

Feature Article

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***Carney v. Union Pacific Railroad Company:* Daylight Comes to Section 414**

I. Introduction

The Illinois Supreme Court in *Carney v. Union Pacific Railroad Co.*, 2016 IL 118984 dealt with three claims founded upon provisions of the Restatement (Second) of Torts: (1) Section 414—*Retained Control*; (2) Section 411—*Negligence in Selection of Contractor*; and (3) Section 343—*Dangerous Conditions On The Land*. Due to its direct and immediate impact upon the myriad of construction injury cases which are founded upon section 414, this article considers only that aspect of the decision. This is the seventh in a series of articles which discuss the evolution and development of construction negligence law under section 414 of the Restatement (Second) of Torts since the Structural Work Act was repealed in 1995. For the first time in over 20 years, the Illinois Supreme Court has entered the interpretive fray regarding the boundaries and elements of the tort, as derived from the language of the rule and its public policy underpinnings. In a cogent and well-reasoned discussion of the doctrine, the court embraces the direct liability reason for the rule and thereby its limitations.

A careful reading of the section 414 aspects of *Carney v. Union Pacific Railroad Co.* casts light upon section 414 and its interpretive comments, permitting the uniform construction of its language which is consistent with the intent of the drafters. *Carney*, 2016 IL 118984. By doing so *Carney* dissipates the darkness and confusion which has vexed the bench and bar in over 60 published decisions, and hundreds of cases which have been resolved at the trial level. In order to best appreciate the illuminative effect of the opinion, the ensuing discussion is segmented.

This article begins by addressing the singular problem of section 414 in Illinois and explores how *Carney v. Union Pacific* is a paradigm of the problem and its solution. Thereafter, the article “fleshes out” the significance of the *Carney* decision in defining the liability of employing contractors for the acts and omissions of independent contractors and the use of the word “control” in section 414. As *Carney* was decided on the threshold issue of duty under section 414, the court was not called upon to consider the element of breach. This article concludes with the authors submitting that by considering the tort in its entirety post-*Carney*, the reality of liability under section 414 can best be considered in its intended context. Utilizing this format facilitates an appreciation of the light and direction which *Carney* gives to the once gelatinous area of construction negligence law.

II. The Singular Problem of Section 414 in Illinois

A. The Problem:

Prior To Carney v. Union Pacific, Construction Negligence Cases Put Illinois Contractors at a Material Economic Disadvantage

Spread boldly on the canvas of our times is public concern for an equitable civil reparations system that equates liability with fault and damages with uncompensated loss. Workers' compensation laws were adopted to protect persons whose injuries arise out of and in the course of their employment. The employer's exposure for workers' compensation is viewed as a cost of doing business. *Pathfinder Co. v. Indust. Comm'n*, 62 Ill. 2d 556, 564 (1976); *Hays v. Ill. Terminal Transp. Co.*, 363 Ill. 397, 402 (1936). To the extent that there is an equitable balance between the nature and extent of the injuries sustained and the statutory compensation afforded for those injuries, public policy is well served.

The same type of balance is sought in third party cases where compensatory damages are awarded to persons injured through the fault of another or others. The somewhat amorphous concept of "fault" finds its definition in statutes and common law which bespeak public policy by proscribing certain conduct. While the common law may vary somewhat in degree and interpretation, general principles, except in extraordinary circumstances, are interpreted in like fashion from jurisdiction to jurisdiction. Certainly, that is the case with section 414 which was adopted by the American Law Institute in the 1930s and has found its way into the common law of virtually every state thereafter. It provides:

§ 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).

The Structural Work Act was repealed effective February 14, 1995. 740 ILCS 150/0.01 to 9 (repealed by P.A. 89-2, § 5, eff. Feb 14, 1995). As the volume of reported decisions instructs, the statute was one of the principal bulwarks of bodily injury law in Illinois between 1958 and its repeal. Decisions under the statute show that the Illinois Supreme Court considered at least 42 cases during that time. See West Key Number System, k1201 to k 1205, (G) LIABILITIES RELATING TO CONSTRUCTION DEMOLITION AND REPAIR, Westlaw Next (Oct. 30, 2015), available at [\(https://a.next.westlaw.com/Browse/Home/WestKeyNumberSystem?guid=I46b57108da6c06b77a9a5e1034b8d082&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)\)](https://a.next.westlaw.com/Browse/Home/WestKeyNumberSystem?guid=I46b57108da6c06b77a9a5e1034b8d082&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)) (*West Key No. Sys.*). Likewise, a plethora of Scaffold Act cases, totaling more than 250 decisions, worked their way through the various appellate districts. See *Id.* Following the repeal of the Structural Work Act, section 414 came to be viewed as a convenient substitute by many. By best count, more than 60 appellate decisions interpreting section 414 have been reported to the present time of which more than 44 postdate repeal of the statute. ILL. REST. OF TORTS ANN. § 414 (1965)-(2015).

Attempts to apply section 414 from 1995 to the present have yielded immense uncertainty in virtually every aspect of the rule's language. As with the blind men circling the proverbial elephant, each appellate district has from time to

time felt a different aspect of the animal and reached a conclusion regarding its significance which is at variance with earlier decisions of that court, not to mention those of other districts.

Common sense dictates that uncertain liability not only confounds responsive conduct but exponentially increases the cost of responding to it. Thus, the disparate constructions given to section 414 have produced both a disproportionate volume of construction negligence cases dependent upon it, and disproportionate premiums to guard against the economic uncertainty of those unknown exposures. The following figures demonstrate both phenomena.

