928).

10. RESTATEMENT (SECOND) OF AGENCY § 493, comment *d.* (1958) (the degree of safety varies with the progress of the work; during initial construction the premises may necessarily be more dangerous). American Bridge Co. v. Seeds, 144 F. 605 (8th Cir. 1906) (workman knocked from bridge construction by load of materials); Standard Oil Co. of Kentucky v. Watson, 154 Ky. 550, 157 S.W. 929 (1913) (plaintiff injured when beam

the employer does not have to place scaffolding on the building to keep his employees safe at every moment. The dangers of building construction, absent negligence on the employer's part or latent dangers of which the employer has knowledge, are considered the ordinary dangers incident to the work, and are therefore assumed by the employee.[11] The courts recognize that in a construction situation the employees themselves are creating and changing the working conditions, and that it is seemingly impossible for an employer to adhere to the safe-place rule at every moment of the construction.[12] Therefore, the duty of reasonable care is shifted onto the employee for his own safety.[13]

When the employer does supply a scaffold for the workman's use, the rule provides that it must be safe. But just because an employee works upon the beams of a building does not make those beams a scaffold. The courts refuse to apply the safe-place rule to the beams of a building by distinguishing the primary purpose of the place from which an employee falls or is otherwise injured from the incidental purpose.[14] If an employee falls from a per-

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broke during demolition); Holloran v. Union Iron & Foundry Co., 133 Mo. 470, 35 S.W. 260 (1896) (workman fell from girder); McNeill v. Bottsford-Dickinson Co., 128 App. Div. 544, 112 N.Y.S. 867 (1908) (deceased fell from steel beams); Lewinn v. Murphy, 63 Wash. 356, 115 P. 740 (1911) (deceased killed when hit by timber falling from floors above); Armour v. Hahn, 111 U.S. 313, 318 (10th Cir. 1884) (workman fell from beams). The court said:

> The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows.

11. Decatur v. Chas. H. Tompkins Co., 25 F.2d 526 (D.C. Cir. 1928) (plaintiff stepped on a nail at construction site); Anderson v. Smith, 35 App. D.C. 93 (1910) (decedant killed when heavy door fell on him during demolition); Beique v. Hosmer, 169 Mass. 541, 48 N.E. 338 (1897) (plaintiff fell through hole in floor of building being constructed); Richardson v. Anglo-American Provision Co., 72 Ill. App. 77, 80 (1897) (plaintiff fell from unnailed board on roof): "The hazard involved in working upon a building during such changes of condition should, it would seem, be held to be an ordinary hazard, incident to the employment and hence assumed by the employee."

12. *See* Armour v. Hahn, 111 U.S. 313 (10th Cir. 1884), note 10 *supra*.

13. Kuptz v. Ralph Solliett & Sons Constr. Co., 88 F.2d 533 (5th Cir. 1937) There a workman fell from concrete form on beams of building. The court said:

> Every workman understands that there is more or less danger incident to the erection of a building, and that conditions of safety will change from time to time as the work progresses. He knows . . . that he must exercise reasonable care to discover and avoid dangers incident to the work; excluding, of course, extraneous or concealed dangers. . . .

14. This determination is explained in Stourbridge v. Brooklyn City R. Co., 9 App. Div. 129, 41 N.Y.S. 128, 130 (1896). A workman was working on a wooden cross beam when the beam broke; he fell and sustained injuries from which he later died. The defendant was not held liable for the death, and the court explained:

> [D]oubtless, in one sense of the term, the employee must always

manent beam of a building during the course of construction, the safe-place rule is not applied because the beam is not provided as a place for the employee to work. Instead it is provided primarily to become a part of the work itself. The workman's use of the beam for support is merely incidental to this primary purpose. Since the beam is a part of the work, and dangers incident to the work are assumed by an employee, the employee thus assumes the danger of a fall from that beam.

