BY GREGORY R. JONES

Will the Real Independent Contractor Please Stand Up?

Examining the concept of retained control.

THE GENERAL RULE UNDER ILLINOIS COMMON LAW is "one who employs an independent contractor is not liable for harm caused by the latter's acts or omissions."[1] The term "independent contractor" has historically been defined as "one who renders service in the course of an occupation representing the will of the person for whom the work is done only as to the result of the work and not as to the means by which it is accomplished, and is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result."[2]

However, the label "independent contractor" does not absolve a hiring entity from tort liability for the latter's *own* negligence when retaining some requisite degree of control over an independent contractor,[3] nor is the label dispositive for determining whether an agency relationship existed between the two parties.[4] As a result, causes of action against employers of independent contractors remain viable in certain instances.

Two potential claims against employers of independent contractors

First, the Restatement (Second) of Torts section 414 (an expression of Illinois common law[5]) states: "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."[6] The rule stated in section 414 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."[7] In sum, section 414 "sets forth one way in which an employer of an independent contractor may be negligent and, thus, directly liable for physical harm to others."[8]

Second, while, as a general rule, no vicarious liability exists for the actions of independent contractors,[9] the fact "[t]hat someone is an independent contractor … does not bar the attachment of vicarious liability for his actions if he is also an agent."[10] Thus, under an appropriate set of facts, a vicarious-liability claim may be properly brought against an employer of a purported independent contractor pursuant to the principles of agency law.

Notably, prior to the Illinois Supreme Court's decision in *Carney v. Union Pacific. R.R. Co.*, "[m]any appellate court decisions … cited section 414 of the Restatement as a basis for imposition of both direct

1. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 31.
2. *Hartley v. Red Ball Transit Co.*, 344 Ill. 534, 538 (1931).
3. See *Carney*, 2016 IL 118984, ¶ 33.
4. See *Sperl v. C.H. Robinson Worldwide, Inc.*, 408 Ill. App. 3d 1051, 1057 (3d Dist. 2011).
5. See *Carney*, 2016 IL 118984, ¶ 35.
6. Restatement (Second) of Torts § 414 (1965) (emphasis added).
7. *Id.*, comment b.
8. *Carney*, 2016 IL 118984, ¶ 36.
9. See *Lawlor v. North American Corp. of Ill.*, 2012 IL 112530, ¶ 42.
10. *Id.* ¶ 43.

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TAKEAWAYS >>

• While the Illinois Supreme Court in *Carney v. Union Pacific R.R. Co.* (2016) clearly speaks to an employer's direct liability for its own negligence, it does not address the employer's vicarious liability for a contractor's negligence.

• Determining vicarious liability requires an analysis of the law, the relationship between the parties, and questions of fact. Still, inconsistent results are likely, given the language in the Restatement (Second) of Torts section 414, its similarities to the test for vicarious liability, and the differences in review standards cited by courts deciding motions for summary judgment surrounding vicarious-liability and section-414 claims.

• Plaintiffs and defendants should look beyond written agreements when determining the viability of legal claims under both section 414 and vicarious liability theories. Pleadings that assert causes of action and highlight allegations surrounding factors distinct to the vicarious-liability test may be advantageous for plaintiffs.

ARGUABLY, AN EXAMINATION OF "THE RELATIONSHIP" BETWEEN PARTIES IS MORE LIKELY TO PROCEED TO A JURY THAN IF A COURT IS CALLED UPON TO DETERMINE THE OFT-CITED AND ROUTINELY POSED QUESTION OF LAW THAT ASKS WHETHER "A DUTY" EXISTS.

liability and vicarious liability against the employer of an independent contractor," but the court clarified that section 414 "articulates a basis only for imposition of direct liability."[11]

Proper test for section 414

Comment (c) explains when the rule stated in section 414 may apply, and it provides, in part, that:

> [T]he 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.*[12]

Further, "[t]he best indicator of whether the defendant retained control sufficient to trigger the potential for liability under section 414 is the written agreement between the defendant and the contractor. But even if the agreement provides no evidence of retained control by the defendant, such control may yet be demonstrated by evidence of the defendant's conduct at variance with the agreement."[13]

In *Carney*, the Court explained that "[a] general right to enforce safety … does not amount to retained control under section 414."[14] Turning to the facts of *Carney*, the plaintiff—Patrick Joseph Carney, the son and employee of the subcontractor—sued the Union Pacific Railroad Company, which had hired a scrap contractor to perform bridge demolition.[15] The scrap contractor retained the services of the subcontractor to help complete the work. Additionally, Union Pacific entered a "Purchase and Removal Agreement" with the scrap contractor, whereby the latter would provide all labor, tools, and materials necessary to remove the bridge. Ultimately, Carney was severely injured when he slid under a support beam.