Fig. 1 - Section 414 Decisions

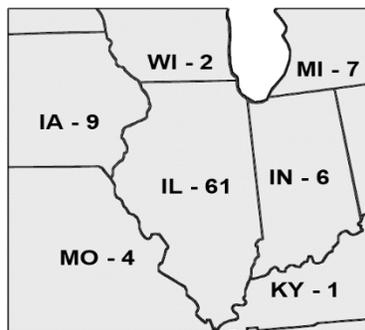
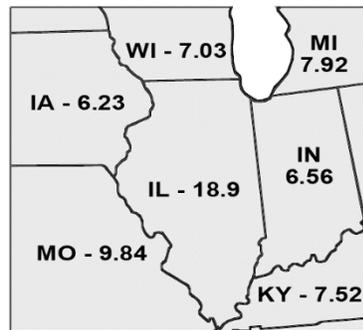


Fig. 2 – Insurance Rates



See *West Key No. Sys.*, *supra*; also see Table based on data collected by INSURANCE SERVICES ORGANIZATION (ISO), *Commercial Lines Manual Division Six General Liability Loss Cost Pages*, (Apr. 2016) (represents the premiums charged to a general contractor per \$100.00 of payroll for a basic general liability policy in each of the respective states).

Indicative of the uncertainties that serve as a vacuum for premium dollars is the reality that the Illinois pattern jury instructions which were adopted for construction accident cases have themselves been found not to state the law. *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, ¶¶ 162-179; *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 86.

To quote an old aphorism: “as the twig inclines so grows the tree.” As the common law is an evolutionary process, it is helpful to examine the roots of a rule in order to predict the course and fullness of its branches. With construction accident law in Illinois, the process begins in 1907.

B. Evolution of the Problem

At a time when life was considerably less complicated and the exposure to injury therefore less frequent, certain occupations presented a higher potential for mishap than others. Among these in 1907 was the burgeoning field of construction in which workers at heights were exposed to appreciable risk by employment several stories above the ground. As the preamble to the Structural Work Act states, concern for this risk prompted remedial steps:

AN ACT providing for the protection and safety of persons in and about the construction, repairing, alteration, or removal of buildings, bridges, viaducts and other structures, and to provide for the enforcement thereof.

Laws of Illinois 1907, p. 312 (approved June 3, 1907, eff. July 1, 1907, amended by P.A. 86-1324, § 460, eff. Sept. 6, 1990, repealed by P.A. 89-2, § 5, eff. Feb 14, 1995) (previously known as the long Title of Act).

Sections 1 through 8 of the Structural Work Act required certain specific safety devices and procedures. In the event of breach, section 9 imposed penalties upon the persons to whom the act applied. This latter class, whose conduct was mandated, was described as “persons having charge of the work.” *Gannon v. Chi., Milwaukee, St. Paul & Pac. Ry. Co.*, 22 Ill. 2d 305, 321 (1961). The clear intent of the legislature was to provide an injured employee with the right of recourse against his employer. In this regard the Act antedated workers’ compensation legislation at a time when the common law remedies afforded injured employees were encumbered by the absolute defenses of assumption of risk, contributory negligence and the fellow servant doctrine. *Kennerly v. Shell Oil Co.*, 13 Ill. 2d 431, 439 (1958).

In 1913 Illinois adopted a Workers’ Compensation Act. 820 ILCS 305/1 to 305/30. Under that statute, employees surrendered all rights of action against their employers in return for a guaranteed, but more limited, recovery. For a period of 12 years thereafter the Structural Work Act was moribund, if not dead. However, in 1923 the Illinois Supreme Court recognized that recovery under the Structural Work Act was possible against others engaged in the construction who might exert influence upon those contractors employing persons who were subject to injury in the event of breach. *John Griffiths & Son Co. v. Nat’l Fireproofing Co.*, 310 Ill. 331, 335-36 (1923). Subsequently, exposure by association and influence became the rule and produced a plethora of litigation. *See West Key No. Sys., supra*.

Ultimately, the new battleground between workers and derivative defendants expanded full circle to include the employer who, although immune from suit by its employees, became subject to liability for indemnity or contribution. *Miller v. DeWitt*, 37 Ill. 2d 273, 287-92 (1967); *Jones v. McDougal-Hartmann Co.*, 115 Ill. App. 2d 403, 407-408 (3d Dist. 1969). Sections 5 and 11 of the Workers’ Compensation Act (820 ILCS 305/5 and 305/11) immunize employers subject to its provisions from liability beyond their exposure to its provisions. Consistent with the premise in 1907 that construction work was innately more hazardous than other trades and occupations, courts continued to interpret the law on a strict liability basis, decrying contributory negligence as a defense. *See Schultz v. Henry Ericsson Co.*, 264 Ill. 156, 164-65 (1914); *see also Gundich v. Emerson-Comstock Co.*, 21 Ill. 2d 117, 130-31 (1961); *see also Bryntesen v. Carrol Const. Co.*, 27 Ill. 2d 566, 568-69 (1968).

