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ILLINOIS CONSTRUCTION NEGLIGENCE, POST-STRUCTURAL WORK ACT: THE NEED FOR A CLEAR LEGISLATIVE MANDATE

PETER PUCHALSKI*

INTRODUCTION

From the casual passer-by to the architectural buff, the grandiose edifice of a downtown skyscraper evokes feelings of awe and marvel. However, little thought is ever given to the perils encountered daily by those employed in the construction industry. The statistics are telling. Since the early 1970's the construction industry's incidence of injury has exceeded national rates by more than sixty percent.[1] Within the construction industry, death rates for ironworkers, routinely involved in extra-hazardous activities, are consistently higher then those for all other construction.[2]

The most common accident at construction sites is falls, and more fatalities result from falls than any other construction activity.[3] Falls kill more than 300 construction workers every year, and injure thousands others.[4]

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* J.D. Candidate, 2003, The John Marshall Law School. Special thanks to Ryan Liska and the entire John Marshall Law Review editorial staff. Thanks also to my father, Dennis Puchalski, for his unparalleled insight into Illinois construction negligence.

1. *See* Bureau of Labor Statistics, *Safer Construction Workplaces Evident During the Early 1990s*, *at* http://stats.bls.gov.iif/oshwc/ossm0004.txt (last visited Feb. 28, 2003) (revealing the dangerous nature of the construction industry compared to national rates encompassing all employment).

2. *See* Earl S. Pollack & Risana T. Chowdhury, *Trends in Work-Related Death and Injury Rates among U.S. Construction Workers, 1992-98*, The Center to Protect Workers' Rights, *at* http://www.cpwr.com/krdeaths.pdf (last visited Feb. 28, 2003) (detailing trends in national death and injury rates within the construction industry, on an individual trade basis).

3. *See* William F. Conour, *Construction Site Accident Facts*, *at* http://www.conour.com/facts.htm (last visited Feb. 28, 2003) (compiling statistics indicating the risk of injury and death associated with the construction industry). This site further asserts that ironworkers are the construction trade with the greatest likelihood of injury. *Id.*

4. *See* The Center to Protect Workers' Rights, *Fall Protection Harnesses: Hazard Alert*, *at* http://www.cpwr.com/hazfallprotection.pdf (last visited Feb. 28, 2003) (describing fall-protection equipment and procedure for the purpose of lowering national death rates related to falls).

On a national level, ironworker death and injury rates have significantly declined from 1992 to 1998.[5] In Illinois, from 1995 to 1998, the number of construction related deaths has increased by 29 percent.[6]

Two conclusions are quite clear. First, it is evident that construction safety is a serious concern that cannot be ignored on either the state or federal level. Second, since 1995, Illinois has not effectively regulated and ensured construction safety.

Until 1995, extra-hazardous construction activities in Illinois were governed by the Illinois Structural Work Act. This Act was extremely controversial and sparked serious debate between labor organizations, political parties, insurance companies, contractors, land owners, architects and workers alike.

This article discusses the relative strengths and weaknesses of both the Illinois Structural Work Act and the Restatement (Second) of Torts § 414, which is the current measure of liability for construction-related injuries in Illinois.[7] This article further contends that the Illinois legislature must correct current litigation problems and ambiguities–as well as increasing construction injury and death rates–by issuing a clear legislative mandate regarding such injuries. This article suggests that the Illinois legislature revise the Structural Work Act to address the Act's previous shortcomings, while providing a clear, reliable and predicable standard upon which to base liability, assess damages, and ensure workplace safety.

Part I explores the background and history of the Illinois Structural Work Act from its inception in 1907, through 1995 when the Illinois legislature repealed it, while chronicling other relevant developments in Illinois tort law. Part II illustrates the operation of the Illinois Structural Work Act and Restatement (Second) of Torts § 414 as construction negligence standards, assessing their efficiency and utility by exploring litigation arising under each measure. Finally, Part III addresses the specific need

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5. *See generally* Pollack & Chowdhury, *supra* note 2 (revealing overall trends in ironworker injury and death rates). Nonfatal injuries to ironworkers dropped from roughly 1,800 injuries per 10,000 workers in 1992 to roughly 800 injuries per 10,000 workers in 1998. *Id.* Work-related deaths among ironworkers dropped from roughly 150 deaths per 100,000 workers in 1992 to under 100 deaths per 100,000 workers in 1998. *Id.*

6. Martin F. Healy, *Vested Interest*, *at* www.iltla.com/october1998vested.htm (last visited Feb. 28, 2003) (describing the alarming raise in construction-related deaths in Illinois since the repeal of the Illinois Structural Work Act in 1995 through 1998).

7. *See generally* RESTATEMENT (SECOND) OF TORTS § 414 (1965) (stating the standard for negligence in exercising control retained by the employer). *See generally* Bruce M. Kohen & Darius H. Bozorgi, *Construction Negligence: Out from the Shadow of the Structural Work Act*, 87 ILL. B.J. 34 (1999) (discussing construction negligence standards as reflected in the RESTATEMENT (SECOND) OF TORTS and the Structural Work Act).

for a clear legislative mandate and further proposes a compromised approach to construction negligence standards.

I. BACKGROUND AND HISTORICAL PERSPECTIVE OF THE ILLINOIS STRUCTURAL WORK ACT AND OTHER RELEVANT LEGISLATION

Part A of this section discusses the historical roots of the Illinois Structural Work Act. Part B reveals the elements of a cause of action under the Act. Part C discusses the Illinois Workers' Compensation Act and its relationship to the Illinois Structural Work Act. Part D approaches the application of comparative negligence and contribution to the Illinois Structural Work Act. In Part E, common law negligence principles relating to construction injuries are defined and discussed. Finally, Part F details the repeal of the Illinois Structural Work Act.

A. Illinois Structural Work Act: A Historical Perspective

On June 3, 1907,[8] the Illinois legislature passed the Structural Work Act,[9] also known as the "Scaffold Act," for the purpose of ensuring workplace safety for construction workers engaged in extra-hazardous activities.[10] Although no recorded legislative history of the Structural Work Act exists, a historical perspective of the times in which it was enacted provides ample insight into the circumstances surrounding the Act's creation.[11] At the turn of the century, America's industrial strength was reaching unprecedented heights.[12] Accompanying this ascension was an alarming rate of workplace injuries.[13] The Illinois

8. 1907 ILL. LAWS 312.

9. Structural Work Act, 740 ILL. COMP. STAT. 150/1-9 (1994) (repealed 1995) [hereinafter Act].

10. *Id.* The Illinois Structural Work Act requires that all scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, used for the erection, repairing, alteration, removal or painting of any structure be created and maintained in a safe, suitable and proper manner. *Id.* at § 1.

11. *See* Gannon v. Chi., Milwaukee, St. Paul and Pac. Ry. Co., 175 N.E.2d 785, 791-792 (Ill. 1961) (explaining the legal climate under which the Illinois Structural Work Act was passed in 1907). Prior to the Structural Work Act, a person "in charge" of the work was required to use ordinary care to protect his workers. *Id.* at 791. However, a defendant in a negligence action was shielded by the defenses of contributory negligence, assumption of risk and the fellow servant rule, all of which created an extremely difficult litigation barrier for any plaintiff to overcome. *Id.* For example, prior to the Structural Work Act, a plaintiff's own negligence would not offset his recovery, but would serve as a complete bar to his action. *See id.* (providing an example where plaintiff's negligence would serve to bar any recovery for injuries).

12. *See generally* ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 2.07 (Matthew Bender ed., 2002) (describing the rising industrial climate in the United States that lead to widespread legislative reform, in particular the Workmen's Compensation Act).

13. *Id.* at § 2.07, 2-13. Larson attributes the birth of the Workmen's

legislature established Illinois' first Workers' Compensation Act, along with the Structural Work Act, to provide workers with an adequate remedy for workplace injuries.[14] However, the legislature required the plaintiff to have sufficiently proven each element of the cause of action before the Structural Work Act entitled him to the provided remedies.[15]

B. Illinois Structural Work Act: Elements of a Cause of Action

To recover the civil remedy established by the Structural Work Act, an injured party had to prove that he/she belonged to the protected class that legislature intended the Act to cover.[16]

Compensation Act in the United States to "the coincidence of increasing industrial injuries and decreasing remedies." *Id.*

14. *See Gannon*, 175 N.E.2d at 792 (explaining the legislative purpose behind the passage of the Structural Work Act). The *Gannon* court concluded that the purpose of the Act was to ensure adequate compensation to the injured worker and prevent future worksite injuries. *Id.* at 791-92. Further, the court reasoned that the doctrines of comparative negligence and assumption of risk were not applied to the Act so that a plaintiff's own negligence would not prove fatal to his own cause of action, as it commonly did prior to the Act's inception. *Id.* at 792. Moreover, the court likened this feature of the Structural Work Act to the Mining Act that had been passed prior to the Structural Work Act and similarly construed. *Id. See also* LARSON & LARSON, *supra* note 12, at § 2.07, 2-13 (explaining the rise in Workmen's Compensation Acts throughout the country in the early 1900s). Larson attributes the vast increase in legislative action throughout the country concerning workmen's compensation to "the coincidence of increasing industrial strength and decreasing remedies." *Id.* Larson further asserts that Illinois, along with Massachusetts and Connecticut, were the leaders among the states in implementing an initiative of reform. *Id. See also History of Workers' Compensation Law*, *at* http://www.workerscompensation.com/illinois/reference/qfacts/qfacts01.htm (last visited Feb. 28, 2003) (tracing the history of the Illinois Workers' Compensation Act from its inception to its current status, detailing each amendment to the Act).