It appears that the distinction between the primary and incidental purpose of the beam is made, and the safe-place rule not applied, as a matter of policy. This is shown by courts indicating that if an employer were held liable, without breach of duty on his part, for an injury incurred by a workman in the process of construction, the employer would be hesitant to undertake such construction.[15]

The Scaffold Acts

In response to the court's refusal to apply the safe-place rule to construction, resulting in immunity to liability for construction employers, and because of the peculiar dangers associated with working on high construction, many states were led to adopt so-called scaffold acts.[16] Such acts impose criminal penalties and

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be in some place; and doubtless, also, the place, in a certain sense, is not safe if an accident occurs there. But the rule that the master must provide a safe place to work only applies where the work and the place are not connected,—where the work is not the construction of the place, as in the case of a mill, factory, mine, . . . etc. In the present case the cross beam was not furnished for the purpose of providing the plaintiff a place to work, but as a part of the structure which he and the other workmen were engaged in erecting. . . . If there was a latent danger of which it [defendant] had knowledge, it should have apprised the workmen. But the distinction I seek to impress is that here the beam was part of the structure,—the common work upon which all the employees were employed,—and the use of it by the deceased for support the mere incident.

15. Holloran v. Union Iron & Steel Foundry Co., 133 Mo. 470, 478, 35 S.W. 260, 262 (1896). Workman fell from the beams of a building; the court found that the beams from which he fell were "entirely sound." It continues by saying:

In the course of the erection of a new building, it is almost impossible to keep it in an absolutely safe condition at every moment of the work. . . . Certain risks are ordinarily incident to the state of things found in the unfinished condition of every building in course of construction. . . . The master has never been held for such injuries to his servants. If he were, he would be the insurer . . . of his servant's or employee's safety. No one would dare to undertake a work requiring the employment of mechanics and laborers to assist him, if such a rule should prevail.

16. Those states having statutes specifically relating to scaffolds are:

civil liability upon those employers who erect unsafe scaffolding. They also impose mandatory scaffolding requirements for the building itself. The purpose of these acts is to protect construction workers, so that negligence on their part in doing their work might not prove fatal.[17] The common-law defenses of assumption of risk and contributory negligence are foreclosed.[18] Typically, scaffold acts deal with all aspects of scaffolds. They apply to scaffolds used in the "erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure."[19] Common provisions of an act are: (1) that an employer shall not erect a scaffold that is unsafe or improper in relation to the work to be done,[20] (2) that a suspended scaffold which is above a statutory limit in feet from the ground must have a guard rail or other protective device upon it,[21] (3) that flooring on the upper levels of a building under construction should be laid to within not less than two or three tiers below the level of the iron construction,[22] (4) that temporary planking must be

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Arizona: ARIZ. REV. STAT. § 23-803(s) (1956) [scaffold considered under hazardous work of the Employer's Liability Law]; California: CAL. LABOR CODE § 7108 (West 1955); Connecticut: CONN. GEN. STAT. ANN. § 31-46 (1958); Delaware: DEL. CODE ANN. tit. 16, § 77 (1953); Illinois: ILL. REV. STAT. ch. 48, §§ 60, 69 (1957); Indiana: IND. ANN. STAT. §§ 20-301, 20-307 (1954 Replacement); Kansas: KAN. STAT. ANN. §§ 44-109, 44-110 (1964); Kentucky: KY. REV. STAT. ANN. §§ 338.160, 338.170, 338.990(5) (1963); Louisiana: LA. REV. STAT. ANN. §§ 40:1672, 1683 (1965); Maryland: MD. ANN. CODE art. 48, §§ 111, 115 (1967); Minnesota: MINN. STAT. ANN. § 182.12 (1947); Missouri: MO. ANN. STAT. § 292.090 (1965); Montana: MONT. REV. CODES ANN. §§ 69-1401, 69-1405 (1947); Nebraska: NEB. REV. STAT. §§ 48-425, 48-434 (1963); New Jersey: N.J. STAT. ANN. § 34:5-165 (repealed) (1962); New York: N.Y. LABOR LAW §§ 240, 242 (McKinney, 1965); Oklahoma: OKLA. STAT. ANN. tit. 40, §§ 174, 177 (1951); Oregon: ORE. REV. STAT. § 654:310 (1965); Pennsylvania: PA. STAT. ANN. tit. 53, §§ 4201, 4204 (1957); Texas: TEX. PEN. CODE art. 1582 (1953).