By its nature, progress, for better or worse, replaces concepts whose time has passed in much the same manner that the internal combustion engine supplanted the horse. While still hazardous, the perils of construction pose no greater risk of injury than a great number of other occupations dependent upon the machinery and technology of the Twentieth and Twenty-First Centuries. *See Employer-Related Workplace Injuries and Illnesses—2013*, BUREAU OF LABOR STATISTICS, Table 1, pp. 6-11 (Dec. 4, 2014), *available at* http://www.bls.gov/news.release/archives/osh_12042014.pdf (showing incidence rates of nonfatal occupational injuries and illnesses by case type and ownership in selected industries for 2013). From its adoption in 1913, the Workers’ Compensation Act afforded an equal remedy to all classes of injured employees. Likewise, the Occupational Safety & Health Administration Act of 1970 (OSHA) specifically proscribed invidious work practices, including those which were the subject of the 1907 statute. *See* 29 U.S.C. §65 §1 to 678 (eff. Dec. 29, 1970). Therefore, with the distinctive need that led to its adoption having been absorbed in the fibers of progress, the Structural Work Act was repealed in 1995, taking with it the strict liability exposure imposed upon persons “having charge of the work.”

C. Old Concepts Die Hard

The “Problem” which is the subject of this article had its origin in the refusal of some to concede that the Structural Work Act had been repealed and therefore liability was no longer strictly imposed upon owners, architects, engineers, contractors and others “having charge of the work” as that term was defined in litigation under the statute. Without missing a beat, those who favored continuation of broad liability turned to the retention of “control” under section 414 as a convenient substitute for the term “having charge of” under the Scaffold Act. From that premise, the race was on to create a common law Scaffold Act, differing only in the recognition of contributory negligence as a complete or mitigating defense.

Under the Act, the phrase “having charge of the work” was viewed as a general term of common understanding that did not require a definitional instruction. Illinois Pattern Jury Instruction, Civil, No. 180.16 (2000). Unfortunately, the same type of confusion pervades the current Illinois Pattern Jury Instruction for use in civil cases involving construction negligence. Illinois Pattern Jury Instructions, Civil, Nos. 55.01-55.04. For example, the duty instruction states: “[a] party who has retained some control over the safety of the work has a duty to exercise that control with ordinary care.” Illinois Pattern Jury Instruction, Civil, No. 55.02. In the instruction, the terms “work” and “control” are neither defined nor circumscribed. Therefore, the question remains whether the duty imposed extends to the right to stop the work for contractual non-compliance, or is limited to the authority to direct the methods and details of the particular work that caused the injury. Thus, the validity of those instructions is subject to question. *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 162-179; *Lee*, 2014 IL App (1st) 130771, ¶ 86.

D. *Carney v. Union Pacific* is a Paradigm of the Problem and its Solution

Carney v. Union Pacific has a complex but illustrative factual situation which led to an equally complex and demonstrative procedural morass before reaching the Illinois Supreme Court. For the purposes of section 414 the *dramatis personae* are: (1) Union Pacific Railroad as the entrusting “employer”; (2) Happ’s, Inc., the entrusted “independent contractor,” and (3) Patrick Carney, the injured plaintiff. Union Pacific entered into a contract with Happ’s, a scrap contractor, for the purchase and removal of three abandoned railroad bridges in Chicago. *Carney*, 2016 IL 118984, ¶ 4. According to the “Purchase and Removal Agreement,” Happ’s purchased three bridges and agreed to provide all the “labor, tools and material necessary for the bridge removals.” *Id.* ¶ 6. In performing the work, Happ’s enlisted Patrick Leo Carney to assist pursuant to a “handshake agreement.” *Id.* ¶ 5. The plaintiff, Patrick Joseph Carney, is the son of Patrick Leo Carney. *Id.* ¶ 8.

The accident happened while Happ’s and Carney were removing the Polk Street bridge, which was “by far the largest of the three.” *Id.* ¶ 7. Using a crane, Happ’s and Carney removed most of the steel cross beams that connected the bridge’s east and west horizontal walls, leaving a few cross beams at the north and south ends for support. *Id.* At the base of the bridge was a “gravel covered steel plate” which ran under the girder walls. *Id.* ¶ 8.

On the day of the accident, Carney recruited his son, the plaintiff, to assist in removing the girder walls after the remaining cross beams were cut and lifted. *Id.* His job was to help “thread four steel cables through holes that had been torched in the bridge’s east girder.” *Id.* The cables were then attached to a spread bar on a crane which was to “lift the girder and lower it onto Polk Street.” *Id.* When the crane operator attempted to lift the east girder it was stuck due to a cross beam at the north end. As a worker was making an additional cut to free the cross beam, it snapped, causing the

west girder, which was unsecured, to fall to the east. *Id.* At the time, the plaintiff was standing north of the bridge on the gravel covered steel plate. When the west girder fell, the steel plate moved up, and the plaintiff slid forward under the west girder. *Id.* The plaintiff's legs were severed below his knees. *Id.*

Under the "Purchase and Removal Agreement," Happ's, along with its agents and employees, were collectively and expressly identified as an "independent contractor" and *not* as employees of Union Pacific. *Id.* ¶ 45. As an independent contractor, Happ's purchased the three bridges and undertook to furnish at its own expense "'all superintendences' as well as 'all labor, tools, equipment, materials and supplies,' necessary to remove the bridges." *Id.* In addition, control over job safety was vested in Happ's. *Id.* ¶ 47. Specifically, Happ's was required "'to keep the jobsite free from safety and health hazards and insure that its employees are competent and adequately trained in all safety and health aspects of the job.'" *Id.*

As the work progressed on all three bridges, the defendant, Union Pacific, was involved only to the extent of a representative who would come by and "check out the jobs." *Id.* ¶ 55. Witnesses uniformly testified that the only direction for the work was given by Happ's, and that no one received instructions from Union Pacific. *Id.* ¶ 54. Nor was anybody from the railroad present at the time of the accident. *Id.*

