

## CONSTRUCTION NEGLIGENCE

### 55.00

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### *INTRODUCTION*

Prior to February 14, 1995, workers injured in construction related settings had a number of avenues under the law by which to pursue a cause of action. Among those were the Illinois Structural Work Act, 740 ILCS 150/1 through 150/9, repealed by P.A. 89-2 § 5, effective Feb. 14, 1995, *Restatement (Second) of Torts* § 343 & § 343A and *Restatement (Second) of Torts* § 414. Construction negligence law has existed for some time, however it was rarely used due to the availability of the Illinois Structural Work Act. Following the Act's repeal in 1995, construction negligence actions have been thrust into the forefront. The law is currently in a state of flux and continues to be an area that is changing and developing.

*Restatement (Second) of Torts* § 414 remains a viable remedy for some construction related injuries. This section is an exception to the general rule of agency dealing with independent contractors. The *Restatement* is as follows:

One who entrusts work to an independent contractor, but who retains 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 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 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 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.

*Restatement (Second) of Torts* § 414 (West 2000).

“Control over any part of the work” is the key element imposing liability under § 414. The term “control” has been compared to the “in charge of” requirement under the Structural Work Act, 740 ILCS 150/1 through 150/9, repealed by P.A. 89-2 § 5, effective Feb. 14, 1995. Adopted by the Illinois Supreme Court in *Larson v. Commonwealth Edison*, 33 Ill.2d 316, 211 N.E.2d 247 (1965), § 414 was most notably discussed and clarified in the cases of *Weber v. N. Ill. 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). These cases set the early standard for § 414's interpretation and application in Illinois.

In *Larson*, the court held that a general contractor who retains control of any part of the work of a subcontractor will be liable for injuries resulting from his failure to exercise this control with reasonable care. *Id.* 33 Ill.2d 316, 325, 211 N.E.2d at 252-253. Although a defendant's conduct is an appropriate consideration under § 414, the most significant question to analyze is whether the defendant retained the authority to control the work. *Larson*, 33 Ill.2d 316, 324-335, 211 N.E.2d at 252. (emphasis added). At common law, retention of the right to control the work is sufficient to subject one to duty and tort responsibility. *Id.* 211 N.E.2d at 252-253, citing *Restatement of Torts* § 414.

The *Weber* court found that § 414 “is applicable to anyone with authority who entrusts work to an independent contractor, e.g., an owner, general contractor or architect.” *Id.* 10 Ill.App.3d 625, 639, 295 N.E.2d at 50. Thus, more than one person may have “control” over a contractor's work. Further, “a contractor owes an independent contractor whom he employs and all the subcontractors' employees a non-delegable duty to provide a safe place to work.” *Id.* 10

Ill.App.3d 625, 640, 295 N.E.2d at 51. This duty applies to anyone connected to a construction project who evidences the requisite level of control. *Damnjanovic v. United States*, 9 F.3d 1270 (7th Cir.1993).

In *Pasko*, the court stated that “[t]he power to forbid work from being done in a manner likely to be dangerous to himself or others is given as an illustration of the type of power retained by an employer which could subject him to liability.” 14 Ill.App.3d 481, 488, 302 N.E.2d at 648. The *Pasko* court placed great emphasis on a defendant's ability to implement or enforce safety procedures. *Id.*

Due to the availability of the Structural Work Act, there was a long period of time when there were not many cases decided under § 414. Since the repeal of the Act, conflicts have arisen regarding the application of § 414, and, specifically, what control is sufficient to render a party liable for failing to exercise that control with reasonable care. These conflicts are most evident in the cases of *Fris v. Pers. Prods. Co.*, 255 Ill.App.3d 916, 627 N.E.2d 1265, 194 Ill.Dec. 623 (3d Dist.1994), *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174, 241 Ill.Dec. 313 (1st Dist.1999), *Brooks v. Midwest Grain Prods. of Ill., Inc.*, 311 Ill.App.3d 871, 726 N.E.2d 153, 244 Ill.Dec. 557 (3d Dist.2000), and *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 728 N.E.2d 726, 245 Ill.Dec. 644 (1st Dist.2000).