17. Schultz v. Henry Ericsson Co., 264 Ill. 156, 164, 106 N.E. 236, 239 (1914).

18. *Id.* "The doctrines of assumed risk and of contrubtory negligence have no application to the statute in question, and furnish no defense thereunder." 264 Ill. at 493.

19. ILL. REV. STAT. ch. 48, § 60 (1957). *See* note 1 *supra.*

20. DEL. CODE ANN. tit. 16, § 7701 (1953):

> A person employing or directing another to perform labor of any kind in the erection . . . of a house, building or other structure shall not furnish or erect . . . scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable, or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.

21. PA. STAT. ANN. tit. 53, § 4202 (1957):

> If any scaffolding or staging, swung or suspended from an overhead support or supports, shall be more than ten feet from the ground or floor, the same shall be deemed unsuitable and improper . . . unless such scaffolding or staging shall, when the same is in use, have a safety-rail, rising at least thirty-four inches above the floor or main portion of such scaffolding or staging, and extending along the outside thereof the entire length of the outside thereof. . . .

22. CAL. LABOR CODE § 7107 (1955): "The erection gang on a building

laid on the tier of the iron work whenever it would not interfere with construction of the building itself,[23] (5) that provisions must be made for both inspection of the work by a predetermined official, and correction of any unsafe scaffolding,[24] and (6) that penalties will be imposed for a violation of the act.[25]

Few jurisdictions have decided the question of whether a permanent beam is to be considered a scaffold under a scaffold act.[26] However, it appears that the courts do not apply a scaffold act to a case in which an employee falls from a permanent portion of a structure and is injured.[27]

The existing statutory decisions have retained the common-law distinction between those places specifically supplied for use by employees for their labor, and those places whereon an employee must necessarily work during the constuction of a building.

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shall at all times have a planked floor below them not more than two stories distant."

23. ILL. REV. STAT. ch. 48, § 65 (1957):

> . . . If the floor beams are of iron or steel the contractors for the iron or steel work of buildings . . . shall thoroughly plank over the entire tier of iron or steel beams on which the structural iron or steel work is being erected, except such spaces as may be reasonably required for the proper construction of such iron or steel work and for the raising and lowering of materials, to be used in the construction of such buildings, or such spaces as may be designated by the plans and specifications for stairways and elevator shafts.

24. MD. ANN. CODE art. 48, § 111 (1965):

> Whenever complaint is made to the commissioner of police or to the inspector, or other persons in charge of the police force of any city . . . that the scaffolding used in the construction, altering, repairing or painting of any building within the limits of such city . . . is unsafe and dangerous to the life and limb of any person, it shall be the duty of such police commissioner . . . to immediately detail a competent police officer to inspect such scaffolding forthwith, with instructions to prohibit the further use of such scaffolding, and, if after proper examination he find the complaint well founded, to require that it be altered or reconstructed in such a manner as to render it no longer dangerous to life or limb. . . .

25. MONT. REV. CODES ANN. § 69-1405 (1947): "Any person violating any of the provisions of the foregoing sections shall be fined not less than one hundred dollars nor more than two hundred dollars for each offense. . . ."

26. 35 AM. JUR. *Master and Servant* § 195 (1967 Supp.).

27. *See* Legowski v. Moreland, 195 Ill. App. 277 (1915) (workman fell from uncovered joists of building; court held that instruction ignoring scaffold act was not error [HURD'S REV. ST. ch. 48, J.&A. para. 5368] since none of the appliances mentioned in the statute were involved in the injury); Brady v. Pennsylvania Steel Co., 134 App. Div. 372, 119 N.Y.S. 75 (1909) (plaintiff fell from deck of a bridge under construction; the court held that a "platform of a bridge in process of construction" was not within the meaning of the New York scaffold act [N.Y. LABOR LAW §§ 240, 242 (McKinney, 1965)].