The circuit court entered summary judgment in favor of the defendant. *Id.* ¶ 11. The appellate court reversed. *Carney v. Union Pac. R.R. Co.*, 2014 IL App (1st) 130105-U, *rev'd by Carney v. Union Pac. R.R. Co.*, 2016 IL 118984. The supreme court allowed the railroad's petition for leave to appeal. *Carney*, 2016 IL 118984, ¶ 15. The supreme court also allowed the Illinois Chamber of Commerce, Illinois Construction Industry Committee, and Associated Builders and Contractors; the Associated General Contractors of Illinois; and the Illinois Association of Defense Trial Counsel to file *amicus curiae* briefs in support of the Union Pacific. *Id.* Like status was accorded to the Illinois Trial Lawyers Association on behalf of the plaintiff. *Id.*

Had the supreme court not accepted jurisdiction, *Carney v. Union Pacific* would have been simply another in the long line of section 414 cases where reviewing courts reached antipodal results on virtually identical facts. Confusion precluding dispositive relief was typically found on the issue of whether the employing contractor possessed the requisite amount and type of control under the operative agreement with the independent contractor, or *de facto* exercised that control to a sufficient extent to support a legal duty.

Moreover, and confusing the language and purpose of section 414, a number of courts held that the rule contemplated *both* vicarious and direct liability. *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 102; *Lederer v. Exec. Constr., Inc.*, 2014 IL App (1st) 123170, ¶ 49; *Lee*, 2014 IL App (1st) 130771, ¶¶ 68-69; *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 123, 149; *Maggi v. RAS Dev. Inc.*, 2011 IL App (1st) 091955, ¶¶ 44-45; *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 31 (1st Dist. 2009). In reversing, the supreme court in *Carney* provided clarity as to both: (1) what is meant by the term "control" under section 414 and its comments, and (2) the fact that the rule is limited to direct, as opposed to vicarious liability. *Carney*, 2016 IL 118984, ¶¶ 36-40.

III. The Significance of *Carney V. Union Pacific* in Defining the Liability of Employing Contractors for the Acts and Omissions of Independent Contractors

A. Section 414 Does Not Create or Contemplate a Vicarious Liability Duty

Since *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865 (1st Dist. 2005), a number of Illinois appellate courts have construed section 414 as creating or recognizing both: (1) vicarious liability on the part of the employing party and/or (2) “direct” liability, depending upon the degree of control which is retained. As the *Carney* court found, that duty bifurcation misapprehends the intent of the drafters of section 414, as discerned from the clear language of comment a to that section and the introductory notes to chapter 15 of the Restatement.

In *Cochran*, the court found that section 414 recognizes two possible theories for liability. *Cochran*, 358 Ill. App. 3d at 874. The first is mentioned in comment a when control of the “operative detail” which is retained by the defendant is so extensive that the law of agency applies and the independent contractor is therefore viewed as the agent of the general contractor. *Id.* Alternatively, the court opined section 414 also deals with “direct liability” in which the level of control is not so comprehensive as to establish vicarious liability, but is sufficiently extensive to give rise to a duty on the part of the general contractor to exercise reasonable care for the safety of the independent contractor’s employees. *Id.* at 877-78. Since *Cochran*, a number of courts have likewise indulged a construction of section 414 that presupposes it addresses both *respondeat superior* and direct liability in construction negligence cases. *Cabrera*, 2015 IL App (1st) 140933, ¶ 102; *Lederer*, 2014 IL App (1st) 123170, ¶ 49; *Lee*, 2014 IL App (1st) 130771, ¶¶ 68-69; *Ramirez*, 2014 IL App (1st) 1236, ¶¶ 123, 149; *Maggi*, 2011 IL App (1st) 091955, ¶¶ 44-45; *Diaz*, 397 Ill. App. 3d at 31.

As discussed in *Cochran v. Sollitt*, the basis for that assumption is the reference in comment a to “the relation of master and servant” in the context of retention of “control over the operative detail of doing any part of the work” *Cochran*, 358 Ill. App. 3d at 874. (citing RESTATEMENT (SECOND) OF TORTS § 414, cmt. a, at 387 (1965)). Flowing from that assumption is the further thought that references in comment c to control over “methods of work or as to operative detail” apply to vicarious liability, leaving a lesser degree of control for the imposition of “direct liability,” under that section. RESTATEMENT (SECOND) OF TORTS § 414, cmt. c, at 388 (1965). Correspondingly, comment b with its requirements of reasonable care in the context of known or imputed dangers applies only to “direct liability” inasmuch as vicarious liability makes the employer responsible for the acts and omissions of the contractor without regard to its own neglect. *Id.* at 387-88.

Addressing that misapprehension, the court in *Carney* specifically held:

The rule set forth in section 414, however, articulates a basis only for imposition of direct liability. Because an employer of an independent contractor is typically not answerable for the contractor’s negligence, “the employer’s liability must be based upon *his own personal negligence*.”

Carney, 2016 IL 118984, ¶ 36 (emphasis in original).

