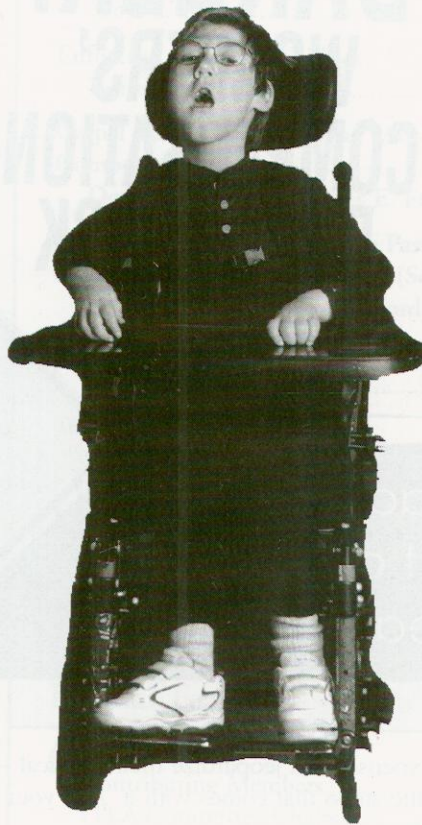


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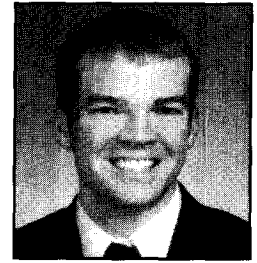
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Curt N. Rodin

Construction Negligence: The Past, Present and Future Application of Section 414 of the Restatement (Second) Torts in Illinois



Jeffrey S. Jordan

by Curt N. Rodin and Jeffrey S. Jordan

Unsafe working conditions and dangerous work practices cause injuries to individuals working on construction sites in Illinois with alarming frequency.¹ The enactment of the Structural Work Act (hereinafter the "Act") in 1907 provided a statutory cause of action to individuals who suffered injuries in a construction setting.² In 1965, the Illinois Supreme Court held that Section 414 of the Restatement (Second) of Torts (hereinafter "Section 414") existed alongside the Act as a common law cause of action for individuals who suffered construction-related injuries.³ Despite the coexistence of the Act and Section 414, most construction related injury lawsuits filed during the twentieth century were brought under the Act.⁴ However, due to the repeal of the Act in 1995, Section 414 has emerged as the preeminent cause of action to litigate construction related injuries.⁵ Although individuals who suffer construction-related injuries in Illinois may also bring claims based on the theories of premises liability⁶ and direct negligence,⁷ this article focuses on the cause of action that promises to be the workhorse of construction related injury litigation: Section 414.

The purpose of this article is to acquaint attorneys with Section 414. To accomplish this goal, the balance of this article is divided into four sections: the first section provides a brief history of construction related injury litigation in Illinois; the second sec-

tion of this article discusses the early application of Section 414 by Illinois courts; the third section discusses the most recent Illinois cases dealing with Section 414; and the fourth section attempts to predict what the future holds for Section 414 in Illinois. This article will not attempt, nor is it intended, to be an exhaustive survey of this area of the law. Rather, this article is a discussion of the general principles and major cases that have shaped this area of trial practice.

I. The History of Construction Related Injury Litigation In Illinois

A. The Common Law

At the turn of the twentieth century, employers or persons in charge of construction sites had a common law duty to exercise ordinary and reasonable care to keep individuals working on the sites free from injury.⁸ However, the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule made it nearly impossible for individuals who suffered injuries while working on construction sites to recover damages from persons in charge of the work.⁹ By shielding themselves with these defenses, persons in charge of construction sites often unjustly escaped liability when a claimant's own conduct contributed to cause his or her injuries despite the defendant's failure to correct unsafe work conditions and dangerous work practices.¹⁰ Absent the threat of le-

gal liability, employers had little incentive to rectify unsafe working conditions or ensure workers avoided dangerous work practices.¹¹