In 2016, the Illinois Supreme Court clarified its position on the degree of “control” for a defendant’s general right to enforce safety on the job site. *Carney v. Union Pac. R. Co.*, 2016 IL 118984 ¶ 47. Courts should generally look to the agreement between the parties in determining whether the hiring entity exercised sufficient control to create a duty and render it vulnerable to liability. *Id.* ¶ 41. In *Carney*, the Supreme Court held that a general contractor is not deemed to retain sufficient control to be liable unless the subcontractor is not entirely free to perform the work in its own way. *Id.* ¶ 46-48. Notably, the Court also clarified that those who hire independent contractors can only be held liable through theories of direct, not vicarious, liability. *Id.* ¶ 36.

The instructions that follow allow the jury to determine whether the defendant retained sufficient “control” to give rise to the duty to exercise that control in a reasonable manner. The instructions below were amended by the IPI Committee in 2018 to reflect the above clarification from the Court in *Carney*, including the use of language directly from *Restatement (Second) of Torts* § 414 (1965), as adopted by *Carney*.

## 55.01 Construction Negligence-- Duty

A[n] [owner] [contractor] [other] who entrusts work to a [subcontractor] [contractor] [other] is liable for injuries resulting from the work if the [owner] [contractor] [other] retained some control over any part 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.

### Notes on Use

This instruction should be given as an introduction to the subject of construction negligence.

### Comment

For the relevant cases see: *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill.App.3d 18, 885 N.E.2d 330, 319 Ill.Dec. 59 (1st Dist. 2008); *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 920 N.E.2d 582, 336 Ill.Dec. 373 (1st Dist. 2009); *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, 995 N.E.2d 381, 374 Ill.Dec. 242; *Carney v. Union Pac. R. Co.*, 2016 IL 118984.

In addition, see *Restatement (Second) of Torts* § 414 (West 2000), and the Introduction to this section.

The use of the IPI 55.00 Series instructions has been upheld in *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill.App.3d 18, 885 N.E.2d 330, 319 Ill.Dec. 59 (1st Dist. 2008); *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 920 N.E.2d 582, 336 Ill.Dec. 373 (1st Dist. 2009) and *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, 995 N.E.2d 381, 374 Ill.Dec. 242.

In *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill.App.3d 18, the defendant general contractor appealed, in part, the trial court's refusal to give a non-pattern jury instruction that had been patterned on the holding from *Martens v. MCL Constr.*, 347 Ill.App.3d 303, 807 N.E.2d 480 (1st Dist. 2004). See *Jones*, 381 Ill.App.3d at 37. The non-pattern jury instructions proposed by the defendant general contractor replaced "safety" with "the means and methods or operative detail" in IPI 55.01-55.02.

In upholding the trial court's denial to give the non-pattern instructions, the *Jones* court rejected the general contractor's argument that the construction negligence instructions no longer reflect the common law on construction negligence. *Jones*, 381 Ill.App.3d at 38. The *Jones* court stated that the *Martens* court's citation to the pattern instructions on construction negligence did not suggest that the court intended its decision to mean that the pattern instructions no longer reflected an accurate statement of the law. *Id.* at 39-40. The court further noted that the *Martens* court referred to IPI 55.02 (2005) ("A party who retains some control over the safety of the work has a duty to exercise that control with ordinary care.") without criticism. *Id.* at 37-38.

In *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 920 N.E.2d 582, 336 Ill.Dec. 373 (1st Dist. 2009), defendant Boller appealed the trial court's refusal to give non-pattern jury instructions. The non-pattern jury instructions proposed by the defendant replaced "safety" of the

work with “manner” in which the work was done in IPI 55.01-55.03. defendant further objected to the giving of IPI 55.04. *Diaz*, 397 Ill.App.3d at 37-39.