In explaining why section 414 rules out vicarious liability the court engages in an analysis of the distinction which differentiates the relationship of agent to principal from that of independent contractor to employer. That distinction starts with the basic rule that under the common law one who employs an independent contractor is not liable for the acts and omissions of the independent contractor. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 21 (1971); *Lawlor v. N.*

Am. Corp. of Ill., 2012 IL 112530, ¶ 42, *Lee*, 2014 IL App (1st) 130771. As the court earlier held in *Hartley Red Ball Transit Co.*, 344 Ill. 534, 539 (1931):

An independent contractor is one who undertakes to produce a given result, but in the actual execution of the work he is not under the orders or control of the person for whom he does the work, but may use his own discretion in things not specified. An independent contractor is one who contracts to do a specific piece of work, furnishing his own assistance, and executing the work either entirely in accordance with his own ideas or in accordance with a plan previously given him by the person for whom the work is done, without his being subject to the orders of the latter in respect to the details of the work. (citations omitted). If the person for whom the work is being done retains the right to control the details and the manner and method by which the work is to be done, the relation of employer and employee exists. The fact that payment is to be made by the piece or the job or the day or the hour does not necessarily control where the workman is subject to the control of the employer as an employee and not as a contractor. (citations omitted)

Red Ball Transit, 344 Ill. at 539; *see also Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 13 (2004).

Consistent with the preceding definition in which the party employing an independent contractor looks to the end result with the contractor responsible for the means and methods of achieving that result, the court in *Carney* affirms the rule of nonliability on two grounds. First, “the hiring entity has no control over the details and methods of the independent contractor’s work and therefore is not in a position to prevent its negligent performance.” Second, the independent contractor, having control over how that work is done, is the proper party to be charged with that responsibility and to bear the risk. *Fonseca v. Clark Constr. Grp., LLC*, 2014 IL App (1st) 130308.

From a practical perspective the rule makes abundant good sense in the setting of a result or end product versus the means of accomplishing that result analysis. One who employs an independent contractor seeks a specific outcome. On the other hand, a principal is interested and invested in the means by which it is accomplished. Adhering to the language in comment a to section 414, as well as its interpretation in *Aguirre v. Turner Constr. Co.*, 501 F. 3d 825, 829 (7th Cir. 2007), the court in *Carney* found that the comment expressly distinguishes between the scope of section 414 and vicarious liability which is controlled by the law of agency. In that respect the court states succinctly: “section 414 takes over where agency law ends.” *Carney v. Union Pacific Ry. Co.*, 2016 IL 118984, ¶ 38.

After dispensing with the notion of vicarious liability under the rule the court focused upon the extent and indicia of control which is required to expose the employer of an independent contractor to liability for “his own personal negligence”.

IV. “Control,” as Used in Section 414, Focuses Upon the Manner, Means and Methods By Which the Contractor Performs His Work. That Performance is Discerned from the Right of Superintendence, if Any, Found in the Contract Between the Parties, Actual Superintendence By the Employer or Both.

Overview

“Control” is defined in each of the comments to Section 414 in the context of the entrusting employer’s supervision or superintendence over the entrusted contractor’s work. In comments a, *b* and *c* the term is used thusly:

Comment a

Such a *supervisory* control may not subject him to liability under the principles of Agency but he may be liable under the rules 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.

Comment b

The rule stated in this Section is usually, though not exclusively, applicable where a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman *superintends* the entire job.

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 generally 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, cmts. a-c (1965).

The distinction between the mode of “general supervision” that does not trigger a duty and the type of supervision which has that effect focuses upon the difference between the end product or finished result of the work, as opposed to how it is accomplished. The former includes scheduling, stopping the work, coordinating the work, ordering changes, inspecting and monitoring the progress and quality of the work, seeing that the work is done in a safe manner and ensuring that safety precautions are followed, all of which are the type of rights which are generally reserved by those who employ independent contractors. RESTATEMENT (SECOND) OF TORTS § 414, cmt. c; *Rangel v. Brookhaven Constructors*, 307 Ill. App. 3d 835, 839 (1st Dist. 1999); *Fonseca v. Clark Const. Group, LLC*, 2014 IL App (1st) 130308, ¶ 28; *O’Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472, ¶ 95; *Downs v. Steel and Craft Builders, Inc.*, 358 Ill. App. 3d 201, 206 (2d Dist. 2005).

On the other hand, the type of control which is required for the imposition of a duty under section 414 is referred to in the sense of *supervision* over “the incidental aspects of the independent contractor’s work.” *Fonseca*, 2014 IL App (1st) 130308 at ¶ 28; *Rangel*, 307 Ill. App. 3d at 838-39. It also includes control over the “means by which the ends were to be achieved”; *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 924 (3d Dist. 1994), and authority over the “manner,” and “means and method” of the work. *Lee*, 2014 IL App (1st) 130771 at ¶ 89; *Calderon v. Residential Homes of Am., Inc.*, 381 Ill. App. 3d 333, 346 (1st Dist. 2008).

The distinction between “general supervision” and direct control recognizes the reality that construction by its nature is a composite of specialized trades which requires delegation to achieve the completed project. *Oshana v. FCL Builders, Inc.*, 2012 IL App (1st) 101628, ¶¶ 31, 33. In that setting, “control” under section 414 presumes entrustment of the work by one party to another with the former retaining “control” over *how* the latter does its specialized job. *O’Connell v. Turner Constr. Co.*, 409 Ill. App. 3d 819 (1st Dist. 2011). It focuses upon the relationship between those parties, including the extent of control delegated to the subcontractor. *Shaughnessy v. Skender Const. Co.*, 342 Ill. App. 3d 730, 740 (1st Dist. 2003) (finding that independent contractor instructed, supervised and directed manner in which its crew’s work was completed without interference from employers of independent contractor). Thus, section 414 contemplates that safe performance of a specialized aspect of the work is delegated to and accepted by an appropriate subcontractor whose expertise encompasses all facets of its own work. By that delegation, the entrusting party relinquishes the “control” that might otherwise have triggered a duty under section 414. *Rogers v. West Constr. Co.*, 252 Ill. App. 3d 103, 106 (4th Dist. 1994). In *Carney*, the court recognized that Happ’s and Carney were the “experts” in bridge removal and for that reason Happ’s was awarded the work by Union Pacific. *Carney*, 2016 IL 118984, ¶ 57.