A scaffold act is not applied unless the primary purpose of the place from which a workman fell was that of a scaffold.[28] In *Parizon v. Granite City Steel Co.*,[29] for example, a workman fell from the completed portions of a metal roof which he was installing. Plaintiff contended that the permanently installed portions of the roof should be considered a scaffold under the Illinois Structural Work Act.[30] The workman had to walk upon this roof while carrying roofing materials to the place where they were being attached to the framework, and he slipped and fell from the roof, sustaining injuries. The *Parizon* court in refusing to apply the act to the permanently installed roof stated:

> It is difficult to conclude that the intent or understanding of the legislature was that the language of the Act applied to a fixed permanent structure, or that such a structure, or its parts, would be a scaffold or platform within the meaning of the Act.[31]

There is authority to the contrary holding that if a permanent part of a building is being used temporarily by workmen as a support, it will fall under the coverage of a scaffold act.[32] However, this authority is distinguishable on its facts. In *Carpenter v. Burmeister*[33] a workman fell from planks which were slated to be nailed onto the roof and become a permanent part of the building. However, at the time of his fall the boards were not yet nailed to the roof and were not yet a permanent part of the structure. Until the boards were affixed they were no more than planks upon which the workmen were to walk, and their primary purpose was as a scaffold. The case, therefore, does not

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28. For common law discussion see note 14 *supra*, and accompanying text. The distinction remains under statutory discussions. *See* Welk v. Jackson Architectural Iron Works, 98 App. Div. 247, 90 N.Y.S. 541 (1904), where a workman fell from a temporary wooden beam which was to support iron beams until they were placed, and was not intended to be used as a scaffold for workmen. The dissenting opinion reads in part:

> This temporary wooden beam, conceding it to have been intended incidentally for the workmen to walk over in placing the iron beams, was no more of a scaffold than the iron beams which were to be laid upon it, and which the workmen would have to walk over more or less in the performance of the details of the labor; and it seems to be entirely clear that this beam was not designed as a platform to walk upon, but as a mere temporary support for the iron beams, with the same incidental purpose of use in walking over as any of the other timbers used in the construction of the building. The mere calling of a beam a scaffold does not make it so *unless the object for which it was primarily designed was that of a scaffold.* . . .

(dissenting opinion accepted on appeal, 184 N.Y. 519, 26 N.E. 1116 (1906)) (emphasis added).

29. 71 Ill. App. 2d 53, 218 N.E.2d 27 (1966).

30. ILL. REV. STAT. ch. 48, §§ 60, 69 (1957).

31. Parizon v. Granite City Steel Co., 71 Ill. App. 2d 53, 218 N.E.2d 27, 34 (1966).

32. Carpenter v. Burmeister, 217 Mo. 104, 273 S.W. 418 (1925) (workman fell from boards on roof); Ross v. Delaware, L.&W. R. Co., 231 N.Y. 335, 132 N.E. 108 (1921) (workman fell from boards on a tressel).

33. 216 Mo. 104, 273 S.W. 418 (1925).

state that if a permanent part of a building is used as a support, it should be considered a scaffold. It is submitted that after being nailed to the roof the primary purpose of the boards would be as a fixed structure, with the incident use of a walkway for employees, and hence would not be considered scaffolding. *Spiezio v. Commonwealth Edison*[34] definitely includes a permanent part of the building under construction within the scaffolding act. In *Spiezio* the workman fell from a vertical steel column upon which it was necessary for him to climb. The column itself was too wide for him to hold onto, and he had climbed it by using hand and toe holds molded into the steel itself. The court held that under the Illinois Scaffold Act, the permanent nature of a workman's support does not necessarily take the case outside of the Act. Saying that not every place a workman stands should be considered a scaffold, the court held that if a permanent part of a building is intended to be used, and is used temporarily, as a support for a workman, it should be considered a scaffold. Conceding that the column had toe holds specifically designed to be worked from, thus differing from a flat beam or joist, the court in *Spiezio* still seemed to overlook the precedent of considering the primary purpose of a permanent structure, and concentrated instead on the incidental purpose of support for workmen.