Boller tendered a modified IPI 55.02 (2006), which defined “retained control” using the language from Comment C of the *Restatement (Second) of Torts* § 414 as follows:

A party who retained some control over the manner in which the work is done, has a duty to exercise that control with ordinary care.

When I use the words, 'retained control' the party must have retained at least some degree of control over the manner in which the work is done. To be liable, a party must have more than 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. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work his own way.

*Diaz*, 397 Ill.App.3d at 38.

The Appellate Court rejected defendant’s argument that the IPI instructions on construction negligence do not accurately state the law because they failed to qualify the term “some control over the work.” The court concluded that “the IPI construction negligence instructions continue to reflect an accurate statement of the law.” *Id.* at 39.

In *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, 995 N.E.2d 381, 374 Ill.Dec. 242, Defendant Bovis claimed that the trial court abused its discretion when it gave the jury the IPI 55.00 (2006) Series instructions. The court noted that the instructions are based upon § 414 of the *Restatement* and informed the jury what plaintiffs had to prove in order for Bovis to be found liable. Plaintiffs had to prove that Bovis retained some control over the safety of the work and that Bovis acted or failed to act in a number of ways, including failing to stop Junior and Senior from working in the unprotected trench. The court held that the evidence supported giving the IPI 55.00 (2006) Series instructions and that the trial court did not abuse its discretion by doing so. *Calloway*, 995 N.E.2d at 419-20.

*Carney v. Union Pac. R. Co.*, 2016 IL 118984 clarified that, in accordance with *Restatement (Second) of Torts* § 414, “[a] general right to enforce safety . . . does not amount to retained control . . .” *Id.* ¶ 47.

## 55.02 Construction Negligence— Requisite Control

A party is deemed to retain some control over the work if there is any part of the work that a [subcontractor] [contractor] [other] is not entirely free to do in [his] [her] [its] own way.

### Notes on Use

This should be used in conjunction with IPI 55.03.

### Comment

*See Restatement (Second) of Torts* § 414, the Comment to IPI 55.01, and the Introduction to this section.

(*Cf. Restatement (Second) of Torts* § 414: “[O]ne 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.”).

In *Carney v. Union Pac. R. Co.*, 2016 IL 118984 at ¶¶ 46-47, the Court found that a hiring entity’s contractual rights to terminate the relationship, enforce work standards, stop work, and enforce general safety in the work site were not sufficient to demonstrate control.

### 55.03 Construction Negligence--Issues Made by the Pleadings/Burden of Proof

Plaintiff \_\_\_\_ seeks to recover damages from defendant[s] \_\_\_\_\_. In order to recover damages, the plaintiff has the burden of proving:

1. The [defendant \_\_\_\_] [defendants \_\_, \_\_, and \_\_] retained some control over any part of the work;
2. Defendant[s] [acted] [or] [failed to act] in one or more of the following ways:
  - a. \_\_\_\_; or
  - b. \_\_\_\_; or
  - c. \_\_\_\_;and in so [acting] [or] [failing to act], was [were] negligent in the manner in which it [they] [exercised] [or] [failed to exercise] its [their] control.
3. Plaintiff \_\_\_\_ was injured; and
4. The [defendant's] [defendants' \_\_\_\_, \_\_\_\_, or \_\_\_\_] negligence was a proximate cause of plaintiff's injuries.

[You are to consider these propositions as to each defendant separately.] If you find that any of these propositions has not been proven as to [the defendant] [any one] [or more] [or all] [of the defendants], then your verdict should be for [the] [that] [those] defendant[s]. On the other hand, if you find that all of these propositions have been proven as to [the defendant] [any one] [or more] [or all] [of the defendants], then you must consider defendant['s] [s'] claim[s] that the plaintiff was contributorily negligent.