B. The Best Indicator of Whether the Entrusting Employer of an Independent Contractor Retained Sufficient Control to Trigger Potential Liability Under Section 414 is the Written Agreement Between the Employer and the Contractor

At the outset of its control analysis the court in *Carney* recognized that: “The issue of a defendant’s retained control may be decided as a matter of law where the evidence is insufficient to create a factual question.” *Carney*, 2016 IL 118984, ¶ 41. That analysis commences with and is controlled by the relationship between the employer and the contractor as it is expressed and defined in the written contract between them. *Id.* In focusing upon the terms of the contract pursuant to which the work was entrusted, the *Carney* court implicitly recognized that delegation of specialized areas of the work is consonant with the customs of the construction industry, where it is recognized that each subcontractor and trade brings a different skill to the job. In *Rogers v. West Constr. Co.*, 252 Ill. App. 3d 103, 107 (4th Dist. 1994), the court recognized that the general contractor was entitled to rely upon the “expertise and experiences” of its subcontractor. Likewise, in *Oshana*, the court affirmed entry of summary judgment for the defendant and in so doing focused upon the subcontractor’s expertise in performing the work that it was hired to complete. *Oshana*, 2012 IL App (1st) 101628, ¶ 29.

The delegation that is recognized in *Oshana* and *Rogers, supra*, is in accord with construction custom and practice and is also in line with numerous opinions that support summary judgment in favor of general contractors who have subcontracted all aspects of the work out of which an accident occurs, retaining only the type of general authority which does not trigger a duty under section 414 of the Restatement. See *Steuri v. Prudential Ins. Co.*, 282 Ill. App. 3d 753 (4th Dist. 1996) (finding general contractor delegated responsibility for the details of the work to subcontractor); *Moiseyev v.*

Rot's Bldg. & Dev., 369 Ill. App. 3d 338, 352 (3d Dist. 2006) (affirming entry of summary judgment in favor of general contractor where it has been shown responsibility for details of the work delegated to subcontractor); *Joyce v. Mastri*, 371 Ill. App. 3d 65, 74 (1st Dist. 2005) (affirming summary judgment in favor of general contractor where subcontractor was contractually responsible for jobsite safety and general contractor took no active role in insuring safety); *Martens v. MCL Constr. Co.*, 347 Ill. App. 3d 303, 313 (1st Dist. 2004) (stating that a contractor unknowledgeable about the details of some task usually delegates that work to an independent contractor).

It is significant to understand that the proper contract to analyze is that between the defendant, who entrusts the work, and the “independent contractor” to whom it is entrusted. That contract embodies the relationship between those parties, including the extent to which the former may have delegated a portion of its work under the general contract with the owner or an upper tier contractor. Some courts have mistakenly looked to the terms of the prime contract pursuant to which the entrusting contractor agreed to do its work. *Moss v. Rowe Constr. Co.*, 344 Ill. App. 3d 772 (4th Dist. 2003). While the entrusting contractor may have agreed to control over all facets of the project, implicit and explicit in that undertaking, is the delegation of portions of the work to subcontractors.

The court in *Carney* focused on three aspects of the Purchase and Removal Agreement between Happ’s and Union Pacific in determining the relationship of the contracting parties and thereby what “control,” if any, was retained by the railroad. In the first instance it looked to how the parties characterized their relationship finding:

The contract between defendant and Happ’s expressly provides that Happ’s, along with its agents and employees, “are not and shall not be considered as employees of [defendant],” that Happ’s “shall be and remain an independent contractor,” and that nothing herein contained shall be construed inconsistent with that status.”

Carney, 2016 IL 118984, ¶ 45.

Second, the court considered the all-encompassing scope of Happ’s undertaking, finding:

The contract required Happ’s to furnish at its own expense, “all superintendence,” as well as all “labor, tools, equipment, materials and supplies” necessary to remove the bridges.

Id.

From those provisions, the court concluded that Happ’s was indeed an “independent contractor” and in that capacity had full responsibility for supervising the bridge removals. *Id.* ¶ 46. Conversely, by surrendering that responsibility to Happ’s, the defendant had divested itself of control over the bridge removals.

The third pertinent provision had to do with “job safety.” The *Carney* plaintiff argued that the railroad had retained the authority to protect its right-of-way by requiring Happ’s to remove unsafe equipment. *Id.* ¶ 47. A like contention was asserted that Union Pacific was able to remove unacceptable employees and to require workers to wear protective gear “such as hard hats and reflective vests.” *Id.* The court found that those amounted to a “general right to enforce safety” which was subordinate to Happ’s specific covenant to provide safety for the job, stating:

Moreover, the contract placed control of job safety with Happ’s. Specifically, Happ’s was required “to keep the job site free from safety and health hazards and insure that its employees are competent and adequately trained in all safety and health aspects of the job.”

Id. ¶ 47.