B. The Structural Work Act

In an effort to decrease the frequency of injuries occurring on construction sites and increase the availability of adequate compensation for the workers who suffered injuries on construction sites, the Illinois legislature enacted the Structural Work Act ("Act"), commonly known as the Scaffold Act, in 1907.¹² The Act removed the possibility of the previously mentioned unjust result by determining guilt based solely on the defendant's culpability without regard to the plaintiff's conduct.¹³ A violation of the Act occurred when a dangerous condition on a construction site caused injury to a worker engaged in extra-hazardous work and the person having charge of the work either knew or should have known that the dangerous condition existed.¹⁴ The Act strongly encouraged persons in charge of construction to rectify unsafe working conditions and ensure workers avoided dangerous work practices because violators of the Act were subject to not only civil suits, but also to criminal penalties.¹⁵

C. The Workers' Compensation Act

In 1911, just four years after enacting the Structural Work Act, the



Illinois legislature passed the Workmen's Compensation Act.¹⁶ The Workmen's Compensation Act provided employees injured in the course and scope of their employment with a cause of action against their employers without regard to fault.¹⁷ However, a provision in the Workmen's Compensation Act barred suits against third-party tortfeasors when injured employees brought actions against their employers.¹⁸ This provision stalled the development of law under the Structural Work Act because injured workers could sue only their employers who were often not the person having charge of the claimant's work.¹⁹ In 1952, the Illinois Supreme Court invalidated the provision in the Workers' Compensation Act that barred third party actions because the provision violated both the Illinois Constitution and the United States Constitution.²⁰ The removal of the bar to third-party actions reinvigorated the Structural Work Act, increasing the number of construction related injury claims brought against persons having charge of the work.²¹

D. The Illinois Supreme Court's Adoption of Section 414

In *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965), the Illinois Supreme Court adopted Section 414 and all of its comments.²² Section 414 provides as follows:

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.

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 manner likely to be danger-

ous 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 the 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.

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

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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.

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.²³

The *Larson* court held that Section 414 imposes a duty on contractors who **retain** a right to control any part of a subcontractor's work to exercise that control with reasonable care.²⁴ A contractor's **exercise** of its right to control a subcontractor's work represents a mere portion of the analysis required under Section 414.²⁵ However, the paramount inquiry is whether the defendant **retained** the right to control a subcontractor's work.²⁶ Unfortunately for plaintiffs, the common law defenses that attack a plaintiff's own conduct, which were inapplicable under the statutory cause of action provided by the Act, apply with full force under Section 414 because it is a common law cause of action.²⁷

Although referred to as a "construction negligence claim," a cause of action based on Section 414 is grounded in ordinary common law negligence principles.²⁸ Therefore, to prevail on a claim under Section 414, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty; (2) that the defendant breached that duty; and (3) that the plaintiff's injury was proximately caused by the breach.²⁹ The existence of a duty is a question of law.³⁰ As will be demonstrated by the cases discussed below, the issue of whether a defendant incurred a duty under Section 414 is the most frequently contested issue in cases brought pursuant to section 414.

E. Interpretations of Section 414 Before Repeal of the Structural Work Act

The focus of Section 414 before the repeal of the Act was on whether the defendant retained the right to control a sufficient amount of the plaintiff's work to incur a duty. Prior to the repeal of the Act, the most instructive applications of Section 414 occurred in *Weber v. Northern Illinois Gas Co.*, 10 Ill. App. 3d 625, 295 N.E.2d 41 (1st Dist. 1973) and *Pasko v. Commonwealth Edison Co.*, 14 Ill. App. 3d 481, 302 N.E.2d 642 (1st Dist. 1973).³¹ In *Weber*, the court held that Section 414 applies to any persons who entrust work to an independent contractor, including property owners, general contractors, architects, or other subcontractors.³² The *Weber* court also reaffirmed the holding of *Larson*, that Section 414 imposes a duty on a person who hires an independent contractor to perform work, but who retains control over any of that work, to exercise that control with reasonable care.³³ In addition, the *Weber* court held that any person who retains the required amount of control owes the hired independent contractor a non-del-



egable duty to provide the contractor with a safe place to work.³⁴ In *Pasko*, the court held that Section 414 imposes a duty to exercise reasonable care on a person who hires an independent contractor, but who retains the right to forbid unsafe work practices.³⁵ The *Pasko* court explained that the right to implement or enforce safety procedures on a construction site satisfies the level of control required to trigger a duty of care under Section 414.³⁶

