An anticompetitive agreement is economically realistic if it is necessary to complete a transfer of goodwill. An allocation to such a covenant is ordinary income to the vendor and amortizable by the vendee,[137] whereas an allocation to an agreement without economic reality is treated as capital gain.[138]

3. *The Specific Allocation Test*

This test is applied where a specific allocation to the covenant has been made in the contract and is later contested by one of the parties. In *Ullman v. Commissioner*,[139] the court of appeals stated that:

> [W]hen the parties to a transaction such as this one have specifically set out the covenants in the contract and have there given them an assigned value, strong proof must be adduced by them in order to overcome that declaration.[140]

The "strong proof" aspect was then strengthened in *Commissioner v. Danielson*,[141] wherein it was held that a party cannot attack the tax consequences of the specific allocation as construed by the Commissioner unless he can produce evidence of undue influence, mistake or fraud at the time the contract was executed.[142]

Thus, the specific allocation test amounts in effect to a conclusive presumption where a party to the contract challenges the allocation. However, the *Danielson* court emphasized that if the Commissioner challenges the allocation, the test would be inapplicable and the economic substance of the covenant, rather than the mere written form, is then examined.[143]

VIII. Conclusion

To the person acquiring a business or an interest in a business from another, a covenant not to compete can be a useful device. There is no question but that protection is needed to guard the enterprise against unfair competition from its former owner. Where properly contemplated,[144] drafted,[145] policed,[146] and enforced,[147] an anticompetitive covenant can do much to assure the covenantee the true and full benefit of his bargain under the contract.

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137. Balthrope v. Commissioner, 356 F.2d 28 (5th Cir. 1966).
138. Schulz v. Commissioner, 294 F.2d 52 (9th Cir. 1961). Here, the covenant was not needed to insure the goodwill because the vendee knew that, among other factors, the covenantor had neither the technical ability nor the desire to compete.
139. 264 F.2d 305 (2d Cir. 1959).
140. *Id.* at 308.
141. 378 F.2d 771 (3d Cir.), *cert. denied*, 389 U.S. 858 (1967).
142. *Id.* at 775.
143. *Id* at 774. In *J. Leonard Schmitz*, 51 T.C. 306 (1968), *aff'd sub nom., Throndson v. Commissioner*, 457 F.2d 1022 (9th Cir. 1972), the Tax Court refused to apply the *Danielson* rule. Rather, it applied the *Ullman* strong proof requirement and held that the contesting seller had met the burden to overcome the specific allocation to the covenant.
144. *See* the discussion of the tax considerations at division VII *supra.*
145. *See* division III *supra.*
146. *See* the discussion of performance and breach in division IV *supra.*
147. *See* division V *supra.*

THE INDEPENDENT CONTRACTOR RULE AND ITS EXCEPTIONS IN IOWA

The rule developed early at the common law that a master is subject to liability for the torts of his servant if that servant is acting within the scope of his employment.[1] It furthermore developed by way of exception to this general rule that the employer of an independent contractor is not liable for the wrongful acts of the contractor or the servants of the contractor.[2] However, considerable controversy has attended this latter rule relating to the non-liability of the employer of an independent contractor, so much so that it has been said that "the rule is now primarily important as a preamble to the catalogue of its exceptions."[3] Moreover, aside from being weakened by numerous exceptions, the general rule has encountered serious challenges to its economic justifications.[4] This Note will examine to what extent the many inroads into the contractee's immunity from liability have been reflected by the decisions in Iowa.

I. DETERMINING THE CONTRACTEE-INDEPENDENT CONTRACTOR RELATIONSHIP

Preceding the question of the employer's liability for the torts of an independent contractor is the initial determination that there in fact exists a contractee-independent contractor relationship. The significance of this deter-

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1. 57 C.J.S. *Master & Servant* § 555 (1948); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.6 (1956); W. PROSSER, LAW OF TORTS 460 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF AGENCY § 219 (1958); *see* Hughes v. Western Union Tel. Corp., 211 Iowa 1391, 236 N.W. 8 (1931). "The general rule as to the liability of the master for the wrongful acts of his servant while within the scope of his employment is too well settled to need citation of authority." *Id.* at 1392, 236 N.W. at 8.

