



## CONSTRUCTION DEFENSE: POST STRUCTURAL WORK ACT

By John W. Patton Jr. and Gregory G. Vacala

A great deal of confusion appears to exist relative to construction litigation since the abolition of the Structural Work Act in 1995. Although construction negligence law has existed for many years, historically, the overwhelming majority of construction litigation was pursued pursuant to the "plaintiff friendly" Structural Work Act. The Illinois Structural Work Act was passed in 1907 and remained the law until its repeal on February 14, 1995. Plaintiffs injured after 11:21 a.m. on February 14, 1995, are barred from bringing actions under the Structural Work Act.

During the "Structural Work Act Era," historically, plaintiffs filed a two-count complaint against each defendant. The first count sounded under the Structural Work Act. The second count sounded in construction negligence. In the majority of cases, the negligence count was nonsuited or dismissed at the final pretrial leaving the matter to go to the jury solely under the charge of the Structural Work Act. Juxtaposed to the traditional theory of negligence, the Illinois Structural Work Act was extremely unique. The culpability of a defendant wasn't adjudicated by its proportion of negligence, but rather by its "charge." The Act was passed as a draconian safety incentive to persons performing construction. The provisions of the Structural Work Act were enforced by focusing the conduct of persons or entities found to be "in charge of" the work as opposed to the injured worker or his conduct. The injured worker's contributory or comparative negligence was inadmissible under the Structural Work Act.

"Construction negligence" cases are treated by the same principles of law applied to traditional common law negligence (such as automobile accidents or premises liability). Under the general principles of negligence, the plaintiff must prove that the defendant owed the plaintiff a duty, the defendant breached the duty, the plaintiff sustained injuries, and a temporal relationship (proximate cause) exists between the action or inaction of the defendant and the plaintiff's injury. The plaintiff's contributory or comparative negligence is admissible to decrease his recovery by the percentage of his fault.

Generally, construction negligence is created in one of two manners. First, the retention of control over the task, job or safety. Second, the maintenance or knowledge of a "dangerous premises." Negligence created as a result of "control" in the construction arena is often referred to as Section 414 of the Restatement of Torts. Commentators have often said that Section 414 is the "common law corollary" to the Structural Work Act. Premises liability is often referred to as Section 343 negligence. There has been very little activity over the past century in Section 414, since the essence of the Structural Work Act duplicated Section 414 without any potential for comparative negligence. The abolition of the Structural Work Act has instilled a new vigor in defining and refining Section 414. This article will address Section 414 and also premises liability under Section 343.

Most accidents involve a subcontractor's employee who cannot sue his employer under the common law; and accordingly, pursues his remedy against the owner, general contractor and/or co-subcontractor. Both the Structural Work Act and common law negligence confer employer immunity and bar an employee's suit against his employer. As in the majority of jurisdictions, Illinois employers have enjoyed statutory immunity from most direct employees actions since the passage of the Illinois Worker's Compensation Act in 1913. Since that time, the employer was able to limit its exposure in work-related accidents involving its own employees to those benefits awarded by the Illinois Industrial Commission. The present relevant provision of the Worker's Compensation Act, 820 ILCS 305/5, is interpreted to be the exclusive remedy by an employee against an employer, barring most common law suits. From 1913 until 1978, not only did the employer enjoy immunity from direct suit, but also a shield from third party contribution actions. The hiatus from all common law liability enjoyed by the employer came to an abrupt end with the 1978 Illinois Supreme Court decision of *Skinner v. Reed-Prentice*, 70 Ill.2d 1, 374 N.E.2d 437, 15 Ill.Dec. 829 (Ill. 1978). This seminal ruling was later codified in the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01 et seq. Accordingly, the third party tortfeasor (usually the owner or general contractor) sued by a plaintiff can third-party the plaintiff's employer for contribution.

Most construction projects involve contractual agreements between the owner, the general contractor and a plethora of subcontractors. Generically, the relationships of the general contractor to owner and subcontractor to general is one of "independent contractor." The Illinois Supreme Court has defined independent contractor as follows: "[A]n independent contractor is one who renders service to another in the course of an independent occupation, representing the will of his employer only as the result of his work and not as to the means by which it is accomplished." *Bristol and Gale Co. v. Industrial Commission*, 292 Ill. 16, 126 N.E. 599.

As a general rule, one who employs an independent contractor is not liable for the acts or omissions of the latter. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill.2d 19, 276 N.E.2d 336 (1971); *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 241 Ill.Dec. 313, 719 N.E.2d 174 (1999). The general rule has exceptions, most notably Sections 414 and 343 of the Restatement of Torts.