F. Repeal of the Structural Work Act

The political makeup in Springfield changed dramatically following the 1994 elections.³⁷ The first action of the newly elected legislature was to repeal the Structural Work Act.³⁸ Governor Jim Edgar signed the repeal into law, making repeal of the Act effective on February 14, 1995.³⁹

II. Early Application of Section 414 Following Repeal of the Structural Work Act

The repeal of the Structural Work Act catapulted Section 414 into the forefront of construction related injury litigation.⁴⁰ After repeal of the Act, the focus of Section 414 analysis remained whether the defendant retained a right to control a sufficient amount of the plaintiff's work thereby establishing a duty.⁴¹ Additionally, shortly following repeal of the Act, Illinois courts generally agreed that the right to stop a plaintiff's work for safety reasons qualified as control over the plaintiff's work for purposes of Section 414.⁴² Therefore, retention of the right to stop the plaintiff's work for safety reasons triggered a duty under Section 414.⁴³

Following repeal of the Act, the Illinois Appellate Court had the opportunity to decide several cases involving Section 414. These cases included:

Rangel v. Brookhaven Constructors, Inc., 307 Ill. App. 3d 835, 719 N.E.2d 174 (1st Dist. 1999); *Brooks v. Midwest Grain Products of Illinois, Inc.*, 311 Ill. App. 3d 871, 726 N.E.2d 153 (3d Dist. 2000); and *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 726 (1st Dist. 2000); and *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 726 N.E.2d 1171 (4th Dist. 2000). *Rangel* and *Hutchcraft* provide examples of courts holding that the defendants retained an insufficient right of control to impose a duty under Section 414.⁴⁴ However, in *Brooks* and *Bokodi*, the courts found that the defendants retained a sufficient right to control to impose a duty pursuant to Section 414.⁴⁵

A. Cases Finding Defendants Owed No Duty to Plaintiffs under Section 414

Rangel involved a defendant general contractor who entrusted work to a subcontractor, plaintiff's employer.⁴⁶ The contract between the defendant and plaintiff's employer provided

that the defendant "shall have the right to exercise complete supervision and control over the work to be done by the subcontractor but such supervision and control shall not in any way limit the obligations of the subcontractor."⁴⁷ The plaintiff filed suit to recover compensation for injuries he suffered when a brace on a scaffold collapsed, causing him to plummet ten feet to the ground and sustain severe injuries. However, the *Rangel* court held that the defendant did not owe a duty to the plaintiff under Section 414 because the defendant did not retain the right to control the "incidental aspects" or "operative details" of the plaintiff's work.⁴⁸ Furthermore, the *Rangel* court supported its holding by pointing out that even if the defendant retained a right to control the "incidental aspects" or "operative details" of the plaintiff's work, the defendant never actually exercised such control.⁴⁹

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In *Hutchcraft*, a defendant property owner entrusted work to an independent contractor, the plaintiff's employer.⁵⁰ The plaintiff filed an action to recover compensation for severe injuries he suffered from an electric shock he received while attempting to lift a large piece of tin in the defendant's basement. The electric shock occurred because the protective insulation covering a live electrical lead on a nearby welding unit had been destroyed, allowing electrical current to travel into the piece of tin the plaintiff attempted to lift. The defendant retained the right to coordinate the plaintiff's work, the right to stop or change the plaintiff's work, the ability to inspect the plaintiff's work, and the right to enforce safety regulations. However, the *Hutchcraft* court held that these rights retained by the property owner did not amount to a sufficient amount of control over the plaintiff's work to trigger a duty under Section 414.