It thus appears that as a general rule a permanent part of a building under construction is not considered a scaffold within the meaning of the Scaffold Act. Although in some fact situations there is a departure from this general rule, a study of the *Louis* case will show that the court should have followed the general rule instead of trying to broaden the application of the Illinois Scaffold Act.

LOUIS V. BARENFANGER

In the *Louis* case the court considered two issues: (1) whether a steel beam is excluded from a scaffold act because of its permanent nature, and (2) whether an employer can be held liable for failing to supply a scaffold. Addressing itself to the issue of whether a permanent part of a building is excluded from the Scaffold Act, the *Louis* court noted that the Illinois Scaffold Act[35] nowhere excluded a permanent portion of the building from its coverage.[36] Furthermore, said the court, the legislature had not defined what shall be considered a safe scaffold because what

34. 91 Ill. App. 2d 392, 235 N.E.2d 323 (1968).
35. ILL. REV. STAT. ch. 48, §§ 60, 69 (1957).
36. Louis v. Barenfanger, 39 Ill. 2d 445, 236 N.E.2d 724, 726 (1968).

could be considered adequate and safe in one circumstance may be totally unsuited in another.[37] The court then held that a permanent beam is within the Scaffold Act, but by so holding its decision, as has been shown, is contra to existing authority.[38] In support of its conclusion the court cited examples of cases in which a permanent structure was considered a scaffold.[39] However, none of the cited cases support the court's holding on this question.[40]

It appears that by holding a permanent beam of a building to be a scaffold or support under the Scaffold Act, the *Louis* court expanded the coverage of the Act beyond the reasonable bounds of statutory interpretation. By including the beam under the Act, the court not only usurped the function of the Illinois legislature[41] through judicial expansion of the Act, but also ignored existing contrary authority, while misconstruing the distinctions already inherent in a scaffold act.

Absent an explicit statement of reasoning in the majority opinion, one may assume that the inclusion of a permanent beam within the coverage of the Act was based upon the court's inter-

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37. *Id.* at 726, quoting Schultz v. Henry Ericsson Co., 264 Ill. 156, 164, 106 N.E. 236, 239 (1914).

38. Bohannon v. Joseph T. Ryerson & Son, Inc., 72 Ill. App. 2d 397, 219 N.E.2d 627 (1966) (workman fell from struts and wire mesh while installing a false ceiling; court held that the scaffold act did not apply since the wire mesh was a part of the work, and the struts were permanent parts of the building); Parizon v. Granite City Steel Co., 71 Ill. App. 2d 53, 218 N.E.2d 27 (1966) (*See* note 29 *supra* and accompanying text).

39. Bounougias v. Republic Steel Corp., 277 F.2d 726 (7th Cir. 1960); Skinner v. United States, 209 F. Supp. 424 (E.D. Ill. 1962); Frick v. O'Hare-Chicago Corp., 70 Ill. App. 2d 313, 217 N.E.2d 552 (1966); Oldham v. Kubinski, 37 Ill. App. 2d 65, 185 N.E.2d 270 (1962).

40. The authority cited by the court does not support its decision for in none of the cited cases did the workman fall from a permanent structure; Bounougios v. Republic Steel Corp., 277 F.2d 726 (7th Cir. 1960) (fell from overhead crane which had been specifically placed so that he could stand on it while painting); Skinner v. United States, 209 F. Supp. 424 (E.D. Ill. 1962) (workman fell from ladder improperly placed against a hanger door; "ladder" is specifically enumerated as an instrument that must be properly placed within the Illinois scaffold act); Frick v. O'Hare-Chicago Corp., 70 Ill. App. 2d 303, 217 N.E.2d 552 (1966) (workman fell from plank across a concrete form, not from a permanent structure); Oldham v. Kubinski, 37 Ill. App. 2d 65, 185 N.E.2d 270 (1962) (workman fell twelve feet from a shovel extension mounted on a tractor; "hoist" is specifically listed in the statute). Also in support of its holding, the *Louis* majority quoted the Wisconsin Supreme Court in Koepp v. National Enameling and Stamping Co., 151 Wis. 302, 139 N.W. 179 (1912), as stating that the Wisconsin legislature left "little, if anything, uncovered which may be used" to support workmen under the scaffold act. However, the Wisconsin court prefaced its statement with and addressed its statement towards any "*temporary* structure made up of parts . . . used for support while doing any kind of work mentioned in the law. . . ." A temporary scaffold existed in the *Koepp* case.

