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Torts—Duty to Provide Safe Equipment

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parties intended the builder to be liable for an injury which did not arise out of a defect in workmanship or material used.

Duty To Provide Safe Equipment

Section 240 (1) of the New York Labor Law provides that, "a person employing or directing another to perform . . . painting . . . of a building . . . shall furnish . . . for the performance of such labor . . . ladders . . . so constructed . . . as to give proper protection. . . ." This statute imposes an absolute duty, the breach of which renders the wrongdoer liable without regard to his care or lack of it.³¹

The plaintiff in *Klutznick v. Citron*,³² hired to paint defendant's home, was provided with a ladder having a defective rung. Because the ladder was too long, the plaintiff without defendant's permission, cut it into two parts and used the section which possessed the weakened rung, from which he fell. The majority of the Court (4-3) held that the plaintiff could not recover for he did not meet his burden³³ of establishing that the employer or director failed to provide him with a ladder which would afford proper protection. The reasoning upon which this conclusion rested was that the injury resulted from an entirely different defective ladder than the one provided by the homeowner.

The dissent cogently points out the confusion of the majority by stating that, "the fact that plaintiff cut a piece from the ladder furnished by defendant has nothing whatever to do with the case since that cutting was in no sense the cause of or related to the accident." This is so because it was the defective rung which was part of the ladder provided by the defendant, which was the cause of the injury.

The Appellate Division³⁴ had reversed a judgment in favor of the defendant because of an alleged error of the trial judge in his instruction to the jury that it could find liability under section 240 only if it found that the defendant supervised the doing of the work. Although the Court of Appeals evaded this difficult issue by confusing another, it found it could not bypass the problem completely. In passing, it stated that the plaintiff was not an employee, but an independent contractor, and that there was no evidence that the defendant directed the manner or method of painting his home but left it solely to the judgment and experience of the plaintiff. In *Koenig v. Patrick Construction*

31. *Koenig v. Patrick Construction Corp.*, 298 N.Y. 313, 83 N.E.2d 133 (1948).

32. 2 N.Y.2d 379, 161 N.Y.S.2d 26 (1957).

33. *Johnson v. Johnson*, 249 App. Div. 859, 292 N.Y.Supp. 921 (2d Dep't 1937).

34. 1 A.D.2d 828, 953, 148 N.Y.S.2d 367 (2d Dep't 1956).

Corp.,³⁵ the Court determined that the statute placed its duty upon a corporation which "hired" an independent contractor to wash the windows of a school it was constructing. One wonders whether the corporation directed the method of washing windows or left the manner to the washer's judgment and experience.

Furthermore, if we accept the Court's definition of "directing"—that is, directing the method and manner of performance—then that word adds nothing to the statute. The common definition of an employer as applied by the courts is, one who controls the means of doing a particular job as well as the end.³⁶ We have a statute placing a duty upon one who employs or upon one who directs. An employer is one who directs the means. What then does the word "direct" mean? We can give it its own significance by defining it as the procuring of another to do the work, as was suggested by the dissenters.

The decision in holding that the plaintiff removed himself from the protection of the statute by sawing the ladder in two, is in this writer's opinion, error. However, the greater danger is that the Court's dictum as to the meaning of the word direct will be applied to all future cases where the plaintiff is an independent contractor. In all fairness it should be said that there are grounds to question whether this statute is intended to be applied to private homeowners when "employing" independent contractors or whether it is restricted to those "employing" independent contractors or employees as a part of *their* business.³⁷ Are we to place this absolute duty of providing safe equipment upon a homeowner who has no ability to distribute the costs of proper protection *in favor* of an independent contractor, one ostensibly in a business, who can distribute the costs of safety through control of the price of his services? The Court was not inclined to consider whether it would apply such an evaluation but instead expressly left open for the future the question of the statute's applicability to private homeowners "hiring" independent contractors.

Recovery Of Illegal Receipts

In *Carr v. Hoy*³⁸ the plaintiff, having been convicted of a charge of violating public decency³⁹ for offering nude females as photography models, brought an action in conversion for his receipts taken by the defendant-sheriff. The complaint was dismissed on the grounds that the money taken and withheld from the

35. See note 31 *supra*.

36. See, *e.g.*, *Hexamer v. Webb*, 101 N.Y. 377, 385, 4 N.E. 755, 757 (1886).

37. *Cf. Sweeney v. Spring Products Corp.*, 257 App. Div. 104, 12 N.Y.S.2d 72 (1st Dept's 1939), *aff'd*, 282 N.Y. 685, 26 N.E.2d 814 (1940) where the court held that the "employer" of an independent contractor was not liable under the statute to an employee of the independent contractor.

38. 2 N.Y.2d 185, 158 N.Y.S.2d 572 (1957).

39. N.Y. PENAL LAW §43.