15. *See generally* 740 ILL. COMP. STAT. 150 /1-9 (1994) (repealed 1995).

16. *See* Vuletich v. U.S. Steel Corp., 512 N.E.2d 1223, 1224 (Ill. 1987) (holding that, as a general rule, the Structural Work Act does not cover all construction-related accidents). *But see* Lafata v. Vill. of Lisle, 561 N.E.2d 38, 42 (Ill. 1990) (stating that Illinois courts have routinely construed the provisions of the Structural Work Act liberally so as to provide adequate protection to workers engaged in extra-hazardous work activities). The *Lafata* court extended coverage to the plaintiff because his work activity was particularly hazardous, although the plaintiff's injury did not involve a scaffold, crane, stay, ladder, support or other mechanical contrivance as section 1 of the Structural Work Act expressly requires. *Id.* at 43. *Compare* Quinn v. L.B.C., Inc., 418 N.E.2d 1011, 1013 (Ill. 1981) (holding that a city building inspector, uninvolved with the erection of a structure was covered under the Act). The *Quinn* court reasoned that the plaintiff should be covered under the Act because his activities bore a legitimate connection to the workplace. *Id.* at 1013. *See also* Halberstadt v. Harris Trust & Sav. Bank, 289 N.E.2d 90, 93 (Ill. 1972) (holding that the activities of a professional window washer were covered under the Structural Work Act, although the act

Next, the injured party had to establish that the defendant owed him/her a duty of reasonable care.[17] Under the Structural Work Act, the injured party could allege the existence of a duty on the part of owners, contractors, sub-contractors, architects or any other third person "having charge of the erection, construction, repairing, alteration, removal, or painting of any building, bridge, viaduct or other structure within the provisions of this Act."[18] Finally, an injured party had to prove a "willful" failure to comply with the provisions of the Act.[19] In the event of death, the civil cause of action was available to a surviving spouse, lineal heirs, adopted children, or anyone dependent upon the decedent.[20] Moreover, violations of the Structural Work Act could lead to

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of "cleaning" was not expressly addressed in section 1 of the Act). *But see* Grant v. Zale Const. Co., 440 N.E.2d 1043, 1045 (Ill. 1982) (holding that the activities of a firefighter, injured while providing medical assistance to a construction worker fell outside of the protected class). The *Grant* court reasoned that a firefighter has no direct connection with the construction process. *Id.* at 1045. *See generally* Scott Owen Reed, *The Protected Class Under the Structural Work Act*, 74 ILL. B.J. 186, 188 (1985) (examining the controversy behind the "protected class" recognized under the Illinois Structural Work Act). The "protected class" of the Structural Work Act has been interpreted both liberally and narrowly throughout Illinois courts. *Id.* For those not explicitly engaged in extra-hazardous activities, Illinois courts do agree that the activities in question must directly aid or further construction activities described in section 1 of the Illinois Structural Work. *Id.* at 187. *See generally* William H. Angler, *Liabilities of an Owner Under the Scaffold Act - The Statute's "Having Charge of" Language Produces Inconsistency - Norton v. Waggoner Equipment Rental & Excavating Co.*, 29 DEPAUL L. REV. 635 (1980) (explaining that there have been inconsistent results applying liability under the Scaffold Act).

17. Cockrum v. Kajima Int'l, Inc., 645 N.E.2d 917, 921-22 (Ill. 1995).

18. 740 ILL. COMP. STAT. 150/9 (1994) (repealed 1995).

19. *Id.* *See also Cockrum*, 645 N.E.2d at 921-22 (holding that under the Illinois Structural Work Act, a "willful" violation is one in which the party "having charge of" the work knew, or through the exercise of reasonable care, should have known, that a dangerous condition existed); Davis v. Commonwealth Edison Co., 336 N.E.2d 881, 885 (Ill. 1975) (equating the "willful" requirement under the Structural Work Act to "knowing"). *But see* Arlen v. United States, 2000 U.S. Dist. LEXIS 13298, at 14 (N.D. Ill. 2000) (holding that a defendant can violate the Illinois Structural Work Act despite a lack of knowledge that the plaintiff would even be present at the worksite); Smith v. Cent. Ill. Pub. Serv. Co., 531 N.E.2d 51, 57-58 (Ill. App. Ct. 1988) (holding that a defendant cannot commit a willful violation where the dangerous condition is of such recent creation and short duration that he could not have reasonably discovered it); Getz v. Del E. Webb Corp., 349 N.E.2d 682, 687-88 (Ill. App. Ct. 1976) (holding that a defendant is entitled to a judgment as a matter of law when the plaintiff can not provide sufficient evidence of whether the defendant knew or should have known of the dangerous condition). This occurs when there is sufficient evidence establishing the fact that the condition existed prior to the plaintiff's injury and that the defendant, through the exercise of reasonable care, should have discovered its existence. *Cockrum*, 645 N.E.2d at 922.

20. 740 ILL. COMP. STAT. 150/9 (1994) (repealed 1995).

criminal sanctions, carrying the penalty of a Class A misdemeanor.[21] The importance of construction safety–evident in both the civil and criminal penalties established under the Structural Work Act–was reinforced by the Illinois legislature with the enactment of the Illinois Workers' Compensation Act.

C. Illinois Workers' Compensation Act

Four years after the enactment of the Structural Work Act, the Illinois legislature passed the first form of the Illinois Workers' Compensation Act.[22] By 1917, Illinois legislation limited the remedies of those injured in the course of extra-hazardous activities to the guaranteed disability payments provided by the Workers' Compensation Act.[23] Then, in 1952, the Illinois Supreme Court held that the surrender clause of the Workers' Compensation Act, section 29, which eliminated all private causes of action against third-party non-employers, was unconstitutional.[24] As a result, Structural Work Act cases began to flourish, as an injured party was now able to sue any negligent party, with the exception of their immediate employer.[25] The current Workers' Compensation Act in Illinois still precludes an injured employee from seeking a private cause of action against

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21. *Id.* The State is authorized, largely through the State's Attorney, but also through any other attorney, to ensure compliance through necessary legal action. *Id.*

22. Workers' Compensation Act, 1911 ILL. LAWS 314 (codified as amended 820 Ill. Comp Stat 305/1-30 (Supp. 2001)). Historians attribute the Act's birth as a response to increasing work fatalities, in particular the Cherry Mine Disaster. *See generally* Rina Merli, *Cherry Mine Disaster*, ILLINOIS HISTORY, April 1973, at 158. In November of 1909, over 200 men died in a tragic mine fire in Cherry, Illinois sparking national attention and encouraging local legislative initiative. *Id.*

23. Workers' Compensation Act, 1911 ILL. LAWS 314 (codified as amended 820 Ill. Comp Stat 305/1-30 (Supp. 2001)). *See Gannon*, 175 N.E.2d at 792 (explaining the effect of section 29 of the Illinois Workers' Compensation Act upon Structural Work Act litigation). Section 29 of the Workers' Compensation Act barred all actions against third-party tortfeasors, resulting in the "limited recourse to the Scaffold Act in the ensuing years." *Id.*

24. Grasse v. Dealer's Transp. Co., 106 N.E.2d 124, 135-36 (Ill. 1952) (holding that the surrender clause, section 29, of the Workers' Compensation Act violated the equal protection clause of both the federal and state constitution). Follwing *Grasse*, an injured worker's recovery was no longer limited to the guaranteed Workers' Compensation payments. *Id.* at 135-36. This ruling gave new life to the Illinois Structural Work Act, allowing an injured party to maintain a private cause of action against a non-employer third party despite the guaranteed payment from his immediate employer. *Id.* at 135-36. *See also Gannon*, 175 N.E.2d at 792 (suggesting that the Illinois Supreme Court's finding of unconstitutionality concerning section 29 of the Workers' Compensation Act led to a revival in Scaffold Act cases throughout Illinois).

25. *Gannon*, 175 N.E.2d at 792.

his/her own employer.[26] Two further developments in Illinois law that collided with the operation of the Structural Work Act were the doctrines of comparative negligence and contribution.