Holding that the trial court did not err in granting summary judgment, the Court pointed out that the agreement "placed control of job safety with [the scrap contractor];"[16] Union Pacific's representatives did not oversee the subcontractor's work and were "not even present at the … bridge at the time of the accident;"[17] and Union Pacific "only sought to avoid another accident by suggesting a way to secure the [support beams] during [a subsequent] bridge removal" that followed the accident giving rise to Carney's claim.[18]

In contrast, the First District of the Illinois Appellate Court in *Wilkerson v. Paul H. Schwendener, Inc.* (a case cited with approval by the Supreme Court in *Carney*) addressed the existence of a duty in the context of a construction project where the general contractor retained control over safety at the worksite.[19] There, the First District held that "[a]lthough the contract between [the subcontractor] and defendant [general contractor] seemingly left to [the subcontractor] control of the operative details of its work and the safety of its employees, [the] defendant['s] [general contractor's] actions on the jobsite show[ed] defendant [general contractor] retained more than a general right of supervision."[20] Specifically, the First District explained that the general contractor: required the subcontractor to comply with a list of 21 safety regulations and to attend weekly safety meetings; had three supervisory employees on site with authority to stop any work being performed dangerously; and wrote to the subcontractor (shortly before the accident) regarding work that was being performed without fall protection—the condition that led to the plaintiff's injuries.

Thus, while the Court in *Carney* determined that summary judgment was appropriate, the test for section 414 direct liability can be described as clearly fact intensive.

Proper test for vicarious liability

When examining the relationship between an employer and an independent contractor, "[t]he test of the relationship is the right to control. It is not the fact

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- Matthew Hector, *Illinois High Courts Finds for Hospital in Apparent-Agency Case*, 106 Ill. B.J. 12 (Feb. 2018), law.isba.org/3eKn948.
- Jason G. Schutte, *Vicarious Liability Bars Contribution Between Principal Defendants*, Trial Briefs (Feb. 2018), law.isba.org/2XoRUor.
- Richard Lee Turner Jr., Carney v. Union Pacific Railroad Co.: *The Illinois Supreme Court Clarifies Extent of Liability to a Subcontractor Employee by an Owner or General Contractor*, Trial Briefs (Nov. 2016), law.isba.org/2WWHjqh.

11. *Carney*, 2016 IL 118984, ¶ 36.
12. Restatement (Second) of Torts § 414, comment c (1965) (emphasis added).
13. *Carney*, 2016 IL 118984, ¶ 41.
14. *Id.* ¶ 47.
15. See *id.* ¶ 5.
16. *Id.* ¶ 47.
17. *Id.* ¶ 54.
18. *Id.* ¶ 61.
19. See *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491, 497 (1st Dist. 2008).
20. *Id.*

of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent."[21] However, "no precise formula exists for deciding when a person's status as an independent contractor is negated."[22]

Nevertheless, "[t]he determination of whether a person is an agent or independent contractor rests upon the facts and circumstances of each case," and, similar to the test under section 414, "the cardinal consideration is whether that person retains the right to control the manner of doing the work."[23] "Another significant factor is the nature of work performed in relation to the general business of the employer."[24] Other factors include: "(1) the right to discharge; (2) the method of payment; (3) the provision of necessary tools, materials, and equipment; (4) whether taxes are deducted from the payment; and (5) the level of skill required."[25] These additional factors are also reflected in the fourth paragraph of the Illinois Pattern Jury Instruction-Civil (IPI-Civil) No. 50.10.[26]

Again, similar to the section 414 test, the test for vicarious liability may begin with a review of the four corners of contractual agreements. But courts caution that "[a] fact finder's determination of whether an agency relationship exists should be made by considering all of the surrounding circumstances and actions of the parties, without exclusive weight being given to contractual labels or provisions."[27]

Notably, despite "retained control" being a central factor for both tests, vicarious liability involves consideration of a number of factors that are *not* addressed in the *Carney* decision or section 414.