Finally, *Louis* cited to 35 AM. JUR. *Master and Servant* § 195 (1967 Supp.) for support. But the cases discussed there did not involve permanent parts of a building. *See* note 35 *supra* and accompanying text.

41. Louis v. Barenfanger, 39 Ill. 2d 445, 450, 236 N.E.2d 724, 730 (1967) (dissenting opinion).

pretation of legislative intention at the time the Act was passed. An examination shows that the suspension of the safe-place rule in a construction situation, absent a statutory duty, had led to many abuses on the employer's part in relation to the safety of his men employed on the construction site. It is these abuses which were eradicated when the legislature created mandatory standards of safety that applied both to scaffolds and to the building under construction itself.

It is submitted that there is inherent in a scaffold act a legislative realization that construction workers, by necessity, at some moment in their work are working upon the steel beams. The safety standards of a scaffold act are not intended to be applied to such a situation.[42] As an example of an implied limitation to the application of a scaffold act, consider the interrelation of the sections of the Illinois Scaffold Act. Section 60 of the Act[43] states that all scaffolding must be safe. Section 63[44] states that if upon inspection a scaffold is found to be unsafe, notification must be given to the employer. He in turn must prohibit the use of the scaffold, remove it from the working area, and alter or reconstruct it until it is made safe for the use of his workmen. This procedure of removal and reconstruction is clearly incapable of being applied to a permanently installed beam. By implication the Act refers only to those contrivances specifically constructed as a place from which workmen are employed, contrivances that can be removed and reconstructed if necessary. It is contended that under a scaffold act the common law distinction is retained between those places specifically erected for support, and those places primarily designed as a permanent installation, albeit with an incidental use as a support.

The *Louis* court disregards this, and reaches a decision which, if carried to its logical conclusion, will make an employer liable to his employee under the Scaffold Act if the latter falls from

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42. *See* note 31 *supra*, and accompanying text.
43. *See* note 1 *supra*.
44. ILL. REV. STAT. ch. 48, § 63 (1957):
If, after examination, such scaffolding, platform or device or any of such parts is found to be dangerous to the life or limb of any person, the Director of Labor or such local authority shall at once notify the person responsible for its erection or maintenance of such fact, and warn him against the use, maintenance or operation thereof, and prohibit the use thereof, and require the same to be altered and reconstructed so as to avoid such danger. . . . After such notice has been so served or affixed, the person responsible therefor shall cease using and immediately remove such scaffolding, platform or other device, or parts thereof, and alter or strengthen it in such manner as to render it safe.

any steel beam upon which he is working, no matter where that beam may be or what the worker's job. It is submitted that this decision ignores the realities of construction. The policy of balancing an employer's duty with an employee's assumption of risk of injury on those portions of a building under construction not included within a scaffold act, has seemingly been discarded.

The second holding of the *Louis* court was that a failure to provide scaffolding could be the basis for a cause of action under the Illinois Act.[45] As noted earlier,[46] at common-law an employer did not have to erect scaffolding on high construction beams for his employee's safety. The *Louis* court examined the general background of statutory purpose and legislative intent surrounding the creation of the Scaffold Act.[47] It found that this situation has been changed. The court reinterpreted and expanded the Act by this holding, for it reached its conclusion in the face of contrary Illinois decisions.[48]

The objective of the Illinois Act as construed by the court was "to provide protection to workmen engaged in extrahazardous work,"[49] and the statutory purpose "was 'to prevent injuries to persons employed in this dangerous and extrahazardous occupation, so that negligence on their part in the manner of doing their work might not prove fatal.' "[50] The court explained that "the words of a statute should be construed to give effect to the legislative intention, which must be ascertained not only from the language of the entire act, but from the evil to be remedied and the object to be attained."[51]

In light of this legislative background, the court found that a failure to supply a scaffold was a basis for a cause of action under the Act. It apparently reasoned that since the legislature

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45. ILL. REV. STAT. ch. 48, §§ 60, 69 (1957).