D. Comparative Negligence and Contribution

Throughout the history of the Structural Work Act, several important tort developments occurred in Illinois. Prior to 1981, Illinois endorsed the doctrine of contributory negligence, which barred a plaintiff's recovery in an Illinois negligence action if that plaintiff was even one percent negligent.[27] In 1977, Illinois showed signs of departure from a contributory negligence system. First, the Illinois Supreme Court adopted the doctrine of contribution[28] in joint tortfeasor cases, allowing a tortfeasor to recover a proportionate share from others jointly responsible for the same tort.[29] Then, in the 1981 decision of *Alvis v. Ribar*,[30] the Illinois Supreme Court applied the doctrine of comparative negligence,[31] citing inequitable results under the previous system of

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26. Workers' Compensation Act, 820 ILL. COMP. STAT. § 305/5(a) (Supp. 2001); Stewart v. Jones, 742 N.E.2d 896, 903 (Ill. App. Ct. 2001) (stating that an employee has no right to recover damages from his/her immediate employer for workplace injuries, other than the compensation guaranteed by the Illinois Workers' Compensation Act). A claimant under the Illinois Workers' Compensation Act is entitled to three benefits. First, the claimant receives temporary total disability checks ("TTD" or "disability") for the time that that claimant is restricted from returning to work by a medical professional and actively seeking medical care. 820 ILL. COMP. STAT. § 305/8(b) (Supp. 2001). Next, all reasonable and necessary medical bills, directly related to the claimant's work accident, are submitted to and covered by the workers' compensation insurance carrier of that claimant's employer. 820 ILL. COMP. STAT. § 305/8(a) (Supp. 2001). Finally, the claimant is entitled to a lump sum settlement; calculated according to that claimant's injury according to permanent partial disability ("PPD") rates, permanent total disability ("PTD") rates or a wage loss differential. 820 ILL. COMP. STAT. § 305/9 (Supp. 2001).

27. *See* BLACK'S LAW DICTIONARY 330 (7th ed. 1999) (defining contributory-negligence doctrine as "[t]he principle that completely bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault").

28. *See* WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY, 496 (16th ed. 1981) (defining contribution as "a payment of an individual's share in a loss for which several are jointly liable.").

29. *See* Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 442 (Ill. 1977) (opining that no compelling reason existed in favor of the continued use of the no-contribution rule). *See also* DEAN PROSSER, TORTS § 50, 307 (4th ed. 1971) (stating that "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone").

30. 421 N.E.2d 886 (Ill. 1981).

31. *See* BLACK'S LAW DICTIONARY at 276 (defining the Comparative Negligence Doctrine as "[t]he principle that reduces a plaintiff's recovery proportionally to the plaintiff's degree of fault in causing the damage, rather than barring recovery completely.").

contributory negligence.[32] The Illinois Supreme Court's decision in *Alvis* foreshadowed an encounter between the principles of comparative negligence and the Illinois Structural Work Act, where a plaintiff's own negligence was not a limiting factor in that plaintiff's tort recovery. By 1984, the Illinois Supreme Court settled this dispute through its decision in *Simmons v. Union Electric Co.*[33] There the Illinois Supreme Court rejected the application of comparative negligence to Illinois Structural Work Act cases.[34] The Illinois Supreme Court specifically held that:

> Because the Act continues to present an exception to the presently prevailing common law principle that an injured person seeking recovery should be penalized to the extent of his own negligence, we hold that comparative negligence does not apply to the conduct of a workman who is eligible to rely upon this Act. Instead, the sole inquiry under the Act is an assessment of the defendant's culpability and not the plaintiff's conduct.[35]

This ruling–eliminating the defense of comparative negligence and assumption of risk–remained controlling throughout the operation of the Illinois Structural Work Act.

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32. *Alvis*, 421 N.E.2d at 896-97. The court held that negligence actions would no longer be decided under the common law doctrine of contributory negligence. *Id.* The court decided to apply the doctrine of comparative negligence, rather than continuing to apply the concept of comparative negligence. *Id.* at 897. This change was implemented to keep Illinois up with the tort developments already endorsed by a majority of the states. *Id.* at 896. Moreover, the court reasoned that it was inequitable to "ignore the plight of the plaintiff who, because of some negligence on their part, are forced to bear the entire burden of their injuries." *Id. See also* Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197, 204 (Ill. 1983) (extending the doctrine of comparative negligence to a cause of action sounding in strict liability); *Skinner*, 374 N.E.2d at 442 (applying the theory of comparative fault in recognizing a contribution claim between two joint tortfeasors, without overruling the old doctrine of contributory negligence). Due to these seminal Illinois Supreme Court cases, a clash between the theories of contribution and comparative negligence–both critical tort reforms–with the Structural Work Act became inevitable.

33. 473 N.E.2d 946 (Ill. 1984).

34. *Simmons*, 473 N.E.2d at 953.

35. *Id.* In reaching its decision to reject the application of the doctrine of comparative negligence to the Structural Work Act, the Illinois Supreme Court cited the importance of the rules of statutory construction stating, "[w]e must apply the legal axiom that the words of a statute should be construed to give effect to the legislative intention, which must be ascertained not only from the language of the entire act, but from the evil to be remedied and the object to be attained." *Id.* at 954. Thus, the *Simmons* court denied the applicability of comparative negligence to maintain the legislative intent of protecting the workman engaged in extra-hazardous activities from unsafe working conditions. *Id. See generally* Andrew M. Gardner, *Comparative Fault and the Structural Work Act: Simmons v. Union Electric Company*, 35 DEPAUL L. REV. 207 (1985).

E. Restatement (Second) of Torts § 414

Common law negligence principles, articulated in the Restatement (Second) of Torts section 414, co-existed with the Illinois Structural Work Act as a separate measure of liability in construction-related injuries.[36] Section 414, fixing liability upon those who "retain control" of work entrusted to independent contractors, was first recognized as valid Illinois law in 1965, with the decision of *Larson v. Commonwealth Edison, Co.*[37] In order to state a cause of action for common law negligence, the plaintiff must allege the existence of a duty, the breach of that duty, and a compensable injury proximately caused by that breach.[38] An important difference between the Illinois Structural Work Act and section 414 appears to have been the role of comparative negligence; as a plaintiff proceeding under the Structural Work Act would not have his tort recovery apportioned by his own negligence.[39] However, under section 414, a plaintiff's recovery is

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36. *See* RESTATEMENT (SECOND) OF TORTS § 414 (1965) (defining the liability attending to construction-related injuries). The section in pertinent part states that:

> [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 injury 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.

Id. Much like the Illinois Structural Work Act, and its "having control of" clause, section 414 litigation largely seems to rest upon interpretation of the "retained control" clause. Section 414 provides commentary on the retained control clause:

> [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 or 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 some retention of a right to supervise that the contractor is not entirely free to do the work in his own way.

Id. at comment (c).

37. *Larson*, 211 N.E.2d at 252. The court held that the retention of the right to control the work of a subcontractor was sufficient to subject one to duty and tort responsibility. *Id.*

38. Rogers v. West Constr. Co., 623 N.E.2d 799, 800 (Ill. App. Ct. 1993). A common law negligence action in Illinois, proceeding under section 414 is determined under the following well-recognized rules: "The employer of an independent contractor is not liable for the acts or omissions of the independent contractor." Bokodi v. Foster Wheeler Robbins, Inc., 728 N.E.2d 726, 732 (Ill. App. Ct. 2000). However, an employer who retains control over any part of the work will be liable for all injuries proximately caused from his subsequent failure to exercise his right of control with reasonable care. *Id.* at 732.

39. *See Simmons*, 473 N.E.2d at 953 (rejecting the availability of the

offset by his/her own level of negligence.[40] Moreover, if a plaintiff's own negligence is found to be greater than fifty percent of the proximate cause of the injury, the plaintiff cannot recover any damages under Illinois law.[41]

F. Structural Work Act Repeal

In 1995, the Illinois legislature repealed the Structural Work Act.[42] Since its repeal, section 414 of the Restatement (Second) of Torts has become the primary measure of liability for construction-related injuries in Illinois.[43]

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defense of comparative negligence to Illinois Structural Work Act cases).

40. *See* Haberer v. Vill. of Sauget, 511 N.E.2d 805, 808 (Ill. App. Ct. 1987) (holding that a plaintiff's actual knowledge of a danger will not defeat his claim). It is only relevant "whether the owner's obligation to pay damages should be reduced based on principles of comparative negligence." *Id.*

41. Limitation on Recovery in Tort Actions; Fault, 735 ILL. COMP. STAT. § 5/2-1116(c) (1986).

42. H.B. 30, 82d Gen. Assem., Reg. Sess. (Ill. 1995). Despite a repeal date of February 14, 1995, construction-related personal injury suits are still being tried today in Illinois courts under the provisions of the old Structural Work Act. *See* Atkins v. Deere & Co., 685 N.E.2d 342, 347-48 (Ill. 1997) (holding that the repeal of the Structural Work Act did not serve as a bar to those causes of action that had accrued prior to the repeal date). In *Atkins*, the Illinois Supreme Court interpreted the preamble of Pub. Act 89-2, resolving the issue of whether the repeal was unconditional. *Id.* First, the court reasoned that there was a presumption of retroactive application, which could only be rebutted by contrary legislative intent. *Id.* at 347. Next, the Illinois Supreme Court found that the body of the text for Public Act 89-2 failed to indicate whether it was to be applied prospectively or retroactively. *Id.* However, the court held that the legislative intent found only in the preamble was sufficient enough to rebut the presumption of retroactive application. *Id.* Thus, those causes of action accruing prior to the repeal date created a "vested right" in the plaintiff to pursue his suit under the defunct Structural Work Act. *Id.* at 348. *See also* Debra Chesnin, *Court Catches Ball Legislature Dropped When Repealing Structural Work Act*, 85 ILL. B.J. 620, 620-26 (1997) (explaining how the Illinois Supreme Court corrected legislation deficiencies). Chesnin suggests that the Illinois Supreme Court "bailed out" the Illinois Legislature by finding the legislative intent to create a savings clause in the preamble of the House bill when the legislation should have clearly expressed its intent in the text of the bill itself. *Id.* at 623.