Carney clarifies the limited scope of section 414

In *Carney*, the Illinois Supreme Court indicated that confusion among Illinois Appellate Court districts as to the scope of section 414 centered around misinterpretation of Comment (a),[28] which states:

> *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 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.[29]

Citing to *Aguirre v. Turner Construction Co.*, an opinion by the Seventh Circuit of the U.S. Court of Appeals, the Court in *Carney* noted that the first sentence of Comment (a) does not explain when section 414 applies but rather when it *does not* apply.[30]

The Court in *Carney* continued parsing through Comment (a) of section 414 by explaining that "[i]f the *control retained* by the employer is such that it *gives rise* to a *master-servant relationship*, thus negating the person's status as an independent contractor, the employer may be liable for the negligence of the contractor's employees under the law of agency."[31] Borrowing again from *Aguirre*, the Court in *Carney* quoted that "section 414 takes over where agency law ends."[32]

In summation, the Illinois Supreme Court's decision in *Carney* unequivocally clarifies that section 414 "addresses only the direct liability of the employer for its own negligence and not vicarious liability, under agency principles, for the contractor's negligence."[33]

What about claims or tests for vicarious liability?

As highlighted by the italicized text above, a distinction exists between two levels of retained control discussed in Comment (a) to section 414. On the one hand, certain "supervisory control" may give rise to section 414 direct liability. On the other hand, a heightened level of "control over the operative detail" of work, which is read in connection with 'master-servant' relationships, may negate one's status as an independent contractor. As noted above, however, the second theory examined in this article is not *respondeat superior*, but rather, the broader concept of vicarious liability that can attach when an independent contractor is also an agent.[34]

THE ILLINOIS SUPREME COURT'S DECISION IN *CARNEY V. UNION PACIFIC R.R. CO.* UNEQUIVOCALLY CLARIFIES THAT SECTION 414 "ADDRESSES ONLY THE DIRECT LIABILITY OF THE EMPLOYER FOR ITS OWN NEGLIGENCE AND NOT VICARIOUS LIABILITY, UNDER AGENCY PRINCIPLES, FOR THE CONTRACTOR'S NEGLIGENCE."

As a practical matter, courts and attorneys often consider the relationships of "master-servant," "employer-employee," and "principal-agent" as being interchangeable. However, IPI-Civil (2011) 50.10 explains that distinctions between the relationships exist and may come into issue. Specifically, the last sentence of the

21. *Hartley v. Red Ball Transit Co.*, 344 Ill. 534, 539 (1931).
22. *Lawlor v. North American Corp. of Ill.*, 2012 IL 112530, ¶ 44.
23. *Id.* (quotations omitted).
24. *Sperl v. C.H. Robinson Worldwide, Inc.*, 408 Ill. App. 3d 1051, 1057–58 (3d Dist. 2011).
25. *Id.* at 1058.
26. See Illinois Pattern Jury Instructions, Civil, No. 50.10 (2011).
27. *Sperl*, 408 Ill. App. 3d at 1057.
28. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 37.
29. Restatement (Second) of Torts § 414, comment a (1965) (emphasis added).
30. See *Carney*, 2016 IL 118984, ¶ 38 (citing *Aguirre v. Turner Construction Co.*, 501 F.3d 825, 829 (7th Cir. 2007)).
31. *Id.* (emphasis added).
32. *Id.* (quoting *Aguirre*, 501 F.3d at 829).
33. *Id.* ¶ 39.
34. See also *Michale v. W.D. Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 61.

first paragraph of IPI-Civil (2011) 50.10 instructs: "[The term 'agent' is broader than either 'servant' or 'employee.' A servant or employee is an agent, but one may be an agent although he is neither servant nor employee.]"[35] Similarly, the Notes on Use for IPI-Civil (2011) 50.10 provide that "[t]he bracketed material in the first paragraph should be used only where there is need to point out that a person may be an agent without being a servant or employee."[36] And the Restatement (Second) of Agency section 2 highlights that an independent contractor "may or may not be an agent."[37]

