

**TORT NOTES**  
**By: James J. Morici, Jr.**

**CONSTRUCTION NEGLIGENCE RESTATEMENT OF TORTS, 2D CLARIFIED BY  
THE ADOPTION OF I.P.I JURY INSTRUCTION**

In November 2001, the Illinois Supreme Court revised the Illinois Pattern Jury Instructions through the adoption of I.P.I. 55.01 et seq. relating to construction site negligence claims. These instructions fill the void left after the repeal of the Structural Work Act in 1995. Many of us felt strongly that instructions in such cases should be based on the law outlined in the Restatement 2d of Torts, Section 414. Unfortunately, judges were cautious about deviating from the I.P.I.'s general negligence instructions. Thanks to 55.03, this difficulty should be eliminated.

Prior to February 1995, the Illinois Structural Work Act had been the traditional outlet by which plaintiffs injured at construction site, brought suit in Illinois. As a result of its repeal, plaintiffs were forced to rely exclusively on construction negligence law, an area rarely utilized. Since the repeal, Illinois courts have continued to rely on section 414 for construction related injuries, however, conflicts have arisen regarding what level of control is sufficient to render a party liable for failing to exercise reasonable care. Some courts have cavalierly created ill defined phrases such as "incidental aspects" and "operative details" and created confusion.

Generally, Illinois courts have applied section 414 broadly by focusing on whether the defendant retained authority to stop the work for unsafe practices to determine if the defendant owed a duty to the plaintiff. Comment (a) of Section 414 discusses when a defendant may be found to have retained the requisite degree of control to establish duty. Under the Restatement, where the

defendant exercises “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” a duty is established.

*Restatement (Second) of Torts, Section 414, comment (a), at 387 (1965).* Furthermore, comment (b) explains that a defendant is subject to liability under Section 414 where 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, 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 himself.

*Restatement (Second) of Torts, Section 414, comment (a), at 387-88(1965).* For a defendant to be found liable under Section 414, a plaintiff must show the defendant retained control over any part of the work and failed to exercise that control with reasonable care.

In drafting these new instructions, the Committee drew heavily not only on Section 414, but also on several Illinois cases which have defined Section 414 throughout the years. These cases include, Larson v. Commonwealth Edison Co., 33 Ill.2d 316 (1965); Weber v. Northern Ill. Gas Co., 10 Ill.App.3d 625 (1<sup>st</sup> Dist. 1973); Pasko v. Commonwealth Edison Co., 14 Ill.App.3d 481 (1<sup>st</sup> Dist. 1973); Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill.App.3d 1051 (1<sup>st</sup> Dist. 2000); Brooks v. Midwest Grain Products of Illinois, Inc., 311 Ill.App.3d 835 (1<sup>st</sup> Dist. 1999), and distinguished rouge cases like Fris v. Personal Products Company, 255 Ill.App.3d 530 (5<sup>th</sup> Dist. 1996), and Rangel v. Brookhaven Constructors, Inc., 307 Ill.App.3d 835 (1<sup>st</sup> Dist. 1999). Each of these cases speak to the duty that a general contractor, or other entities, has to all subcontractor employees when they retain control over any part of the work. It is this principle which is the framework of the new I.P.I. instructions.

Instruction 55.01 states:

A(n) (owner) (contractor) (other) who entrusts work to a (subcontractor) (contractor) 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) (contractor's) (other's) failure to exercise that control with ordinary care.

Instruction 55.02 states: “a party who retained some control over the safety of the work has a duty to exercise that control with ordinary care.” Instruction 55.03 is comprised of the burden of proof instruction. Finally, the series concludes with instruction 55.04, relevant to those cases where more than one person had some control over the safety of the work.

This new I.P.I series supports fair and reasonable compensation for construction site injuries.

They repair some of the damage that was inflicted by the misguided repeal of the Structural Work Act. It is in this author's opinion that far too much time and effort has been wasted in the court rooms of Illinois regarding proper instructions in these cases and these new instructions, effectuated November 2001, provide the proper groundwork for this area of law rapidly emerging in the wake of the Structural Work Act. These adopted instruction are obviously the law now in Illinois and must be utilized in all construction site negligence cases.

*For a discussion of the historical perspectives of Section 414 and its increased significance in light of the repeal of the Illinois Structural Work Act, see “Construction Negligence: Out from the shadow of the Structural Work Act” 87 Illinois Bar Journal, Page 34, January 1999.*

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