46. *See* notes 10, 11 *supra* and accompanying text.

47. This background is based upon references to three cases: Larson v. Commonwealth Edison Co., 33 Il. 2d 316, 211 N.E.2d 247 (1965) (workman fell from scaffolding); Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 22 Ill. 2d 305, 175 N.E.2d 785 (1961) (same); Schultz v. Henry Ericsson Co., 264 Ill. 156, 106 N.E. 236 (1914) (workman fell from scaffold runway). It will be noted that a scaffold was in existence in all of these cases, and that the question of an employer's duty to erect a scaffold was not at any time in issue.

48. Morck v. Nicosia, 91 Ill. App. 2d 327, 235 N.E.2d 287 (1968) (workman fell from beams); Parizon v. Granite City Steel Co., 71 Ill. App. 2d 53, 218 N.E.2d 27 (1966) (fell from roof); Bradley v. Metropolitan Sanitary District, 56 Ill. App. 2d 482, 206 N.W.2d 276 (1965) (workman injured in excavation cave-in).

49. 236 N.E.2d at 726, citing: Schultz v. Henry Ericsson Co., 264 Ill. 156, 106 N.E. 236 (1914); Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 22 Ill. 2d 305, 175 N.E.2d 785 (1961); Larson v. Commonwealth Edison Co., 33 Ill. 2d 316, 211 N.E.2d 247 (1965).

50. 236 N.E.2d at 726, quoting Schultz v. Henry Ericsson Co., 264 Ill. 156, 164, 106 N.E. 236, 239 (1914).

51. 236 N.E.2d at 726, quoting Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 22 Ill. 2d 305, 317, 175 N.E.2d 785, 791 (1961).

intended to provide protection to structural workers by passing an act relative to scaffolding used in structural work, it must have been the legislative intention to make actionable a failure to provide a scaffold if a workman falls from any steel beam. The court stated that from "a realistic viewpoint, if the failure to provide scaffolding would not be actionable under this statute, then every person to whom the Act was directed could defeat its purpose by simply failing to provide a scaffold. . . ."[52] Furthermore, said the court, holding that a failure to erect scaffolding would not be actionable would produce the " 'absurd result . . . that a statute designed to broaden the common-law duty and to give added protection, would be construed as imposing a lesser duty than the common law.' "[53]

The *Louis* court disregarded the fact that prior cases realized and maintained the balance of duties existent in a scaffold act. It is true that an employer must erect scaffolding in certain areas of the work, for example, temporary flooring must be laid to within a certain statutory level below the iron construction.[54]

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52. 236 N.E.2d at 726.

53. *Id.*, quoting Larson v. Commonwealth Edison Co., 33 Ill. 2d 316, 325, 211 N.E.2d 247, 253 (1965):

> Even at common law retention of the right to control the work is sufficient to subject one to duty and tort responsibility, . . . and the retention of the right to control must carry with it the same duty and responsibility under the Scaffold Act. Otherwise, the absurd result would be that a statute designed to broaden the common-law duty and to give added protection, would be construed as imposing a lesser duty than the common law.

(It will be noted that the *Larson* court is deciding where the liability for an unsafe scaffold shall rest, and the question of an employer's failure to erect a scaffold was not in issue. There was a scaffold existant from which the workman fell in the facts of the *Larson* case). The *Louis* court cites to 20 A.L.R.2d 873 (1950) to support its decision that an employer must place scaffolding on the building, noting that a failure to erect scaffolding would breach an employer's duty to provide a safe place to work at common law. But the A.L.R. does not support the court, for as noted earlier (note 12 *supra*) the safe-place rule was subject to an exception in a construction situation. In addition, section 5 of the cited A.L.R. does not state that an employer must place scaffolding on beams, but reads instead:

> A general contractor in possession and control of a building is under a duty toward employees of other contractors on the job to see that joists and other supports for floors, roofs, and places temporarily to be used to stand walk or sit on, are reasonably safe to work on.