To be sure, the *Carney* opinion did not make any attempt to differentiate potential nuances amongst these three types of relationships, nor did it consider IPI-Civil (2011) 50.10 or the Restatement (Second) of Agency in its analysis of section 414. But the Court did note that the plaintiff "[had] not pursued a claim of vicarious liability."[38] Put another way, because the cause of action in the complaint applicable to the defendant "[spoke] only to defendant's own negligence and [did] not seek to hold [the] defendant vicariously liable for any negligence of [its scrap contractor]," the court "confine[d] [its] analysis to whether [the] defendant retained control over the work of its [scrap] contractor … such that direct liability might attach under section 414."[39] Arguably, if the Court in *Carney* wanted to preclude any possibility of vicarious liability attaching in cases where there is an absence of even the lower level of retained "supervisory control" necessary to trigger potential direct liability under section 414, it could have stated that Carney's attempt to make a claim outside of the pleadings was moot. But read in context, the Court simply declined to consider the issue of a specific claim for vicarious liability.

Thus, it would be improper to read *Carney* as standing for the proposition that, absent the lower level of retained "supervisory control" needed to trigger direct liability under section 414, a claim for vicarious liability can *never* be valid.

Why additional clarification is needed & tips for practitioners

Similar to the declaration in *Carney* that courts appeared "confused" regarding proper application of section 414, the Introduction to IPI-Civil 55.00 explains that "the law [of construction negligence] is currently in a state of flux and continues to be an area that is changing and developing."[40]

Potential confusion may also surround the appropriate review standard for courts considering the two types of legal theories being discussed in this article.

Specifically, for section 414 direct liability, courts must consider whether the defendant's "conduct … establish[es] a duty under section 414."[41] And while some cases, such as *Wilkerson*, state "[g]enerally, whether a general contractor retained sufficient control to trigger liability under section 414 is a question of fact,"[42] that is stated in the face of the more routinely cited standard of "[w]hether a duty exists is a question of law for the court to decide."[43]

Perhaps complicating matters further, cases such as *Aguirre* have postured that, "[p]roceeding on the understanding that section 414 states a theory of direct liability based on a general contractor's failure to exercise reasonable care, whether [a general contractor] retained a level of control sufficient to give rise to a duty to exercise reasonable care is a question of law."[44] To be sure, by stating that "[t]he 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," the *Carney* opinion may help clarify the issue.[45] But given the fact-intensive nature of section 414 retained-control tests, inconsistent results are almost certainly inevitable.

On the other hand, courts testing for vicarious liability hold that "[w]hether *the relationship* of principal and agent or owner and independent contractor existed [is] a question of fact for the jury unless the relationship was so clear as to be indisputable."[46] Put another way, "[t]he nature of *the relationship* depends on the actual practice between the parties and, as a general rule, is a mixed question of law and fact to be submitted to the jury."[47] Arguably, an examination of "the relationship" between parties is more likely to proceed to a jury than if a court is called upon to determine the oft-cited and routinely posed question of law that asks whether "a duty" exists.

Under the current state of the law, practitioners may best serve their clients in the following ways. First, both plaintiffs and defendants should conduct extensive investigation and discovery outside the confines of written agreements and determine the viability of legal claims under both section 414 and vicarious liability theories. Second, where a colorable claim can be made, plaintiff attorneys may consider drafting pleadings that assert causes of action *and* highlight allegations surrounding the factors distinct to the vicarious-liability test.

35. Illinois Pattern Jury Instructions, Civil, No. 50.10 (2011).
36. *Id.*
37. Restatement (Second) of Agency § 2(3) (1958).
38. *Carney*, 2016 IL 118984, ¶ 40.
39. *Id.*
40. Illinois Pattern Jury Instruction, Civil, No. 55.00 (revised Dec. 17, 2018).
41. *Carney*, 2016 IL 118984, ¶ 61.
42. *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491, 494 (1st Dist. 2008).
43. *American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992).
44. *Aguirre v. Turner Construction Co.*, 501 F.3d 825, 829 (7th Cir. 2007).
45. *Carney*, 2016 IL 118984, ¶ 41.
46. *Shoemaker v. Elmhurst-Chicago Stone Co.*, 273 Ill. App. 3d 916, 920 (1st Dist. 1994) (emphasis added).
47. *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 80 (emphasis added).