43. *See* Kohen & Bozorgi, *supra* note 7, at 34 (recognizing the new importance of section 414 after the repeal of the Structural Work Act). *See also* Genaust v. Ill. Power Co., 343 N.E.2d 465, 468 (Ill. 1976) (applying section 343 of the RESTATEMENT (SECOND) OF TORTS, in an independent contractor situation). The *Genaust* court held that "[a] possessor of land owes an invitee a duty of exercising reasonable care to discover dangerous conditions on his land." *Genaust*, 343 N.E.2d at 472. Section 343 provides that a possessor of land owes a duty of reasonable care to its invitees to protect them from a dangerous condition or activity on the land. RESTATEMENT (SECOND) OF TORTS § 343 (1965). This duty only arises if the landowner "knows or by the exercise of reasonable care would discover" the dangerous activity on the land. *Id.* § 343(a). However, section 343 does not directly address general contractor/subcontractor relationships or "retained control" issues, and is

The fate of the Illinois Structural Work Act in the most recent decade can be tied directly to bi-partisan politics. The 1995 repeal of the Illinois Structural Work Act came immediately after the Illinois Republican party gained the majority of both the House and Senate.[44] Since 1995, the Democratic Party made numerous attempts to resurrect the Illinois Structural Work Act.[45] On March 27, 2001, the Illinois House passed a bill re-establishing the Structural Work Act in Illinois.[46] However, with a Republican majority controlling the Illinois Senate,[47] the bill was dead upon arrival.[48] In the latest elections, Democrat Rod Blagojevich won the governorship and the Illinois Democratic Party gained majority status in both the House and Senate.[49] In effect, the

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evoked far less frequently than section 414 in construction negligence cases that would have been litigated under the former Illinois Structural Work Act. Kohen & Bozorgi, *supra* note 7, at 34-35. For these reasons section 343 will not be discussed in this comment. *See also* RESTATEMENT (SECOND) OF TORTS § 311 (1965) (asserting a negligent misrepresentation theory). A very creative plaintiff may also use section 311 arguing that the competence, quality or safety
of the work was negligently misrepresented to him. Dennis J. Cotter, Michael J. McGowan & Morfia J. Komobs, *Who is in Control? Defending Construction Negligence Claims*, *at* http://www.osalaw.com/publications/ DefendingConstructionNegligenceClaims _12.pdf (last visited Feb. 20, 2003) (describing the various theories a construction negligence plaintiff may pursue in his claim). Section 311 appears to be invoked less often than section 343, and likewise will not be discussed in this article.

44. ILLINOIS SECRETARY OF STATE, 1995-1996 ILL. BLUE BOOK 64 (1996) (revealing the composition of the 89th General Assembly to be 64 Republican seats to 54 Democratic seats).

45. H.B. 210, 91st Gen. Assem., Reg. Sess. (Ill. 1999) (proposing a new Illinois Structural Work Act sponsored by Tom Dart (Democrat, Chicago); subsequently defeated by a Republican controlled Senate). *See also In Springfield*, CHI. DAILY L. BULL., Mar. 19, 1999, at 3 (quoting Representative Tom Dart, Democrat (Chicago) regarding the importance of his House bill).

> Construction-related deaths went up after Illinois dropped the law. We were one of the safest states in the union years back. We aren't any more . . . . Reinstating the act will send the message that worker safety should be a top priority for businesses . . . . Labor groups . . . must pressure senators to live up to statements about protecting working men and women . . . . Now it's put up or shut up' time[.]

Id.

46. H.B. 158, 92d Gen. Assem., Reg. Sess. (Ill. 2001) (purporting to re-establish the Illinois Structural Work Act–sponsored by Representative Bradley).

47. Ray Long and Douglas Holt, *Lawmakers Brace for Rocky Ride on Remap, 3rd Airport and Alot More*, CHI. TRIB., Jan. 11, 2001, at 1DN (revealing the composition of the current Illinois Senate as 32 Republican seats to 27 Democrat seats).

48. *Illinois Association of Chamber and Commerce Executives: 2001 Legislative Agenda Mid-Session Review*, *available at* http://www.iacce.org/ news_resources/pdf/sess.pdf (last visited Feb. 18, 2003). The bill narrowly passed the House, with a minimum 60-vote majority. *Id.*

49. *See* Ray Long & James Janega, *Illinois Democrats Unified–For Now,*

political and legislative conditions present for the repeal of the Structural Work Act in 1995 have entirely reversed, and many view the re-enactment of the Structural Work Act as a very real possibility for the 2003 legislative calendar.[50]

The following sections will provide an in-depth analysis of the effectiveness of both the Structural Work Act and the Restatement (Second) of Torts § 414 as reliable and predictable measures of liability.

II. THE ILLINOIS STRUCTURAL WORK ACT AND § 414: ANALYSIS OF LITIGATION PROBLEMS

Part A addresses the operation of the Illinois Structural Work Act. This section will explore the common litigation problems arising out of the Act, focusing on the: Structural Work Act's "willfulness" standard, the protected class, the "having control of" clause, and the role of comparative negligence. Part B addresses the Restatement (Second) of Torts § 414, detailing litigation concerns with a particular emphasis on the "retained control" clause and the role of comparative negligence.

A. The Illinois Structural Work Act

Prior to its repeal, the Illinois Structural Work Act served as a seminal construction safety statute, while also providing the primary civil remedy for workers who suffered construction-related injuries.[51] The Structural Work Act remained valid law in Illinois for some eighty-eight years,[52] an indication that the Act served a valid purpose and had its relative strengths. However, an analysis of case law litigated under the Structural Work Act reveals several flaws. This section will explore the relative strengths and weaknesses of the Act.

CHI. TRIB., Nov. 7, 2002, at 1 (detailing Illinois' latest election results).

50. *See* Jim Sonnenberg, *Firms Are Wary of Incoming Guv*, CRAIN'S CHI. BUSINESS, Jan. 13, 2003, at SB6 (explaining the business community's fear that recent election results would lead to the re-enactment of the Structural Work Act). *But see* Editorial, *Blagojevich Getting Less Bold On Scaffolding Act Issue*, THE STATE J.-REG., July 28, 2002 at 15 (comparing Blagojevich's early campaign promise to bring back the Structural Work Act "with one stroke of a pen," to later and more reserved statements like, "[l]et's see what the bill is before I agree to summarily sign it.").

51. *See* Kohen & Bozorgi, *supra* note 7, at 34 (detailing the history of remedies available for construction-related injuries in Illinois). *See also* *Bokodi*, 728 N.E.2d at 731 (explaining the historical relationship between the Illinois Structural Work Act and section 414). The *Bokodi* court recognized section 414 as replacing the Structural Work Act as the primary construction negligence measure in Illinois. *Id.*

52. *See* 740 ILL. COMP. STAT. 150/1 (1994) (repealed 1995) (indicating the starting effective date for the Structural Work Act as 1907). *But see* Structural Work Act – Repeal, Feb. 14, 1995, IL. PUB. ACT 89-2 (repealing the Structural Work Act).

1. The Illinois Structural Work Act: The "Willfulness" requirement

Courts required the injured party to prove a "willful" violation to proceed with a cause of action under the Structural Work Act.[53] The willfulness requirement was a flaw in the Illinois Structural Work Act, because the term willful, as applied in the Act, departed from the term's traditional legal meaning. The Illinois Supreme Court adequately summarized its position by saying, "[a]lthough the word 'willful' appears in the statute, the courts have not construed that word in its ordinary sense."[54] In other words, a willful violation of the Illinois Structural Work Act did *not* require a reckless, wanton or deliberate disregard for the Act's provisions.[55] The Illinois Supreme Court held that a defendant could willfully violate the Act without even being present on the worksite.[56] Essentially, a willful violation of the Act occurred when one who exercised control over the work knew, or in the exercise of reasonable care, should have known of the existence of a dangerous workplace condition.[57] Any revised statute should only use a well-established statutory term, like willful, if it intends upon using that term in a consistent manner. However, the ambiguity regarding the Structural Work Act's willful requirement was not the Act's only flaw.

53. *See* 740 ILL. COMP. STAT. 150/9 (1994) (repealed 1995) (assessing liability for "willful violations" or a "willful failure to comply" with the Act's provisions); *see also Rodgers*, 623 N.E.2d at 804 (recognizing a willful violation as an element of a Structural Work Act cause of action).