2. DeMoss v. Darwin T. Lynner Constr. Co., 159 N.W.2d 463, 468 (Iowa 1968); 41 AM. JUR. 2d *Independent Contractors* § 24 (1968); 57 C.J.S. *Master & Servant* § 584 (1948); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.11 (1956); PROSSER, *supra* note 1, at 468; RESTATEMENT (SECOND) OF TORTS § 409 (1965). The justification most usually cited for the rule is that "since the employer has no power over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." RESTATEMENT (SECOND) OF TORTS § 409, comment *b* at 370 (1965).

3. Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 201 Minn. 500, 503, 277 N.W. 226, 228 (1937). The *Restatement* devotes no less than nineteen sections to all the exceptions. *See* RESTATEMENT (SECOND) OF TORTS §§ 410-29 (1965). *See also* Brown, *Liability for the Torts of Independent Contractors in West Virginia*, 55 W. VA. L. REV. 216 (1953); Comment, *Liability for the Torts of Independent Contractors in California*, 44 CALIF. L. REV. 762 (1956); Comment, *Employer's Liability for Negligence of His Independent Contractor*, 30 TENN. L. REV. 439 (1963); Comment, *Responsibility for the Torts of an Independent Contractor*, 39 YALE L.J. 861 (1930).

4. *See, e.g.*, F. HARPER, A TREATISE ON THE LAW OF TORTS § 292 (1933); Douglas, *Vicarious Liability and Administration of the Risk*, 38 YALE L.J. 584, 594 (1929); Morris, *Torts of an Independent Contractor*, 19 ILL. L. REV. 339 (1934); Note, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. CHI. L.REV. 661 (1973).

mination on a study of the exceptions to the independent contractor rule is great, for many an apparent situation ripe for the application of one of the "exceptions" to the rule finds such application obviated by a decision that the relationship of the parties is actually one of master-servant or principal-agent.[5] It should also be noted at the onset that the need for such a determination is not limited to the context of tort law, but arises also under the laws relating to workmen's compensation.[6]

The formula used in determining the existence of "independent contractor" status in Iowa has never been particularly formalized. It was early recognized by the court that "[t]here is no absolute rule for determining whether, under a given state of facts, the one doing or having charge of the work is an independent contractor or an employee"[7] Still, in deciding whether the one acting for an employer is an employee or an independent contractor, various matters of fact have consistently been considered, including the right of the employer to terminate the relationship or discharge the person employed;[8] whether the employer or the workman furnishes the tools, equipment, or appliances used in

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5. See *Malloy v. Stoddard Construction Co.*, 183 Iowa 881, 167 N.W. 610 (1918), an action against a general contractor to recover for injuries occasioned by the plaintiff's falling over obstructions on a sidewalk surrounding a work site. The defendant argued that liability rested solely with the subcontractor doing the excavation phase of the work as an independent contractor. The court rejected this contention, holding that the subcontractor "was not an independent contractor and that [defendant] did not expect or require him to assume the duty of cleaning the sidewalk of the obstructions caused by moving the excavated materials across its course." *Id.* at 887, 167 N.W. at 612. By so holding, the court avoided the question of whether or not, even if the subcontractor was an independent contractor, the general contractor could nonetheless be found liable under that exception relating to an employer's non-delegable duty. (*See generally* discussion at division II, B *infra*). "This situation makes it unnecessary for us to consider the general proposition as to how far, if at all, it is competent for a principal contractor, who undertakes a work a part of which, in its nature, involves more or less obstruction to the public use of a sidewalk, can avoid liability with respect to such use by subletting that part of the work to another contractor." 183 Iowa at 888, 167 N.W. at 613.

6. The Iowa Workmen's Compensation Act specifically excludes from its provisions applicable to workmen or employees those denominated as independent contractors. *See* IOWA CODE § 85.61(3)(b) (1975). In *In re Amond's Estate*, 203 Iowa 306, 210 N.W. 923 (1926) the court commented on the exclusion and the concurrent omission of the legislature to define what it meant by the term "independent contractor" by stating: "The statutes of this state do not, as do the statutes in some other jurisdictions, define an independent contractor, . . . [but] [t]he meaning of the term 'independent contractor' has been many times judicially determined." *Id.* at 307, 210 N.W. at 924.

7. Franks v. Carpenter, 192 Iowa 1398, 1400, 186 N.W. 647, 648 (1922). *See also* Burns v. Eno, 213 Iowa 881, 240 N.W. 209 (1932). "The question raised is one which lends itself to endless debate and rather plausible argument on either side. Discussion on the question abounds in the books. Harmony is apparent in the statement of principles and in the platitudes and abstract phases of the subject. But in the application of the abstract to the concrete, and of the principles to the particular case in hand, there is much diversity and confusion of opinion . . . ." *Id.* at 884, 240 N.W. at 210.