As to [that] [those] claim[s], defendant[s] has [have] the burden of proving:

A. Plaintiff [name] acted or failed to act in one or more of the following ways:

1. \_\_\_\_; or
2. \_\_\_\_; or
3. \_\_\_\_;

and in so [acting] [or] [failing to act] was negligent, and

B. Plaintiff's negligence was a proximate cause of [his injury] [and] [damage to his property].

If you find that plaintiff has proven all the propositions required of [him] [her], and the defendant[s] ha[s][ve] not proven all of the propositions required of the defendant[s], then your verdict should be for the plaintiff as to [that] [those] defendant[s] and you will not reduce plaintiff's damages.

If you find that defendant[s] [has] [have] proven all of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for [that] [those] defendant[s].

If you find that defendant[s] [has] [have] proven all of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was less than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the plaintiff as to [that] [those] defendant[s] and you will reduce the plaintiff's damages in the manner stated to you in these instructions.

### Notes on Use

This combined issue-burden instruction is designed for use in a common law construction negligence case. The committee drew heavily on *Restatement (Second) of Torts* § 414, and Illinois cases construing it. *E.g.*, *Larson v. Commonwealth Edison Co.*, 33 Ill.2d 316, 211 N.E.2d 247 (1965); *Carney v. Union Pac. R. Co.*, 2016 IL 118984; *Weber v. N. Ill. Gas Co.*, 10 Ill.App.3d 625, 295 N.E.2d 41 (1st Dist.1973); *Pasko v. Commonwealth Edison Co.*, 14 Ill.App.3d 481, 302 N.E.2d 642 (1st Dist.1973); *Ryan v. Mobil Oil Co.*, 157 Ill.App.3d 1069, 510 N.E.2d 1162, 110 Ill.Dec. 131 (1st Dist.1987); *Haberer v. Village of Sauget*, 158 Ill.App.3d 313, 511 N.E.2d 805, 110 Ill.Dec. 628 (5th Dist.1987); *Claudy v. City of Sycamore*, 170 Ill.App.3d 990, 524 N.E.2d 994, 120 Ill.Dec. 812 (1st Dist.1988); *Bezan v. Chrysler Motors Corp.*, 263 Ill.App.3d 858, 636 N.E.2d 1079, 201 Ill.Dec. 647 (2d Dist.1994); *Fris v. Personal Prods. Co.*, 255 Ill.App.3d 916, 627 N.E.2d 1265, 194 Ill.Dec. 623 (3d Dist.1996); *Fancher v. Cent. Ill. Pub. Serv. Co.*, 279 Ill.App.3d 530, 664 N.E.2d 692, 216 Ill.Dec. 55 (5th Dist.1996); *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174, 241 Ill.Dec. 313 (1st Dist.1999); *Brooks v. Midwest Grain Prods. of Ill.*, 311 Ill.App.3d 871, 726 N.E.2d 153, 244 Ill.Dec. 557 (3d Dist.2000); *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 728 N.E.2d 726, 245 Ill.Dec. 644 (1st Dist. 2000); *Hutchcraft v. Indep. Mech.*, 312 Ill.App.3d 351, 726 N.E.2d 1171, 244 Ill.Dec. 860 (4th Dist. 2000).

This instruction is designed to be given with IPI 10.01, "Negligence--Adult—Definition," IPI 10.04 "Duty to use ordinary care--Adult-Defendant," B10.03 "Duty to use ordinary care--Adult-Plaintiff--Definitions of contributory and comparative negligence--Negligence," IPI 11.01 "Contributory negligence--adult--definition," as appropriate. *See also* premises liability cases arising under the deliberate encounter exception to the open and obvious doctrine, IPI 120.02.03.



#### **55.04 Construction Negligence--More Than One Person Having Control**

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

#### **Notes on Use**

This instruction should be given with IPI 55.03 in cases in which there is evidence that more than one person, whether or not a defendant, retained some control over the work. Carney v. Union Pac. R. Co., 2016 IL 118984 ¶¶ 33-35, 46-48; *Cf. Restatement (Second) of Torts* § 414.