54. *Davis*, 336 N.E.2d at 885; ILLINOIS PATTERN JURY INSTRUCTIONS 2D, Civil, No. 180.01 (1971) (defining a "willful" violation under the Structural Work Act as "a person having charge of the work knew, or in the exercise of ordinary care, could have known of a dangerous condition.")

55. *See generally* Gundich v. Emerson-Comstock Co., 171 N.E.2d 60, 67 (Ill. 1960); Oldham v. Kubinski, 185 N.E.2d 270, 280 (Ill. App. Ct. 1962).

56. *See Cockrum*, 645 N.E.2d at 921-22 (holding that liability can be assessed on a defendant unaware of a plaintiff's presence on the jobsite, if that defendant should have known that the plaintiff would be present). In *Cockrum*, the defendant (general contractor) was charged with constructive knowledge of plaintiff's (sub-contractor employee) presence on jobsite due to his control of security and jobsite access. *Id. But see Getz*, 349 N.E.2d at 687-88 (holding that a defendant cannot violate the Act if the dangerous condition is of recent creation). In *Getz*, the court reasoned that the defendant, the general contractor on the construction site, could not have reasonably discovered the existence of unsafe work practices concerning a scaffold, and therefore could not be held liable for the damages incurred. *Id.* at 688. *See also* Smith v. Cent. Ill. Pub. Ser. Co., 531 N.E.2d 51, 58 (Ill. App. Ct. 1988) (holding that the defendant, owner of a power plant, could not have reasonably known about an icy scaffold). In *Smith*, the dangerous condition materialized during a lunch break and the court reasoned that the defendant could not therefore be held liable for the plaintiff's injuries. *Id.* at 58.

57. *See generally* Kennerly v. Shell Oil Co., 150 N.E.2d 134, 139 (Ill. 1958); Schultz v. Henry Ericsson Co., 106 N.E. 236, 240 (Ill. 1914).

2. The Illinois Structural Work Act: The Protected Class

Another flaw in the Illinois Structural Work Act was the controversy over establishing the Act's protected class. Despite Illinois courts' willingness to "liberally construe" the provisions of the Structural Work Act, there was little argument over the fact that the Act did not cover all construction-related accidents.[58] Section 1 of the Act expressly limited the scope of coverage to those injuries arising out of the activities of "erection, repairing, alteration, removal or painting," that were due to a failure in "scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances."[59] Despite these express provisions, Illinois courts chose to unnecessarily extend the scope of the "protected class" under the Act.

First, Illinois courts extended coverage to a plaintiff who is not employed on the worksite, if that plaintiff could establish a legitimate connection to that worksite.[60] This destroyed the predictability and reliability of the Act, as coverage was extended or denied in a seemingly arbitrary manner.[61] For example, a building inspector injured during an inspection was allowed to bring suit under the Act[62] while a court denied coverage of a firefighter injured during the administration of medical assistance

58. *See* Bezan v. Chrysler Motors Corp., 636 N.E.2d 1079, 1083 (Ill. App. Ct. 1994) (holding that while liberally constructed, the Illinois Structural Work Act does not provide protection to all construction activities). Protection under the Structural Work Act is limited to extra-hazardous activities. *Id.* at 1083. *See also Rogers*, 623 N.E.2d at 805 (stating that the Structural Work Act was never intended to cover all activities and hazards associated with construction).

59. 740 ILL. COMP. STAT. 150/1 § 1 (1994) (repealed 1995).

60. *See* Bennett v. Musgrave, 266 N.E.2d 128, 131 (Ill. 1970) (holding that a jobsite volunteer, injured while on that jobsite, was covered under the act). The plaintiff in *Bennett* had been inspecting the construction site at the request of the defendant, and was therefore engaged in a construction activity allowing for coverage under of the Act. *Id.* at 131. *But see* Kelly v. Northwest Cmty. Hosp., 384 N.E.2d 102, 105 (Ill. 1978) (holding that a plaintiff, who had voluntarily entered the jobsite and subsequently died, was not covered under the Structural Work Act). In *Kelly*, the court reasoned that the plaintiff, present on a jobsite but without a legitimate, construction-related purpose should not be extended coverage under the Act. *Id.* at 105. *See also* Long v. City of New Boston, 440 N.E.2d 625, 631 (Ill. 1982) (denying coverage to a volunteer plaintiff, injured while stringing Christmas lights on utility poles). The court in *Long* reasoned that the plaintiff's activities could not be regarded as an "erection" of a structure under section 1 of the Illinois Structural Work Act, as the plaintiff had argued. *Id.* at 631.

61. *See* Reed, *supra* note 16, at 187 (arguing that no discernable pattern can be found regarding the interpretation of the "protected class" in Illinois construction negligence case law).

62. *See, e.g.*, *Quinn*, 418 N.E.2d at 1013 (extending coverage to a city-building instructor because of his "vital role in the construction process").

to a construction worker.[63] Both plaintiffs were municipal workers injured on worksites in the furtherance of their job duties and yet the court allowed coverage of one plaintiff under the Act.[64] Also, this liberal interpretation was unnecessary because it did not further the purpose of the Act, which is to ensure workplace safety for construction workers engaged in extra-hazardous activities.[65]

Illinois courts further complicated the protected class issue by extending coverage to construction employee plaintiffs not engaged in extra-hazardous activities, if they could prove that their activities were integral to the assistance or furtherance of section 1 activities.[66] This extension of coverage would prove a dubious rationale.[67] For instance, courts allowed coverage for a boilermaker who was killed while unloading pedestals from a railcar because his activities were "integral" to the erection of air heaters.[68] A plaintiff who delivered a propane tank to a construction site was also covered under the Act for injuries that occurred when the plaintiff fell a matter of inches from a wooden plank that had been placed over muddy ground.[69] Again, the court

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63. *See, e.g., Grant*, 440 N.E.2d at 1045 (denying coverage under the Act to a firefighter injured while rescuing a construction worker). The court reasoned that the administration of medical aid does not constitute a direct connection to the construction process. *Id.*

64. *See generally Quinn*, 418 N.E.2d at 1013; *Grant*, 440 N.E.2d at 1045.

65. *See Rogers*, 623 N.E.2d at 805 (defining the purposes of the Act as "provid[ing] protection to the workers engaged in work activities of a particularly hazardous nature.").

66. *See* Reed, *supra* note 16, at 188-90 (explaining the "integral relation" requirement).

67. *See id.* at 190 (arguing that "[t]he difficulty with the Act is not in the language which limits its coverage, but with the analysis used by the courts in interpreting that language."). Reed believes that there exists no clear rule upon which the courts base their decisions. *Id.*

68. McNellis v. Combustion Eng'g, Inc., 317 N.E.2d 573, 576 (Ill. 1974). In *McNellis*, the plaintiff was unloading component parts for an air heater from a railcar and suffered fatal injuries when pinned to the side of a rail car by a pedestal that unexpectedly fell. *Id.* at 575. In finding coverage under the Act, the court reasoned that the general task of erecting a steam-generating unit necessitates the incidental task of unloading component parts. *Id.* In a spirited dissent, Justice Ryan argued that this extension of coverage was contrary to the purpose of the Act, and was without textual support, as the plaintiff's activities were not addressed in section 1 of the Act. *Id.* at 576-77 (Ryan, J., dissenting). Justice Ryan also embraced the constitutional defense raised by the defendants, stating that an extension of coverage to the plaintiff would create an arbitrary classification. *Id.*

69. Ashley v. Osman & Ass'n, Inc., 448 N.E.2d 1011, 1016 (Ill. App. Ct. 1983). In *Ashley*, muddy conditions necessitated the delivery of materials and equipment from storage buildings to the actual construction site. *Id.* at 1012. In delivering the materials and equipment, the workmen walked over wooden planks and concrete forms to prevent them from sinking into the deep mud. *Id.* The plaintiff suffered severe muscle and nerve damage after a plank slipped out from underneath him and the propane tank he carried fell on top of him. *Id.* In finding coverage, the court reasoned that the plaintiff as a

reasoned that delivery of materials was an integral part of their construction, a section 1 activity.[70]

However, Illinois courts did not provide coverage to all plaintiffs injured in the delivery of materials to be used in the erection of a structure.[71] An ironworker injured by slipping off a tractor during the process of transferring structural steel to a construction site was denied coverage under the Act.[72] Much like the "legitimate connection" extension to the non-employee plaintiff, these decisions are difficult to compromise and indicate an absence of reliability.[73] Moreover, one Illinois Supreme Court justice suggested that these applications of the Structural Work Act represented a constitutionality issue as arbitrary classifications.[74] It is also important to note that at the time of injury, none of these employees were engaged in extra-hazardous activities, and providing for their protection under the Structural Work Act failed to advance the Act's purpose of ensuring adequate safety and compensation to construction employees directly engaged in extra-hazardous activities.[75]

A revised safety statute and civil remedy must provide more guidance in determining the protected class, while anticipating

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roofer (his normal duties) and the plaintiff as a deliverer (not normal duties, but necessitated by muddy conditions) could not be separated. *Id.* at 1216. Therefore, the court found that the plaintiff's delivery of materials and equipment to the construction site were an integral part of his extra-hazardous roofing duties and should be covered under the Structural Work Act. *Id.*

70. *Id.*

71. *See generally* Crafton v. Lester B. Knight & Assoc., Inc., 263 N.E.2d 817, 819 (Ill. 1970).