8. *See, e.g.*, Sanford v. Goodridge, 234 Iowa 1036, 1043, 13 N.W.2d 40, 43-44 (1944); Norton v. Day Coal Co., 192 Iowa 160, 164, 180 N.W. 905, 907 (1920); Ash v. Century Lumber Co., 153 Iowa 523, 540, 133 N.W. 888, 894 (1911); 41 AM. JUR. 2d *Independent Contractors* § 19 (1968); 56 C.J.S. *Master & Servant* § 3(5) (1948). *But see* Arthur v. Marble Rock Consol. School Dist., 209 Iowa 280, 228 N.W. 70 (1929). "While it is true . . . the school district . . . reserved the right 'to make changes in the regulations' and 'terminate the contract at any time,' nevertheless those elements in the contract do not constitute [the plaintiff] as its mere employee. Although those elements of the agreement are important in the consideration before us, yet they are outweighed and overcome by other more prominent conditions and provisions." *Id.* at 289, 228 N.W. at 73.

doing the work;[9] the method of the workman's payment, whether by the time or by the job;[10] and the actual nature of the business or occupation conducted.[11] Numerous other considerations could also be mentioned as being some evidence of the relationship.[12] However, in Iowa, as elsewhere, the primary test which has emerged for determining whether or not one acting for an employer is an employee or an independent contractor is the extent of the right of the employer to control the details of the contracted work.[13] Where a right to control is determined to exist in the employer, a finding of a master-servant or principal-agent relationship follows; where such a right to control is determined to be lacking, the relationship is one of a contractee-independent contractor.[14]

Exactly what degree of control by the employer is sufficient to constitute this right to control is, of course, the crucial question, and one which has been variously answered by the Iowa court.[15] Usually the existence of the right to

9. *See, e.g.*, Storm v. Thompson, 185 Iowa 309, 313, 170 N.W. 403, 404 (1919); 41 AM. JUR. 2d *Independent Contractors* § 13 (1968); 56 C.J.S. *Master & Servant* § 3(7) (1948); RESTATEMENT (SECOND) OF AGENCY § 220(e) (1958). But the mere furnishing of machinery or equipment by the employer will not of itself be conclusive of a master-servant relationship in the face of other criteria. Kelleher v. Schmitt & Henry Mfg. Co., 122 Iowa 635, 98 N.W. 482 (1904); Miller v. Minnesota & N.W. Ry., 76 Iowa 655, 39 N.W. 188 (1888).

10. *See, e.g.*, Francis v. Johnson, 127 Iowa 391, 393, 101 N.W. 878, 879 (1904); 41 AM. JUR. 2d *Independent Contractors* § 14 (1968); 56 C.J.S. *Master & Servant* § 63(8) (1948); RESTATEMENT (SECOND) OF AGENCY § 220(g) (1958). However, the manner of payment, though often significant, is not necessarily controlling. Pace v. Appanoose Co., 184 Iowa 498, 509, 168 N.W. 916, 919 (1918); Frisbee v. Hawkeye Land Co., 170 Iowa 540, 544-45, 153 N.W. 85, 86 (1915).

11. *See, e.g.*, Aita v. John Beno Co., 206 Iowa 1361, 1365-67, 222 N.W. 386, 388 (1928); Norton v. Day Coal Co., 192 Iowa 160, 163-64, 180 N.W. 905, 906-07 (1920); 41 AM. JUR. 2d *Independent Contractors* § 18 (1968); RESTATEMENT (SECOND) OF AGENCY §§ 220(b), (c) (1958).