The common law negligence corollary to the Structural Work Act is found in Section 414 of the Restatement (Second) of Torts. Under this exception, one who employs an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others that is caused by the employer's failure to exercise his control with reasonable care. Restatement (Second) of Torts § 414 (1965). Section 414 was first recognized by the Illinois Supreme Court as an expression of law in Illinois in *Larson v. Commonwealth Edison Co.*, 33 Ill.2d 316, 325, 211 N.E.2d 247 (1965). Section 414 provides as follows: Section 414 "Negligence in Exercising Control Retained by Employer. One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414, at 387 (1965).

### **Section 414 (Comment a)**

"If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a matter likely to be dangerous to himself or others. Such

a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." Restatement (Second) of Torts § 414, Comment a, at 387 (1965).

### **Section 414 (Comment b)**

"The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so." Restatement (Second) of Torts § 414, Comment b, at 387-99 (1965).

### **Section 414 (Comment c)**

"In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts § 414, Comment c, at 388 (1965).

It must be pointed out that Section 414 is a negligence restatement. Accordingly, to state a cause of action for common law negligence under Section 414, the plaintiff must allege that the defendant owed a duty to the plaintiff, the defendant breached that duty, and the plaintiff suffered a compensable injury proximately caused by the defendant's breach. *Rogers v. West Construction Co.*, 252 Ill.App.3d 103, 105, 191 Ill.Dec. 209, 623 N.E.2d 799 (1993).

Section 414 is an exception to the general rule that the employer of an independent contractor is not liable for the acts or omissions of the independent contractor. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill.2d 19, 21, 276 N.E.2d 336 (1971). Applying Section 414, an employer who retains control of any part of the work will be liable for injuries resulting from his failure to exercise his right of control with reasonable care. *Larson v. Commonwealth Edison Co.*, 33 Ill.2d 316, 325, 211 N.E.2d 247 (1965); *Claudy v. City of Sycamore*, 170 Ill.App.3d 990, 995, 120 Ill.Dec. 812, 524 N.E.2d 994 (1988). The key question focuses upon (ironically, as with the Structural Work Act) control or retained control. The retention of control is the assumption of a duty. In a construction negligence action, the court must determine whether a contractor assumed a duty by retaining such control over the work of the subcontractors that the contractor was required to supervise and its failure to supervise in any of the ways ascribed in the complaint was a proximate cause of the injury. *Weber v. Northern Illinois Gas Co.*, 10 Ill.App.3d 625, 641, 295 N.E.2d 41 (1973).

Under Section 414 (comment a) a defendant retains control by: "The power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others." Comment b states that Section 414 is usually applied to a defendant who "fails to prevent the subcontractors from doing even the details of work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know the subcontractor's work is being so done and has opportunity to prevent it by exercising the power of control which he has retained in himself."

Our courts have identified a number of factors to be considered in determining whether the totality of the circumstances establishes that a party had control of the work of the construction site. The factors cited include: supervision and control of the work performed; a retention of the right to supervise and control it; constant participation in ongoing activities at the construction site; supervision and coordination of the subcontractor; responsibility for safety precautions at job sites; authority to issue change orders; authority to stop the work; ownership of equipment used at the job site; familiarity with construction practices; and the ability to correct unsafe or improper work habits and equipment deficiencies. *Lyle v. Sester*, 103 Ill.App.3d 208, 430 N.E.2d 699 (1981); *Hausam v. Victor Gruen*, 86 Ill.App.3d 1145, 408 N.E.2d 1051 (1980). More than one person may have "control" over a contractor's work. *Weber v. Northern Illinois Gas*, 10 Ill.App.3d 625, 295 N.E.2d 41 (1973). To understand the courts' application of Section 414, let's look at some cases and typical factors where liability was found or not found, as follows: a. *Bokodi v. Foster Wheeler* (3/31/2000), 312 Ill.App.3d 1051, 728 N.E.2d 726

### **Liability/Control Found**

A general contractor was found to owe a duty of care to a subcontractor's employee who injured his back using a manual lifting device. The court found the general's control based upon the following factors:

1. General contractor established its own safety program.
2. General contractor employed full time safety manager to hold weekly meetings.
3. Full time safety manager walked job site to check for safety compliance.
4. All employees were empowered to halt subcontractors if they witnessed safety violations
5. General contractor instructed subcontractors' employees as to:
  - a.) Personal protective equipment;
  - b.) Work clothes;
  - c.) Personal grooming.
6. General contractor told subcontractors:
  - a.) Where to erect barricades;
  - b.) Where to install warning lights;
  - c.) When to notify adjacent landowners.(*Fris v. Personal Products* (1994), 255 Ill.App.3d 916, 627 N.E.2d 1265)

### **No Liability**

No liability was found by the general as to subcontractor's employee, injured while lifting a pallet. The court found the general not liable in negligence because of the following factors:

1. Employer or general contractor controls ends; independent contractor controls means by which ends achieved.
2. The principle in paragraph 1 holds true even if:
  - a.) Owner or general contractor retains the right to inspect;