54. ILL. REV. STAT. ch. 48, § 65 (1957):

> All contractors and owners . . . where the plans and specifications require the floors to be arched between the beams thereof . . . shall complete the flooring or filling in as the building progresses, to not less than within three tiers or beams below that on which the iron work is being erected. If the plans and specifications . . . do not require filling in between the beams or floors, . . . all contractors for carpenter work in the course of construction shall

However, excluding those specific places at which scaffolding must be laid, most scaffold acts, and the Illinois Act, allow broad discretion to an employer to determine when to use a scaffold. Section 60 of the Illinois Scaffold Act,[55] for example, states that when a scaffold is "erected and constructed" it must then be safe. Section 65 of the Act[56] states that on the level of the ironwork itself, scaffolding must be placed only where it will not interfere with the construction work in progress, or the necessary supplying of such work. Thus it would seem that the legislature has stated that scaffolding need *not* be placed on certain portions of the work. It is in the employer's discretion to decide what space is reasonably needed for the construction itself, and this in turn will determine the extent of such scaffolding. A further example of the employer's discretion is section 64 of the Act,[57] relating to work on high smokestacks and the like. This section does not state when an employer *must* use a scaffold, but it states instead that *if* a scaffold is used the employer is required to have an operative subscaffolding existant.

In *Louis* the plaintiff did not fall from erected scaffolding, but from a steel beam. The court, by holding that the employee has a cause of action because the employer failed to place scaffolding on this beam, eradicated the discretion vested in the employer by a scaffold act. It appears that the *Louis* court would require an employer to place scaffolding on each and every beam positioned on the structure. This scaffolding would have to be placed, removed and placed again as the construction progressed beam by beam. By holding that a failure to provide a scaffold can be actionable in this situation, the court not only ignored existant cases, but it did not reasonably interpret the Scaffold Act. The court's analysis of the background and purpose of a scaffold act is correct, but it failed to take notice that the legislature, while protecting construction workers, also realized the necessities of modern construction, and left broad discretion in the experienced employer as to when a scaffold must be erected.

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lay the under flooring thereof or a safe temporary floor on each story as the building progresses to not less than within two stories or floors below the one to which such building has been erected.

55. *See* note 1 *supra.*

56. *See* note 23 *supra.*

57. ILL. REV. STAT. ch. 48, § 64 (1957):

That any person, firm or corporation in this State, hiring, employing, or directing another to perform labor of any kind, in the erecting, repairing, altering or painting of any water pipe, stand pipe, tank, smoke stack, chimney, tower, steeple, pole, staff, dome or cupola when the use of any scaffold, staging, swing, hammock, support, temporary platform or other similar contrivance are required or used, in the performance of such labor, shall keep and maintain at all times, while such labor is being performed, and such mechanical device is in use or operation, a safe and proper scaffold, stay, support or other suitable device, not less than sixteen (16) feet or more below such working scaffold. . . .

Conclusion

Absent a statute, the common-law rule of providing a safe place to work is not applied to a construction situation, and an employee on the beams of a building, barring the negligence of an employer or a latent defect, assumes the risk of an injury. The scaffold acts, applied to construction, eliminate many of the dangers inherent in such work by creating mandatory standards of safety to which an employer must adhere. However, even under these acts, an employer is given broad discretion in deciding when the necessities of his work require the use of a scaffold. Once this discretion is exercised and a scaffold is used, a scaffold act requires the employer to meet statutory standards. Inherent in a scaffold act is the realization that construction workers, by the very nature of their work, must sometimes walk and work upon the beams of a building. It is contended that the Act is not applicable to those beams, and that the employee is then assuming the risk of an injury.

Louis not only eradicated the employer's discretion, but also expanded the Scaffold Act to include those very beams to which the act was not intended to apply. The decision, if followed, could become a costly and time-consuming hinderance to the construction process, for it would require an employer to apply scaffolding standards to every beam positioned on the structure. It is submitted that this expansion of the Act to include the permanent beams, should be reconsidered in the light of both the realities of construction and the legislative intent already expressed in the Act.

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