B. Cases Finding Defendants Owed a Duty to Plaintiffs under Section 414

Brooks involved a defendant property owner who hired an independent contractor, plaintiff's employer, to perform work on its premises.⁵¹ The plaintiff filed a lawsuit to recover compensation for injuries he incurred when he fell twenty feet to the ground from a platform on which he was performing ironwork without a safety harness. The defendant promulgated a set of safety rules applicable to the plaintiff and assigned a project engineer to remain on the site at all times to oversee all work performed on its property. Additionally, the defendant retained the rights to stop any work for failure to follow its safety rules. The *Brooks* court held that the defendant owed the plaintiff a duty pursuant to Section

414 because of the amount of control defendant retained over plaintiff's work. The court supported its decision by pointing out that a defendant need not actually exercise its retained rights of control to incur a duty under Section 414. To the contrary, the *Brooks* court stated "an employer need only retain the control of any part of the work in order to be subject to liability for a failure to exercise his control with reasonable care."⁵²

In *Bokodi*, the defendant was a general contractor who hired subcontractors, including the plaintiff's employer, to perform work.⁵³ The plaintiff filed suit to recover compensation for back injuries he sustained while lifting a piece of steel with a rope and pulley system. The defendant acted as the superintendent of the entire project and retained extensive rights to supervision subcontractors' work. Additionally, the defendant *Bokodi* discussed safety matters in meetings with subcontractors and was responsible for the overall construction schedule and coordination of subcontractors' work. Moreover, the defendant retained the authority to stop any subcontractor's work for safety reasons and to prohibit the resumption of work until the subcontractor rectified the safety concern. The *Bokodi* court held that the defendant's retention of the right to control safety on the construction site triggered a duty to exercise that control with reasonable care pursuant to Section 414.

II. Recent Application of Section 414

A. Illinois Pattern Jury Instructions

Reconciling the *Rangel* and *Hutchcraft* decisions with the *Brooks* and *Bokodi* decisions is a difficult, if not impossible, task. In an effort to resolve the inconsistent application of Section 414 as exemplified by the above-mentioned

cases, the Illinois Supreme Court Committee on Pattern Jury Instructions in Civil Cases drafted several jury instructions regarding construction negligence to provide assistance to the courts.

I.P.I. No. 55.01 provides:

Construction Negligence-Work Entrusted to Another

A[n] [owner] [contractor] [other] who entrusts work to a [subcontractor] [contractor] [other] can be liable for injuries resulting from the work if the [owner] [contractor] [other] retained some control over the safety of the work and the injuries were proximately caused by the [owner's] [contractor's] [other's] failure to exercise that control with ordinary care.⁵⁴

I.P.I. No. 55.02 provides:

Construction Negligence-Duty

A party who retained some control over the safety of the work has a duty to exercise that control with ordinary care.⁵⁵

I.P.I. No. 55.03 is too lengthy of an instruction to lay out here in its entirety. Generally, I.P.I. No. 55.03 combines an "issues instruction" with a "burden of proof instruction" and sets out with specificity the burdens each party bears at trial.⁵⁶

I.P.I. No. 55.04 states:

Construction Negligence-More Than One Person Having Control

One or more persons may have some control over the safety of the work. Which person or persons had some control over the safety of the work under the particular facts of this case is for you to decide.⁵⁷

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Although these jury instructions were designed to alleviate the confusion in applying Section 414 and provide for a uniform, or at least consistent, application of Section 414, the three following cases demonstrate that the confusion remains.⁵⁸

B. *Shaughnessy v. Skender Const. Co.*⁵⁹

Shaughnessy involved a general contractor who hired a subcontractor to perform work on a construction project. That subcontractor then hired another subcontractor, the plaintiff's employer, to perform some of the work it contracted to perform for the general contractor. The plaintiff filed an action against the general contractor and the original subcontractor to recover compensation for severe injuries he suffered when a board on which he was standing broke, causing him to fall to the ground below. The *Shaughnessy* court framed the issue in the case as whether the defendants *exerted* sufficient control over the plaintiff's work to incur a duty under Section 414. The *Shaughnessy* court held that although the defendants retained a "general right to stop, start and inspect the progress of the work," the defendants did not incur a duty under Section 414 because they did not actually *exercise* their control by instructing the plaintiff how to perform his work.⁶⁰