72. *Id.* In *Crafton*, the plaintiff was assisting in the loading of a tractor with structural steel to be hauled to a construction site. *Id.* at 818. The plaintiff was injured when a combination of muddy conditions and premature acceleration of the tractor caused him to slip off the back and fall to the ground. *Id.* In denying coverage, the Illinois Supreme Court interpreted the Structural Work Act's "plain meaning" to find that the plaintiff's activities were not intended to be covered under section 1. *Id.*

73. *See* Reed, *supra* note 16, at 188-90 (asserting the unpredictability of the protected class acts to discourage settlements where coverage is an issue).

74. *McNellis*, 317 N.E.2d at 576-77 (Ryan, J., dissenting). Justice Ryan argued that the danger the plaintiff was exposed to was a danger inherent in the unloading of materials from a railcar, and not a danger peculiar to extra-hazardous work. *Id.* at 577. Next, Ryan reasoned that the classification was based upon the particular purpose for which the unloaded materials were to be used. *Id.* Ryan contends that this classification is arbitrary and bears no reasonable relation to the true legislative intent, protecting extra-hazardous construction activities. *Id.* Ryan argues that the danger faced by the plaintiff is routinely faced on construction sites and that it is unfair to extend coverage to a plaintiff unloading materials for the purpose of "installation," and denying coverage to a plaintiff unloading materials for another purpose, when the dangers they face are identical. *Id.*

75. *See generally Rogers*, 623 N.E.2d at 805.

problematic concerns regarding employees and non-employees, with a particular emphasis on municipal workers, volunteers, non-hazardous construction occupations and passer-bys. While the protected class was often challenging, the Structural Work Act did prove reliable in other aspects. Litigation proceeding under the Structural Work Act benefited from a clear set of factors to determine the "having control of" clause.[76]

3. The Illinois Structural Work Act: The "Having Control of" Clause.

Liability under the Illinois Structural Work Act was limited to those persons or entities having charge of the work.[77] The Illinois courts failed to provide a conclusive or bright-line test for interpreting the having charge of clause throughout the operation of the Structural Work Act.[78] However, the Illinois Supreme Court cited with approval ten relevant factors that may be used to determine whether a defendant was in charge of work.[79] These factors provided an adequate frame upon which a lawyer could base discovery inquiries and formulate trial strategies. These factors indicate that having charge of is not limited to custody, restraint or direct control, and can be ascertained only by surveying the totality of the circumstances surrounding the accident.[80]

It is of paramount importance that any revised safety statute containing a "control" clause, include relevant factors that provide lawyers and courts with a more tangible grasp on what

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76. *See generally Simmons*, 473 N.E.2d at 949-50; *Chance v. City of Collinsville*, 445 N.E.2d 39, 42 (Ill. App. Ct. 1983).

77. 740 ILL. COMP. STAT. 150/9 (1994) (repealed 1995); *Quinn*, 418 N.E.2d at 1013. The *Quinn* court held that that coverage under the Structural Work Act could be extended to non-employees who were sufficiently involved in the construction process; *see generally* Angler, *supra* note 16.

78. *See Larson*, 211 N.E.2d at 251 (recognizing the clause "having charge of" as a generic term of broad import).

79. *Simmons*, 473 N.E.2d at 949-50 (citing *Chance*, 445 N.E.2d at 42). *Chance* states that the ten relevant factors are:

> (1) [S]upervision and control of the work; (2) retention of the right to supervise and control the work; (3) constant participation in ongoing activities at the construction site; (4) supervision and coordination of subcontractors; (5) responsibility for taking safety precautions at the jobsite; (6) authority to issue change orders; and (7) right to stop the work. . . . (8) ownership of the equipment at the jobsite; (9) defendant's familiarity with construction customs and practices; and (10) whether d efendant was in a position to assure worker safety or alleviate equipment deficiencies or improper work habits.

Chance, 445 N.E.2d at 42.

80. *See Simmons*, 473 N.E.2d at 949 (defining "having charge of" as a factual question involving numerous factors). The *Rodgers* court cited the 10 relevant factors, previously endorsed by the Illinois Supreme Court, as the basis of their determination of the control issue. *Rodgers*, 623 N.E.2d at 804.

supervisory activities, or lack thereof, constitute actionable behavior. A clear set of factors improves the reliability of a measure and the efficiency of trial procedure. Any revised safety statute must also consider the role of comparative negligence in a plaintiff's tort recovery.

4. The Illinois Structural Work Act: The Role of Comparative Negligence

In the landmark Illinois case, *Simmons v. Union Electric Co.*, the Illinois Supreme Court held that the principles of comparative fault were not applicable to a plaintiff proceeding under the Structural Work Act.[81] The *Simmons* court relied upon the Illinois General Assembly's intent and strict rules of statutory construction in reaching their decision.[82] The *Simmons* decision was valid law until the repeal of the Structural Work Act.[83]

Simmons sparked the most controversy concerning the Structural Work Act, and any revised Structural Work Act must first determine if the doctrine of comparative negligence is in fact inconsistent with the purposes of a safety statute. While the non-availability of comparative negligence created no litigation problems, the policy behind the decision was commonly critiqued. The unavailability of the comparative fault defense under the Structural Work Act was routinely attacked by the Illinois defense bar, the insurance community[84] and the Republican Party, all citing inequitable decisions[85] and claiming undue economic

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81. *See Simmons*, 473 N.E.2d at 953 (holding that in order to effectuate the intent of the General Assembly, an injured worker's recovery under the Structural Work Act should not be reduced by his own fault). The Simmons court stated that "[t]he sole inquiry under the Act is an assessment of the defendant's culpability and not the plaintiff's conduct." *Id. See also* Gardner, *supra* note 35, at 235-39 (discussing the ramifications of the *Simmons* decision in Illinois case law). Gardner argues that the Illinois Supreme Court erred in *Simmons* by not extending the comparative negligence doctrine to Structural Work Act cases. *Id.*

82. *Simmons*, 473 N.E.2d at 953-54.

83. 740 ILL. COMP. STAT. 150/9 (1994) (repealed 1995).

84. *Work Act Repealed,* CHI. TRIB., Feb. 15, 1995, at 18 (quoting Timothy J. Conlon, an insurance professional).

> I applaud the efforts of the Illinois General Assembly to vote for its (Structural Work Act) repeal . . . . The Structural Work Act favors only select skilled workers and not all trades or unions . . . . It encourages unsafe work practices of individual carelessness by making the "plaintiff" free of any comparative fault . . . . The Structural Work Act has been an enormous financial burden to Illinois business due to higher construction costs and higher insurance premiums . . . . Construction in our state has been stifled.

Id.

85. *See* Carlton v. Verplaetse, 458 N.E.2d 584, 586-87 (Ill. App. Ct. 1983) (holding that the plaintiff's disregard of a direct order to stop working did not serve as a bar to his recovery under the Structural Work Act); Basden v.

hardship.[86] To no surprise, the Republican-controlled Illinois House and Senate repealed the Act in 1995.[87] The Illinois plaintiff bar, labor unions, the Democratic Party, and the workers themselves praised the liberal construction of the Act, and argued that the lack of comparative negligence helped ensure workplace safety by allowing an injured plaintiff to bring suit against any negligent party, with the exception of their immediate employer.[88] A revised Structural Work Act should attempt to bridge the gap between these parties and present a compromised approach, ensuring both adequate safety and recompense while alleviating economic hardships. Much like the Structural Work Act, the Restatement (Second) of Torts, § 414 has evoked both praise and dissatisfaction.

B. Restatement (Second) of Torts, § 414

Common law negligence principles governing construction-related injuries, expressed in section 414, both co-existed with the Structural Work Act and survived its repeal.[89] The Illinois Supreme Court first recognized section 414 as valid Illinois law in 1965.[90] Currently, section 414, "[a] first cousin of the Illinois Structural Work Act," is the strongest negligence theory under which to pursue damages in construction-related injuries.[91] Like

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Kiefner Bros., 414 N.E.2d 951, 957-58 (Ill. App. Ct. 1980) (holding that plaintiff's lack of experience in carpentry was not relevant and was barred as an improper introduction of comparative negligence).

86. *Illinois Manufacturer's Association: IMA Legislative report, at* http://www.ima-net.org/publications/highlights/sphlts021501.html (last visited Feb. 23, 2003). This site presents the argument typified by the Illinois business community, that the Structural Work Act stunted economic growth and deprived the State in its ability to attract new businesses by forcing employers to defend both Workers' Compensation and Structural Work Act claims. *Id.*

87. H.B. 30, 82nd Gen. Assem., Reg. Sess. (Ill. 1995). *See also State Legislature Can Repeal Remedial Acts After All*, CHI. DAILY L. BULL., July 30, 1999, at 5 (discussing the repeal of the Structural Work Act by the newly elected Republican majority).