The preceding provisions are found in virtually all construction subcontracts. Absent some exercise of supervision, contrary to the provisions of the agreement, it is doubtful that a plaintiff can overcome an agreement which defines the relationship of the parties as contractor and independent contractor, obligates the latter to provide all labor and materials required for the work, and vests responsibility for safe performance of the work with the independent contractor.

C. De Facto Control of the Work at Variance With the Contract May also be Considered

The distinction between “general supervisory authority,” which does not trigger a duty under section 414, and the type of active involvement that has that effect is often referred to as “pervasive supervision of the work.” *Lee*, 2014 IL App (1st) 130771, ¶¶ 89, 94; *Shaughnessy v. Skender Constr. Co.*, 742 Ill. App. 3d 730, 739 (1st Dist. 2003). By definition it requires an actual presence on the jobsite together with one or more of the following significant factors: (1) provision of tools or other equipment for the work; *Shaughnessy*, 742 Ill. App. 3d at 738; (2) giving instruction to the subcontractor as to how to perform its job responsibilities; *Cochran*, 358 Ill. App. 3d at 869; and (3) involvement in the specific details of the subcontractor’s work, including its safe performance. *Id.*

In *Carney* the only persons who were involved with the work were employees of Happ’s and Carney Group. *Carney*, 2016 IL 118984, ¶ 55. While railroad representatives would come by and “check out the jobs,” they never spoke to the actual workers. *Id.* Nor were any Union Pacific employees present at the Polk Street bridge site at the time of the accident. *Id.*

The plaintiff attempted to resurrect *de facto* retained control by offering evidence of post occurrence actions of the defendant. *Id.* ¶ 56. In that regard, railroad employees met with Happ’s to discuss removal of the third and final bridge. *Id.* ¶ 57. In so doing they created a “list of steps” to remove the girders in a safer fashion. *Id.* ¶ 58. While the court recognized that post occurrence actions could be probative of “control.” it held that efforts to “avoid another accident” were insufficient as a matter of law to establish a duty under section 414. *Id.* ¶ 60. The court pointed out that holding otherwise would penalized a defendant’s safety efforts. *Id.* ¶ 61.

The court emphasizes that pro-active safety efforts, including the right to stop the work or require that it be done in a safe manner, would not establish sufficient control to give rise to a duty under section 414. *Id.* Further, relying upon *Fris v. Pers. Products Co.*, 255 Ill. App. 3d 916, 924-25 (3d Dist. 1994), the court found that equating an entrusting contractor’s right to require “that work be done in a safe manner to “control” would result in strict liability for all injuries to employees of independent contractors.” *Id.*

On the issue of duty under section 414 the court’s analysis concludes:

Because the record contains no evidence that defendant retained at least some degree of control over the ***manner*** in which Happ’s performed the bridge removal work, we hold that the trial court did not err in granting defendant’s summary judgment on plaintiff’s retained-control theory of duty and liability. (Bold italics supplied).

Id. ¶ 62.

While the analysis in *Carney* left off by finding that no duty arose under section 414, assuming a duty, the plaintiff, would still have to prove that the railroad was negligent.

V. The “Controlling” Party Must Have Actual or Constructive Knowledge of the Hazardous Condition or Work Practice for Liability To Attach

Curiously, the battle lines in construction negligence cases under section 414 of the Restatement are almost always drawn exclusively on the “control” issue. While “control” within the Restatement’s meaning of that term is the *sine qua non* before a legal duty arises, a finding of “control” is akin to cocking the hammer on a gun. As set forth in the express language of section 414, the controlling “employer owes a duty to exercise reasonable care” and is “subject to liability for physical harm to others . . . which is caused by his failure to exercise his control with reasonable care.” RESTATEMENT (SECOND) OF TORTS § 414 (1965). Thus, the cocked hammer is triggered by the negligence of the defendant in failing to exercise “his control with reasonable care.”

Reasonable care takes into account the controlling party’s actual or constructive knowledge of the hazardous condition or unsafe work practice which caused the injury. In that respect the following language of comment b is both instructive and controlling:

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, cmt. b, at 387-88 (1965) (emphasis added).

The emphasized language in the preceding quotation from comment b is intended to highlight the requirement of actual or imputed knowledge of the risk in question as a condition precedent to liability. It is significant to understand that the knowledge which is required to “trigger” the duty to prevent resultant injury is independent of the retained control which permits the defendant to prevent that injury. In this respect the “duty” derived from “control” is remedial as opposed to investigative. Section 414 does not contemplate an obligation on the part of a “controlling” party to affirmatively investigate or seek out potential hazards or unsafe work practices with the objective of preventing them. This too is in contradistinction to the mandate under the Structural Work Act that a party “having charge of the work” was obligated to correct any violations of which he “could have known.” *Kennerly*, 13 Ill. 2d at 439; *Smith*, 86 Ill. App. 3d at 574.

Whether tied to the overall work or the specific work which caused the injury, “reasonable care” relates to what the defendant actually “knew or had notice of.” *Rangel*, 307 Ill. App. 3d at 839. As otherwise expressed, a party having control of the work has preventive and/or remedial responsibilities only as to those hazards of which he has actual knowledge or actual reason to know. *Bieruta*, 331 Ill. App. 3d at 269. There is no *a priori* obligation to require safe practices or inspect the work of others to insure compliance with safety standards. *Hutchcraft*, 312 Ill. App. 3d at 359.