C. *Moss v. Rowe Const. Co.*⁶¹

Moss involved an Illinois Department of Transportation ("IDOT") construction project to improve a state highway. IDOT hired a general contractor to superintend and oversee the project. The general contractor then hired a subcontractor, the plaintiff's employer, to install traffic control devices along the highway. The administrator of the plaintiff's estate brought an action against the general contractor after the plaintiff was struck and killed by the boom of a truck-operated derrick while work-

ing on the project. The *Moss* court framed the issue it was deciding under Section 414 as follows:

Did defendant retain some degree of duty to control safety on the project? Further, if defendant did retain that duty to control safety, did defendant negligently exercise or fail to exercise that duty to control safety?⁶²

Additionally, the *Moss* court rejected the analysis of Section 414 in *Rangel*, *Hutchcraft*, and *Shaughnessy*, by stating "[t]he issue is not control of the 'means and methods' of performing the task, but rather who contractually and/or physically has the duty to control safety of the project."⁶³

Furthermore, the *Moss* court placed substantial emphasis on the fact that a clause in the contract between the defendant and IDOT granted defendant the right to "control safety on the project."⁶⁴ Therefore, the *Moss* court found the defendant retained the right to control a sufficient degree of the plaintiff's work to incur a duty under Section 414. The *Moss* court also reinforced the well-established rule that contractual obligations can trigger a duty under Section 414, regardless of whether the defendant actually exercises the contractual obligations.

D. *Martens v. MCL Const. Corp.*⁶⁵

Martens involved a construction manager that hired a subcontractor to perform ironwork on a construction project. The subcontractor then hired another subcontractor, plaintiff's employer, to perform a portion of the ironwork. The plaintiff sued the construction manager and the original subcontractor to recover compensation for injuries he sustained when he fell from an iron joist while working without a safety harness. The general contractor implemented a safety program, "which entailed citing contractors for rule and regulation violations, maintaining reasonable safeguards, and designating a safety director whose

duty was to prevent accidents."⁶⁶ Despite the defendant general contractor's authority to control the safety on the project, the *Martens* court held that the defendants did not retain a sufficient amount of control over plaintiff's work to incur a duty under Section 414. The court rejected the approach taken by the *Moss* court, which imposed a duty where the defendant retained the right to control safety on a project. Instead, the *Martens* court followed *Shaughnessy*, which imposes a duty only if the defendant retained control of the specific means and methods of the independent contractor's work.

E. Conflict between the First and Fourth Districts of the Appellate Court

Similar to the considerable difficulties experienced by the drafters of the Illinois Pattern Jury Instructions in attempting to reconcile decisions like *Rangel* and *Hutchcraft* with decisions such as *Brooks* and *Bokodi*, the conflicting decisions in *Shaughnessy*, *Moss*, and *Martens* create even more confusion.⁶⁷ The First and Fourth Districts of the Illinois Appellate Court have made this confusion even more pronounced by openly criticizing and accusing the other court of misapplying Section 414.⁶⁸ In *Moss*, the Fourth District found that the First District improperly interpreted and applied Section 414 in *Shaughnessy*.⁶⁹ In *Martens*, the First District responded to the Fourth District's criticisms in *Moss* by reaffirming the righteousness of *Shaughnessy* and criticizing the Fourth District's reading of *Shaughnessy*.⁷⁰

Resolution of this marked disagreement will most likely require intervention by the Illinois Supreme Court. The Illinois Supreme Court had two recent opportunities to resolve the blatant inconsistency and disagreement when the defendant from *Moss* and the plaintiff in *Martens*



each filed Petitions for Leave to Appeal. Unfortunately, the Supreme Court denied both Petitions.

IV. The Future Application of Section 414 In Illinois

A. Potential Guidance from the Illinois Supreme Court

The conflicting interpretations of Section 414 performed by the First District Appellate Court in *Shaughnessy* and *Martens* and the Fourth District Appellate Court in *Moss* demonstrate the need for guidance from the Illinois Supreme Court. Hopefully, the Supreme Court will soon have the opportunity to clear up the confusion surrounding Section 414.