88. *Workplace Safety: The Structural Work Act Repeal, at* http://www.ilafl-cio.org/SAFETY.HTM (last visited Feb. 23, 2003) (arguing that the Structural Work Act ensured safety by allowing injured workers to bring suit against any negligent party, with the exception of their immediate employer). This site further contends that the Structural Work Act did not damage Illinois business interests, as the Illinois construction injury grew at seven times the national rate while the Structural Work Act was in place. *Id.*

89. *See Bokodi*, 728 N.E.2d at 731 (discussing historical relationship between the Structural Work Act and section 414). The *Bokodi* court details the co-existence of both measures, though recognizing that prior to the repeal, the Structural Work Act was the primary civil remedy for construction-related injuries. *Id.*

90. *See Larson*, 211 N.E.2d at 252-53 (holding that the retention of a right to control work subjects one to duty and liability under valid common law).

91. Kohen & Bozorgi, *supra* note 7, at 34. *See also* RESTATEMENT (SECOND)

the Structural Work Act, an analysis of litigation arising under section 414 is a good indication of the utility and reliability of the Restatement Approach. This section will focus on two important aspects of section 414, the retained control clause, and the role of comparative negligence.

1. Restatement (Second) of Torts, § 414: "Retained Control" Clause

The general rule under which section 414 litigation is tried is simple. The section explains that a person who retains the control of any part of the work of an independent contractor, who that person hired, is subject to liability for any physical harm to others that occurs.[92] Unfortunately, Illinois courts operate without a list of relevant factors in determining retained control, as they did with the having control of clause of the Structural Work Act. However, it is openly accepted that the reservation of a general right of supervision is not sufficient to prove retained control.[93] On the other hand, the power to forbid work from being done in an unsafe manner is almost conclusive evidence of the type of retained power necessary to incur liability.[94]

Current litigation concerns surrounding section 414 focuses on the aspects of work the defendant must actually retain control over to trigger liability.[95] The emergence of a split between the

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OF TORTS § 343 (1965) (defining common law premises liability, another theory under which to seek damages for construction-related injuries). This theory, however, is evoked far less frequently than section 414. Kohen & Bozorgi, *supra* note 7, at 35.

92. RESTATEMENT (SECOND) OF TORTS § 414 (1965). The section states that:

> [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.

Id.

93. *See* Rangel v. Brookhaven Constructors, Inc., 719 N.E.2d 174, 177 (Ill. App. Ct. 1999) (holding that the defendant's right of supervision, in the absence of any further right over the operative details of plaintiff's work, was not sufficient to meet the retained control clause). The *Rangel* court reasoned that the subcontractors were entirely free to control the means and methods of their own work. *Id.* at 177-78. Further, the injury occurred on a scaffold provided by the subcontractor, who was also responsible for the unsafe method of performing the work. *Id.* at 177. Finally, this unsafe method of work was proposed to the plaintiff a few hours before the accident occurred, which the court found to be too restrictive a time period to charge the defendant with constructive notice. *Id.*

94. *See generally* Schoenbeck v. DuPage Water Comm'n, 607 N.E.2d 693, 698-99 (Ill. App. Ct. 1993); Ryan v. Mobil Oil Corp., 510 N.E.2d 1162, 1168 (Ill. App. Ct. 1987) (citing Pasko v. Commonwealth Edison Co., 302 N.E.2d 642, 648 (Ill. App. Ct. 1974)).

95. *See* Kohen & Bozorgi, *supra* note 7, at 36 (explaining the split in reasoning between the first and third district appellate courts, while siding

First and Third District Appellate Courts further complicates matters.[96] First District Appellate Court cases hold that the defendant must only retain control over unsafe job conditions and work practices, and is most consistent with the requirements of the Structural Work Act.[97] However, Third District Appellate Court cases have raised the bar, requiring that the defendant control the means and methods or the operative details of the plaintiff's work.[98] These fundamental differences diminish the

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with the reasoning of the majority, the first district appellate court).

96. *See id.* (arguing that the reasoning of the third district, which requires the defendant to retain control over the operative details of the plaintiff's work, is too dogmatic and that only the plaintiff's employer alone could possibly satisfy this strict requirement). Kohen and Bozorgi argue that this interpretation of section 414, renders the law forceless. *Id.*

97. *See Bokodi*, 728 N.E.2d at 735 (holding that defendant who went to great lengths to control workplace safety standards retained control over the plaintiff's work). In *Bokodi*, the defendant (general contractor) retained the right to monitor weekly safety meetings, determine appropriate protective equipment and work clothes, and order the plaintiff's work to be stopped. *Id.* The defendant also employed a full-time safety manager to conduct safety meetings and check the jobsite for safety compliance. *Id.* For these reasons, the court found that the defendant had "retained control" over the plaintiff's work. *Id. See also Claudy*, 524 N.E.2d at 998 (holding that a defendant need only exercise control over any part of an independent contractor's work to satisfy the "retained control" clause). The defendant in *Claudy*, a city that hired a subcontractor for tree removal, was held to have retained control over the plaintiff's work. *Id.* at 995. The control issue was established through evidence of routine visits to worksites, a retention of the right to stop work, and the ability to fire personnel not complying with safety standards. *Id. See also Weber*, 295 N.E.2d at 51 (holding that defendant "retained control" over plaintiff's work by retaining the right to stop work and the ability to order unsafe or inadequate equipment removed). The defendant in *Weber* retained the power to forbid and stop work, the right of supervision and the right to remove a workman considered unfit or unskilled. *Id.* The *Weber* court satisfied the "retained control" clause by a finding that the plaintiff was not entirely free to perform his work in his own way. *Id.* at 50. *See also Pasko*, 302 N.E.2d at 649 (holding that a defendant who employed a jobsite inspector that knew the plaintiff was using inadequate equipment "retained control" over the plaintiff's work). In *Pasko*, the defendant had employed a jobsite inspector who visited the jobsite twice daily and was present during the excavation. *Id.* at 648. That inspector admitted to having actual knowledge of the plaintiff's inadequate equipment, and his failure to correct known equipment deficiencies was a breach of a duty of reasonable care. *Id.*

98. *See* Fris v. Personal Prod. Co., 627 N.E.2d 1265, 1268 (Ill. App. Ct. 1994) (holding that the defendant's general authority over the construction activities of the plaintiff was not enough to trigger liability). In *Fris*, the court said:

> Although Personal Products retained the right to require that work be done in a safe manner, this general authority cannot be viewed as creating such a right of supervision as to have prevented Stephen (Subcontractor) from doing routine work in its own way . . . . It did not control the routine and incidental aspects of Stephen's work . . . . Adoption of Fris' (Plaintiffs's) theory of liability would in effect result in strict liability for all injuries to employees of independent contractors.

predictability of section 414 litigation and leave lawyers uncertain regarding the level of culpability they must establish.

This issue illustrates the main flaw of section 414, its lack of guidance in determining the retained control clause. Any revised safety standard should provide relevant factors, and address the type of work a defendant must retain control over to become liable.

2. Restatement (Second) of Torts, § 414: The Role of Comparative Negligence

The fundamental difference between the Structural Work Act and section 414 litigation is that under section 414, a plaintiff's negligent conduct may be introduced into evidence.[99] Comparative negligence is used in construction negligence cases to determine whether the tortfeasor's obligation to pay damages should be reduced based upon the plaintiff's own level of negligent conduct.[100]

In shaping a new construction safety statute, the role of comparative negligence cannot be ignored. The function of this equitable doctrine must be weighed against the purpose of protecting and adequately compensating the injured workman. Since the repeal of the Structural Work Act, construction-related deaths in Illinois have risen twenty-nine percent,[101] an indication that section 414, and its recognition of comparative negligence, did not adequately ensure workplace safety.

In the following section, this comment will present a new and revised construction safety statute. This revised statute will provide an alternative to the shortcomings of the Structural Work Act, in particular the willfulness requirement and the protected class, while endorsing the strength of the factors used in determining the having control of clause and the Act's power as a deterrent of unsafe workplace conditions. It will also address the

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Id.

99. *See* Kohen & Bozorgi, *supra* note 7, at 39 (explaining the role of comparative negligence in construction negligence litigation). *Cf.* Varilek v. Mitchell Eng'g Co., 558 N.E.2d 365, 377 (Ill. App. Ct. 1990) (holding that evidence was admissible indicating, plaintiff's awareness of slippery conditions); *Alvis*, 421 N.E.2d 896-97 (replacing the old doctrine of contributory negligence with the doctrine of comparative negligence as controlling tort law in Illinois).

100. *See Haberer*, 511 N.E.2d at 808 (holding that the obviousness of the danger causing the plaintiff's injury did not bar his recovery, but could be introduced into evidence to offset his recovery based upon the principles of comparative negligence); Kohen & Bozorgi, *supra* note 7, at 46 (explaining that the open and obvious defense available to defendants under section 343 litigation is not available to defendants under section 414). The defense of comparative negligence is available to defendants under both sections 343 and 414. *Id.*

101. Healy, *supra* note 6 (describing the alarming raise in construction related deaths in Illinois since the repeal of the Illinois Structural Work Act in 1995 through 1998).

litigation problems involved in section 414 case law, like the lack of guidance in determining the retained control clause. Finally, this revised statute will weigh the policy issues involved in including or disregarding the doctrine of comparative negligence in determining a plaintiff's tort recovery.