Appellate decisions under section 414 have consistently required that a controlling defendant have knowledge of the risk before liability would attach. As succinctly stated in *Cochran v. Sollitt*, “[a]ccording to *comment b* to Section 414, the general contractor’s knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability.” 358 Ill. App. 3d at 880.

In *Rangel v. Brookhaven Constructors, Inc.*, *supra*, the plaintiff slipped as he stepped onto the third brace of a drywall scaffold. In affirming summary judgment, the appellate court found *inter alia*: “[t]he general contractor neither ‘knew nor had reason to know of’ . . . this unsafe method of performing the work.” *Rangel*, 307 Ill. App. 3d at 839. The court further noted that Brookhaven would not “be charged with that knowledge simply because a duty to exercise ordinary care might arise under section 414.” *Id.* Likewise in *Shaughnessy v. Skender Constr. Co.*, *supra*, the court found that neither the general contractor nor the steel fabrication contractor had either the opportunity or reason to know that the plaintiff would use a defective board “to span the gap between the tower and the ledge of the wall opening.” *Shaughnessy*, 342 Ill. App. 3d at 734.

In *Martens v. MCL Constr. Corp.*, *supra*, the court emphasized the absence of evidence that the defendants were aware or had reason to know that the “work was being done in an unsafe manner before the plaintiff was injured” *Martens*, 347 Ill. App. 3d at 319. The same result was reached in *Cochran v. George Sollitt Constr. Co.*, *supra*. There the plaintiff fell from a ladder which he had positioned on a piece of plywood “placed atop two milk crates set in a drainage pit” *Cochran*, 358 Ill. App. 3d at 868. In affirming summary judgment based upon both the absence of control and lack of knowledge of the hazard, the court emphasized that: (1) the unsafe setup was in existence for an hour or less; and (2) none of the defendant’s “competent persons” had observed it. *Id.* at 873.

The same outcome was compelled in *Calderon v. Presidential Homes of Am., Inc.*, *supra*, where the plaintiff, a roofer, fell off a ladder as he was attempting to carry “a 60-pound bundle of shingles to the rooftop.” *Calderon*, 381 Ill. App. 3d at 335. The accident took place on a Saturday when the defendant was not present and involved the decision of the plaintiff and his employer not to use a “boom crane” or “conveyor-type apparatus” for that purpose. *Id.* at 336. Recognizing that claims under section 414 require actual or constructive knowledge of an unsafe work practice or hazardous condition, even if a control-based duty exists, the court stated: “[t]he general contractor’s knowledge, actual or constructive, of the unsafe work methods or a dangerous condition is a precondition to direct liability.” *Id.* at 347.

In order for a defendant contractor to have the requisite actual or imputed knowledge to trigger remedial action the hazard must be of such a nature that its existence was either open and obvious, continuous or such that its ubiquity would be imputed to a reasonably observant contractor. *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 162-179; *Maggi*, 2011 IL App (1st) 091955, ¶ 53; *Diaz*, 397 Ill. App. 3d at 36. Whether or not a defendant had actual or constructive knowledge of the dangerous condition or unsafe work practice therefore turns upon the nature and duration of the hazard and the contractor’s exposure to it. Where the condition or practice is open and obvious or it is actually observed by the defendant’s superintendent or project manager, it is no defense that those supervisory employees lacked sophistication to appreciate the hazard. *Ramirez*, 2014 IL App (1st) 123663, ¶¶ 162-179. On the other hand, where the defendant contractor lacks the opportunity to observe the danger, knowledge will not be imputed and liability will not follow. *Lee*, 2014 IL App (1st) 130771, ¶ 102; *O’Gorman*, 2015 IL App (1st) 133472, ¶ 95.

As discussed *supra*, the court in *Carney v. Union Pacific* never reached the question of whether the defendant had constructive notice of the conditions and work practices which led to the plaintiff’s injury. However, as no one from the railroad was present, it is unlikely that the defendant had actual or constructive knowledge that Happ’s would allow the

western bridge girder to become destabilized and that a demolition subcontractor’s employee might be standing on the bridge “floor plate” which might move concomitantly with the descending girder. By hindsight, anything is possible and *ergo* avoidable. Reality requires actual facts which demonstrate to the defendant, pre-accident, that the subcontractors have “carelessly done their work in such a way as to create a dangerous condition” RESTATEMENT (SECOND) OF TORTS § 414 cmt. b.

Conclusion

Carney v. Union Pacific is a watershed decision in the area of construction negligence law. After more than 20 years since repeal of the Structural Work Act and over 60 published appellate decisions, interpreting section 414 as its successor, the Illinois Supreme Court has finally articulated the nature, limitations and boundaries of the tort. In doing so it has dispelled the notion that the rule contemplates vicarious liability. To the contrary, it is a direct liability concept which focuses solely upon the “employer’s” own acts and omissions in exercising such control as supports a duty to do so reasonably.

Carney also makes clear that “control” as the triggering mechanism for a duty looks to the employer’s contractual retention or exercise of supervision over the manner, means and methods of how the contractor does its work. General authority, including the right to stop the work, focuses upon the end result or completed product, as opposed to how the job is accomplished. That distinction is significant inasmuch as construction is a composite of skilled trades and crafts in which each subcontractor contributes its specialized services, including the safe performance of those specialized services.

Carney was decided on the threshold issue of legal duty. However, even assuming that the requisite control to support a “duty” is found, a plaintiff must still prove that the controlling defendant knew or had reason to know of the dangerous condition or work practice. Absent that actual or imputed knowledge any duty begotten of control is not breached and liability will not attach.

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