The Illinois Supreme Court has not discussed Section 414 since it first adopted the section in its 1965 decision, *Larson v. Commonwealth Edison Co.*⁷¹ Consistent with its decision in *Larson*, the Supreme Court should define the degree of control a defendant must retain to trigger a duty under Section 414 like it defined the "having charge of the work" phrase in the Act. In *Larson*, the Supreme Court explained that the "having charge of the work" phrase escaped precise definition; instead, it declared the phrase "was a generic term of broad import."⁷² Likewise, the Supreme Court should construe the amount of control required under Section 414 as a generic term of broad import since both the Act and Section 414 shared the purposes of making construction sites safer and providing remedies to individuals who suffer injuries on construction sites.⁷³

Additionally, the Supreme Court should find that the *Moss* court properly framed the issue in a Section 414 case as whether the defendant retained the right to control a sufficient degree of the plaintiff's work to incur a duty to exercise that control with reasonable care, regardless of whether the defendant actually exercised its right of control. Also con-

sistent with *Moss*, the Supreme Court should hold that when a defendant retains the right to control the safety of a construction project, the defendant incurs a duty under Section 414 to exercise that control with reasonable care. Such an interpretation is consistent with the text of Section 414 and the majority of cases interpreting and applying Section 414.

The Supreme Court should also clarify this area of law by examining the accuracy of the Illinois Pattern Jury Instructions on construction negligence. This would help remove any disagreement between lower courts as to what is a sufficient amount of retained control to impose a duty pursuant to Section 414. The jury instructions on construction negligence resulted from the substantial consideration of members of the Committee. Furthermore, although the Supreme Court approved the construction negligence instructions for publication, this alone does not demonstrate the Supreme Court's approval of the instructions. Consequently, examination of the construc-

tion negligence instructions by the Supreme Court would provide a valuable guide to lower courts analyzing claims brought under Section 414.

The Supreme Court could provide even more guidance to lower courts by directing them to consider several factors to determine whether defendants retained sufficient control over an independent contractor's work to incur a duty under Section 414. These factors, drawn from several decisions of the Illinois Appellate Courts, include: (1) the right to stop work for safety reasons; (2) the authority to implement safety rules/procedures; (3) the employment of a safety consultant who is consistently present on the job site; (4) the consistent supervision of the work; (5) the consistent direction of the work; (6) the consistent coordination of the work; (7) the responsibility for ensuring compliance with safety precautions at the job site; (8) the authority to issue change orders; (9) the holding of meetings in which safety issues

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are discussed; (10) the ownership of the equipment used at the job site; and (11) the authority to order removal of unsafe equipment.⁷⁴ The above-mentioned factors would provide courts with a concrete framework from which to analyze whether a defendant who hired an independent contractor retained a sufficient right to control that independent contractor's work to trigger a duty under Section 414.

B. Reenactment of the Structural Work Act

The Illinois legislature has made several unsuccessful attempts to resurrect the Structural Work Act since its repeal in 1995.⁷⁵ However, the recently changed political makeup in Springfield has generated renewed hope for reenactment of the Act.⁷⁶ House Bill 158, which was entitled the Structural Work Act of 2001, was passed by the House and referred to the Senate, but its status as of January 7, 2003, was "session sine die."⁷⁷ Even if the Structural Work Act is reenacted, guidance from the Supreme Court regarding the application of Section 414 remains necessary because the Act and Section 414 will once again coexist as they did from 1965 through 1995.

Conclusion

Clearly, the application of Section 414 by Illinois courts has resulted in several inconsistent Illinois Appellate Court decisions. This article does a better job of pointing out these inconsistencies than it does of suggesting meaningful ways to resolve them. However, the inconsistent opinions and the difficulties experienced by both courts and practitioners in dealing with Section 414 and construction negligence in general, demonstrates the burgeoning nature of this

area of law. If nothing else, this author hopes that readers of this article have gained at least a basic understanding of the intricacies and pitfalls of construction related injury litigation.

ENDNOTES

¹ See Peter Puchalski, "Illinois Construction Negligence, Post-Structural Work Act: The Need for a Clear Legislative Mandate," 36 J. Marshall L. Rev. 531, 531-32 (Winter 2003) (discussing the high incidence of injuries that occur on construction sites in Illinois).