- b.) Owner or general contractor orders changes to specifications and plans;
  - c.) Owner or general contractor ensures safety precautions observed.
3. Owner or general contractor does not control incidental aspects.
  4. Independent contractor controls:
    - a.) Means of completing work;
    - b.) Methods of completing work;
    - c.) Techniques of completing work.(Rangel v. Brookhaven (1999), 307 Ill.App.3d 835, 719 N.E.2d 174)

### **No Liability**

The general contractor was not liable for the subcontractor's employee's fall from a scaffold where the subcontractor supplied the scaffold and, hours before the fall, plaintiff was instructed by his employer in an unsafe work practice requiring him to step on the scaffold's brace. The court found the general contractor not liable here because:

1. General contractor had only right of supervision.
2. General contractor had no right to direct installation of drywall.
3. General contractor had no right to direct scaffold erection.
4. General contractor gave no direction of operative details.
5. There was no notice to general contractor of hazardous method employed.
6. The exclusive charge and control to independent contractor of:
  - a.) Equipment;
  - b.) Means;
  - c.) Methods;
  - d.) Personnel.(Sobczak v. Flaska (1998), 302 Ill.App.3d 916, 706 N.E.2d 990)

### **Liability/Control Found**

The owner acting as the general contractor was held liable for plaintiff's injuries based on the following:

1. Employee is under direct supervision of property owner.
2. Owner is listed as general contractor on building permit.
  - a. Owner told employee:
    - a) What to do;
    - b) When to do it;
    - c) How to do it.(Rogers v. West (1993), 252 Ill.App.3d 103, 623 N.E.2d 799)

### **No Liability**

1. General contractor checking daily progress.
  2. General contractor not supervising manner in which work is done.
- (Stevri v. Prudential (1996), 282 Ill.App.3d 753, 668 N.E.2d 1066)

### **No Liability**

1. Delegation of details to independent contractor.

In addition to control of work, a landowner or general contractor may be found liable as a possessor of land (premises liability) pursuant to Section 343 of the Restatement of Torts (Second) as adopted by the Illinois Supreme Court in *Genaust v. Illinois Power Company*, 62 Ill.2d 456, 343 N.E.2d 465 (1976). The Restatement (Second) of Torts, Section 343, states the settled law regarding the liability of possessors of land to invitees. *Geraghty v. Burr Oak Lanes, Inc.* (1955), 5 Ill.2d 153, 157; *Blue v. St. Clair Country Club* (1955), 7 Ill.2d 359, 363; *Nowick v. Union Starch and Refining Co.* (1973), 54 Ill. 2d 93; *Fancil v. Q.S.E. Foods, Inc.* (1975), 60 Ill.2d 552, 557. It provides: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he  
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and  
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and  
(c) fails to exercise reasonable care to protect them against danger."

Recent cases have stressed the latter part of comment f, which states:

"Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position, the advantages of doing so would outweigh the apparent risk." *Cihon v. Cargill*, 293 Ill.App.3d 1055, 689 N.E.2d 153 (1997)."

Overall, When presented with a question of a duty of care owed by an owner of a premises to an independent contractor employed by the owner, Section 414 of the Restatement of Torts should be read in harmony with the Premises Liability Act and Sections 343 and 343(a) of the Restatement of Torts. *Cihon v. Cargill*, 293 Ill.App.3d 1055, 689 N.E.2d 153 (1997); *Fancher v. Central Illinois Public Service Co.*, 297 Ill.App.3d 530, 664 N.E.2d 692.

Unlike the Illinois Structural Work Act, a plaintiff's comparative negligence is admissible as a matter of law in construction negligence cases. The plaintiff's contact associated with known risks and hazards can be introduced into evidence. The Appellate Court first recognized the rule of comparative negligence in construction cases under Section 414 in the case of *Varilek v. Mitchell Engineering Co.*, 558 N.E.2d at 369. The principle has also been used in construction negligence cases under 343(a) of the Restatement of Torts concerning the natural accumulation of ice and snow and the absence of any duty by the defendant relative to same. *Jakubiec v. City Services Co.*, 844 F.2d 470, 7th Circuit 1998. Accordingly, in the defense of any construction negligence claim, a substantial effort must be initiated to develop and present evidence of the plaintiff's comparative or contributory negligence.

The abolition of the Structural Work Act has altered construction accident practice and procedure. The focus has shifted to negligence under Sections 414 and 343. Many of the control/charge factors of the Structural Work Act overlap Sections 414 and 343. Although the owner/contractor will gain the advantage of employing comparative negligence as a defense, it appears that the common law corollary of the Structural Work Act, Section 414 of the Restatement of Torts, will enable the plaintiff to pursue liability under the common law where the owner or general contractor retains control of means, methods or safety practices. However, we will gladly accept the availability of comparative fault with the 50% rule and the repeal of the Structural Work Act.

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