III. PROPOSAL

Part A briefly introduces a new, revised safety statute representing departures from both the Structural Work Act and section 414. Part B addresses the willfulness requirement and the role of comparative negligence in this revised statute, discussing a proposed two-prong approach with a modified or compromised acceptance of comparative negligence. Part C focuses on a much stricter, plain meaning approach to the protected class issue proposed under the revised construction safety statute. Finally, Part D addresses the control issue, and focus on the importance of developing relevant factors for courts to consider.

A. Proposed Safety Statute

In an effort to ensure adequate protection and compensation to injured workers without burdening the construction industry with undue economic hardships, the following proposed statute provides a measure of liability that represents a more reliable, predictable, and compromised approach to construction negligence.

The proposed statute is a re-establishment of the previous Structural Work Act with the following modifications. First, the revised statute establishes two levels of culpability, a "grossly negligent" violation and a "negligent" violation. Next, the revised statute must expressly limit the scope of the protected class to those employed on the worksite and engaged in extra-hazardous activities. Further, the revised statute will endorse the ten relevant factors used in Structural Work Act case law as a basis for determining the control issue. Finally, the proposed statute will introduce a compromised approach to comparative negligence, leaving its applicability up to the nature of the defendant's violation.

B. Proposed Change to "Willfulness" Requirement & the Role of Comparative Negligence

Under the previous Structural Work Act, the willfulness requirement did not require wanton, intentional, reckless or deliberate conduct.[102] A plaintiff need only prove that a defendant, while retaining control, failed to exercise reasonable care.[103] It was

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102. *See* ILLINOIS PATTERN JURY INSTRUCTIONS 2D, *supra* note 54 (defining the requirements for a willful violation under the Structural Work Act).

103. *See generally Schultz*, 106 N.E.2d at 240; *Kennerly*, 150 N.E.2d at 139.

also well established that a defendant was not able to raise the defense of comparative negligence in an effort to mitigate his own liability.[104]

The proposed change to the Structural Work Act's willfulness requirement establishes two levels of culpability. Violations are considered as either gross negligence or a lesser level of culpability, mere negligence, and each word is to be treated according to their accepted legal connotation.[105] Further, the proposed statute suggests a compromised, limited acceptance of comparative negligence. Under the revised statute, grossly negligent violations preclude a defendant from raising comparative negligence as a trial issue. This maintains the prior Structural Work Act's power as a deterrent, ensuring safe working conditions by denying the availability of comparative negligence as a defense.[106] However, a negligent violation under the revised Act would allow a defendant's liability to be offset by the level of the plaintiff's own negligent conduct. This will lessen the economic hardship that the prior Structural Work Act placed on the construction industry. This is a clear departure from the prior Structural Work Act, but it represents a compromised approach to comparative negligence, that does not compromise workplace safety.

C. Proposed Protected Class

In interpreting the old Structural Work Act, Illinois courts unnecessarily complicated the Act's protected class by extending coverage to non-employees, volunteers, and those not explicitly engaged in extra-hazardous activities.[107] In determining a revised approach to the protected class it is important to consider the purpose of the old Act. The purpose of the Illinois Structural Work Act was to provide adequate protection and compensation to those

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104. *Simmons*, 473 N.E.2d at 953.

105. *See* BLACK'S LAW DICTIONARY 1057 (7th ed. 1999) (defining gross negligence as a "conscious, voluntary act or omission in reckless disregard of a duty" to another). The aggrieved party may "typically recover exemplary damages." *Id. See also* W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 34, 211-12 (5th ed. 1984) (suggesting that most courts consider gross negligence less severe than a reckless disregard, and differing from ordinary negligence only in degree, but not necessarily in kind); BLACK'S LAW DICTIONARY 1056 (7th ed. 1999) (defining negligence as a "failure to exercise a standard of care that a reasonably prudent person would have exercised" under the similar circumstances); KEETON, *supra* § 28, 161 (recognizing negligence as the dominant cause of action for accidental injury in America).

106. *See* RESTATEMENT (SECOND) OF TORTS § 414 (1965) *supra* note 36 and accompanying text (noting the liability of construction-related accidents).

107. *See supra* notes 67-74 and accompanying text (illustrating how the Structural Work Act was broadly interpreted by courts to include persons not covered by the plain language).

injured in the course of extra-hazardous activities.[108] In other words, its purpose was not limited to providing monetary compensation to the injured worker, but also to deter the practice of unsafe working conditions altogether.[109] Extending coverage to non-employees, volunteers, passer-bys or those not engaged in extra-hazardous activities failed to further the purposes of the Act and diminished its predictability.

The revised approach limits coverage to jobsite employees engaged in extra-hazardous activities, as defined in section 1 of the old Structural Work Act.[110] Only these specific individuals should enjoy the benefit of no comparative negligence concerning grossly negligent violations. Moreover, this approach allows far less judicial interpretation. Under the old Structural Work Act, the Illinois Supreme Court routinely supported a liberal construction of the Act[111] leading to various and seemingly arbitrary extensions of the protected class.[112] The revised statute creates a more reliable and predictable measure of liability by limiting the protected class to a strict interpretation of section 1 activities performed only by jobsite employees.

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108. *See Rogers*, 623 N.E.2d at 805 (holding that the purpose behind the Act was to provide adequate protection to those work activities of a particularly hazardous nature); *Larson*, 211 N.E.2d at 251 (holding that the legislative purpose was to provide maximum protection to those engaged in particularly hazardous construction activities). The *Larson* court held that the Act should be liberally construed by courts to ensure this maximum protection. *Id.*

109. *See Davis*, 336 N.E.2d at 884 (explaining the relationship between the various hazards of the construction industry and the purpose of the Illinois Structural Work Act); *Larson*, 211 N.E.2d at 251 (holding that to ensure the maximum protection intended by the legislation, liability extends not only to those on-site who control construction operations but also to owners and any other individuals). For example, an architect, exercising direct charge over construction activities, may be found liable. *Id. See Workplace Safety*, *supra* note 88, at 18 (suggesting that, an injured workman could bring suit against any negligent party, save his immediate employer, the Structural Work Act provided a strong incentive for all worksite employers to create a safe working environment). The Act's power as a deterrent of unsafe working conditions was also strengthened by the Act's criminal sanctions, a class A misdemeanor, provided for under section 9. 740 ILL. COMP. STAT. 150/9 (1994) (repealed in 1995).

110. 740 ILL. COMP. STAT. 150/1 §1 (1994) (repealed in 1995). Section 1 limits liability to those occupied in the activities of "erection, repairing, alteration, removal or painting" of a "structure" while engaged on "scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances." *Id.*

111. *See Davis*, 336 N.E.2d at 884 (applying a liberal interpretation of the Structural Work Act in holding that a negligent crane operator received coverage under the Act).

112. *See supra* notes 67-74, and accompanying text (providing examples where the limiting language of the Structural Work Act was not enough to prevent courts from extending coverage to people outside the scope of the Act).

D. Proposed Control Clause

The revised statute retains the same having control principle in addition to the ten relevant factors established by Illinois courts for determining liability under the Act.[113] This will help avoid the current litigation problems found in section 414 case law concerning the type of work courts would require a defendant to retain control over to trigger liability.[114] The proposed clause rejects the Third District Appellate Court's stricter approach to the control issue as both an impractical and unnecessary deviation from long recognized principles.[115]

IV. CONCLUSION

Perhaps the most compelling reason to establish new legislation regarding construction safety is the fate of the workers themselves. A twenty-nine percent increase in construction-related injuries since the repeal of the Illinois Structural Work Act is an undeniable statement of ineffectiveness.[116] Ambiguities in current litigation and overall unpredictability represent a further need for reform. Since 1995, Illinois has neither secured its construction workers an adequately safe workplace nor secured a sufficient civil remedy for workplace deaths and injuries. These deficiencies can only be resolved through legislative efforts. In an attempt to bridge the gap between all interested parties and initiate much needed reform, the proposed construction safety statute and civil remedy described in this article represent a compromised approach to this issue.

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113. *See Larson*, 211 N.E.2d at 251 (recognizing the having charge of clause as being "a generic term of broad import" to the Structural Work Act).

114. *See* sources cited *supra* notes, 92-96 and accompanying text (discussing the difficulties of section 414 litigation). *See generally* Kohen & Bozorgi, *supra* note 7.

115. *See* Kohen & Bozorgi, *supra* note 7, at 36-37 (arguing that the third district appellate court's standard cannot be satisfied by an injured plaintiff, and is inconsistent with both the view of the first district appellate court and the case law under the old Structural Work Act).

116. Healy, *supra* note 6 (describing the alarming rise in construction related deaths in Illinois since the repeal of the Illinois Structural Work Act in 1995 through 1998).