² 740 ILCS 150/1-9 (1994) repealed by Ill. Pub. Act 89-2, § 5 (1995).

³ *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 325, 211 N.E.2d 247 (1965).

⁴ See *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 1057, 728 N.E.2d 726 (1st Dist. 2000) (stating "[f]or most of the latter half of this century, liability attending construction-related injuries in Illinois was analyzed under the terms of the Structural Work Act").

⁵ See Bruce M. Kohen and Darius H. Bozorgi, "Construction Negligence: Out from the Shadow of the Structural Work Act," 87 Ill. B. J. 34, 34 (January 1999) (arguing that Section 414 "is the strongest theory under which to pursue a construction negligence case").

⁶ *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468, 343 N.E.2d 465 (1976) (the Illinois Supreme Court adopted Section 343 of the Restatement (Second) of Torts, which 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 the danger." See also *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 149-51, 554 N.E.2d 223 (1990) (the Illinois Supreme Court adopted Section 343A of the Restatement (Second) of Torts, which states: (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.").

⁷ See *Unger v. Eichleay Corp.*, 244 Ill. App. 3d 445, 450-52, 614 N.E.2d 1241 (3d Dist. 1993).

⁸ *Gannon v. Chicago, Milwaukee, St. Paul and Pacific Railway Co.*, 22 Ill.2d 305, 317, 175 N.E.2d 785 (1961).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Id.*

¹² See *Id.* at 317-18; see also *Schultz v. Henry Ericsson Co.*, 264 Ill. 156, 164, 106 N.E. 236 (1914).

¹³ *Simmons v. Union Electric Co.*, 104 Ill. 2d 444, 459, 473 N.E.2d 946 (1984).

¹⁴ *Davis v. Commonwealth Edison Co.*, 61 Ill.2d 494, 502, 336 N.E.2d 881 (1975).

¹⁵ 740 ILCS 150/1-9 (West 1994) repealed by Ill. Pub. Act 89-2, 5, effective February 14, 1995.

¹⁶ 820 ILCS 305/1-30 (West 2003).

¹⁷ 820 ILCS 305/5(a) (West 2003).

¹⁸ *Gannon*, 22 Ill. 2d at 318.

¹⁹ *Id.*

²⁰ *Grasse v. Dealer's Transp. Co.* 412 Ill. 179, 201, 106 N.E.2d 124 (1952).

²¹ *Gannon*, 22 Ill. 2d at 318.

²² *Larson*, 33 Ill. 2d at 325.

²³ Restatement (Second) of Torts § 414 (2003).

²⁴ *Larson*, 33 Ill. 2d at 325.



²⁵ *Id.* at 324-25.

²⁶ *Id.*

²⁷ See Illinois Pattern Jury Instruction, Civil, No. 55.03 (2003).

²⁸ See *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583, 587, 776 N.E.2d 774 (1st Dist. 2002).

²⁹ *Id.*

³⁰ *Id.*

³¹ See Illinois Pattern Jury Instruction, Civil, No. 55.00 (2003).

³² *Weber v. Northern Illinois Gas Co.*, 10 Ill. App. 3d 625, 639, 295 N.E.2d 41 (1st Dist. 1973).

³³ *Id.* at 637-39.

³⁴ *Id.* at 640.

³⁵ *Pasko v. Commonwealth Edison Co.*, 14 Ill. App. 3d 481, 488, 302 N.E.2d 642 (1st Dist. 1973).

³⁶ *Id.*

³⁷ See Puchalski, 36 J. Marshall L. Rev. 531, 541-42 (Winter 2003).

³⁸ See *Id.*

³⁹ See *Id.*

⁴⁰ See *supra* note 5. See also Illinois Pattern Jury Instruction, Civil, No. 55.00 (2003).

⁴¹ See *infra* notes 44-45, 59, 61, 65.

⁴² See *infra* notes 44 and 61.

⁴³ See *infra* notes 44 and 61.

⁴⁴ *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 719 N.E.2d 174 (1st Dist. 1999); *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 726 N.E.2d 1171 (4th Dist. 2000).

⁴⁵ *Brooks v. Midwest Grain Products of Illinois, Inc.*, 311 Ill. App. 3d 871, 726 N.E.2d 153 (3d Dist. 2000); *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 728 N.E.2d 726 (1st Dist. 2000).

⁴⁶ *Rangel*, 307 Ill. App. 3d at 836-37.

⁴⁷ *Id.* at 838.

⁴⁸ *Id.* at 839, citing *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 934, 627 N.E.2d 1265 (3d Dist. 1994).

⁴⁹ *Rangel*, 307 Ill. App. 3d at 839.

⁵⁰ *Hutchcraft*, 312 Ill. App. 3d at 353.

⁵¹ *Brooks*, 311 Ill. App. 3d at 873.

⁵² *Id.* at 874.

⁵³ *Bokodi*, 312 Ill. App. 3d at 1054.

⁵⁴ See Illinois Pattern Jury Instruction, Civil, No. 55.01 (2003).

⁵⁵ See Illinois Pattern Jury Instruction, Civil, No. 55.02 (2003).

⁵⁶ See Illinois Pattern Jury Instruction, Civil, No. 55.03 (2003).

⁵⁷ See Illinois Pattern Jury Instruction, Civil, No. 55.04 (2003).

⁵⁸ See *infra* notes 77, 83, and 93.

⁵⁹ *Shaughnessy v. Skender Const. Co.*, 342 Ill. App. 3d 730, 794 N.E.2d 937 (1st Dist. 2003).

⁶⁰ *Id.* at 738.

⁶¹ *Moss v. Rowe Const. Corp.*, 344 Ill. App. 3d 772, 801 N.E.2d 612 (4th Dist. 2003).

⁶² *Id.* at 776.

⁶³ *Id.* at 777.

⁶⁴ *Id.* at 777 and 783.

⁶⁵ *Martens v. MCL Const. Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004).

⁶⁶ *Id.* at 316.

⁶⁷ See *supra* notes 44-45, 59, 61, and 65.

⁶⁸ *Moss*, 344 Ill. App. 3d at 777; *Martens*, 347 Ill. App. 3d at 316.

⁶⁹ *Moss*, 344 Ill. App. 3d at 777. (stating, "In [*Shaughnessy*], the court disregarded contractual language requiring the general contractor to be "responsible for initiating, maintaining[,] and supervising all safety precautions and programs in connection with the performance of the contract and to employ a superintendent whose duties included the prevention of accidents. We cannot ignore the contract. To do so, here, would make the contractual obligations for safety a meaningless nullity, especially in light of the deposition testimony here.") (internal citations omitted).

⁷⁰ *Martens*, 347 Ill. App. 3d at 316. (stating, "In [*Moss*], the court erroneously stated that the *Shaughnessy* court 'disregarded' the above contract language. The *Moss* court further misconstrued the holding in *Shaughnessy*, stating the *Shaughnessy* court found the general contractor not subject to [S]ection 414 liability despite 'evidence demonstrating that the defendant failed to' comply with its contractual responsibilities to maintain and supervise its safety program and employ a superintendent whose duties included the prevention of accidents. Even a cursory reading

of *Shaughnessy* establishes that no facts indicated the defendants failed to comply with those contractual responsibilities.") (internal citations omitted).

⁷¹ See *Larson*, 33 Ill. 2d at 325.

⁷² *Id.* at 321-22.

⁷³ *Id.* at 325.

⁷⁴ See *supra* notes 3, 32, 35, 45 and 61. See also *Sobczak v. Flaska*, 302 Ill. App. 3d 916, 706 N.E.2d 990 (1st Dist. 1998); *Haberer v. Village of Sauget*, 158 Ill. App. 3d 313, 511 N.E.2d 805 (5th Dist. 1987).

⁷⁵ See Puchalski, 36 J. Marshall L. Rev. 531, 541 (Winter 2003).

⁷⁶ See *Id.* at 541-42

⁷⁷ See Website for the Illinois General Assembly, www.legis.state.il.us. (follow links to 92nd General Assembly, House Bill 158).

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