12. Such considerations would be the skill required in the particular occupation, the length and time of employment, whether or not the work performed is a part of the regular business of the employer, the arrangements, if any, as to the medical treatment of the workmen, and the rights, if any, of the contractor to employ assistants or to delegate or substitute others to do the work. *See generally* Volkswagen Iowa City, Inc. v. Scott's Inc., 165 N.W.2d 789, 792 (Iowa 1969); Swain v. Monona County, 163 N.W.2d 918, 921 (Iowa 1969); Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 1215, 146 N.W.2d 261, 264-65 (1966); Schlotter v. Leudt, 255 Iowa 640, 643, 123 N.W.2d 434, 437 (1963); Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254, 257 (1931); 41 AM. JUR. 2d *Independent Contractors* §§ 5-23 (1968); 56 C.J.S. *Master & Servant* § 3(2) (1948); RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

13. "It is generally agreed the most important test is the right to control the work done." Duffy v. Harden, 179 N.W.2d 496, 502 (Iowa 1970). "In all of the cases decided by this court, particular emphasis has been given to the right of the employer to dictate and control the manner, means, and details of performing the services." *In re* Amond's Estate, 203 Iowa 306, 308, 210 N.W. 923, 924 (1926). *See also* Johnson v. Scott, 258 Iowa 1267, 1272, 142 N.W.2d 460, 463 (1966); Houlahan v. Brockmeier, 258 Iowa 1197, 1202, 141 N.W.2d 545, 548 (1966); McDonald v. Dodge, 231 Iowa 325, 327, 1 N.W.2d 280, 282 (1941); 41 AM. JUR. 2d *Independent Contractors* § 6 (1968); 56 C.J.S. *Master & Servant* § 3(3) (1948).

14. "In determining whether a person is an independent contractor or an employee, we look first as to who has the right to control the physical conduct of the service. If this control is vested in the person giving service, he is an independent contractor; if it is vested in the employer, then the person rendering the service is an employee." Greenwell v. Meredith Corp., 189 N.W.2d 901, 904-05 (Iowa 1971).

15. "[T]he control of the employer over the servant should be of such a character as to enable him to direct the manner of performing the services, and to prescribe what particular acts shall be done in order to accomplish the end intended." Callahan v. Burlington & Mo. River R.R., 23 Iowa 562, 564 (1867). "The control necessary to render a

control may be inferred from a combination of the factual matters noted above, which varies according to the circumstances of each case. On balance, however, the degree of control required to render the one performing services an employee must be a control exercised by the employer over the means and manner of the performance of the work, and not merely over the results.[16] If the one performing the services answers to the employer only as to the result, but himself selects the means, he must be regarded as an independent contractor.[17] In sum, an independent contractor is one who, by virtue of his contract, possesses independence in the manner and method of performing the work he has contracted to perform for the other party to the contract.[18]

While the actual terms of the agreement between the parties is the starting point for reaching any conclusion as to the presence of such control as may indicate the precise relationship between the parties,[19] the court indicated in *Sanford v. Goodridge*[20] that it would not be bound by the mere recitation that a workman is an independent contractor if in fact under the entire contract the workman only possesses the same independence that employees in general enjoy. In so stating, the court noted that "[t]he law looks to the substance and not to the form of the contract to determine the relationship . . . ."[21] Furthermore, in *Cowles v. J. C. Mardis Co.*,[22] the court acknowledged the potential dual character or relation which may arise from varying degrees of control in different portions or phases of the work; that is, "that, as to some parts of the work, a party may be a contractor, and yet be a mere agent or employee, as to other work."[23]

II. Liability of the Employer

As mentioned,[24] the usual statement has been that the employer of an in-

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subordinate an employee must be *authoritative* control as distinguished from mere suggestion or cooperation as to detail." McDonald v. Dodge, 231 Iowa 325, 330, 1 N.W.2d 280, 283 (1941). "The power to direct must go beyond telling what it is to be done,—to telling 'how it is to be done.'" Norton v. Day Coal Co., 192 Iowa 160, 165, 180 N.W. 905, 908 (1920).

16. Volkswagen Iowa City, Inc. v. Scott's Inc., 165 N.W.2d 789, 793 (Iowa 1969); Schlotter v. Leudt, 255 Iowa 640, 643, 123 N.W.2d 434, 437 (1963).

17. Pace v. Appanoose County, 184 Iowa 498, 509, 168 N.W. 916, 919 (1918); Francis v. Johnson, 127 Iowa 391, 393, 101 N.W. 878, 879 (1904); Overhouser v. American Cereal Co., 118 Iowa 417, 419, 92 N.W. 74, 75 (1902).

18. Sanford v. Goodridge, 234 Iowa 1036, 1042, 13 N.W.2d 40, 43 (1944).

19. See generally *Malloy v. Stoddard Construction Co.*, 183 Iowa 881, 167 N.W. 610 (1918), discussed at note 5 *supra*, where in its discussion of the defendant's liability the court stated that the defendant, "having by its contract undertaken the entire work, is *prima facie* answerable for the manner of its performance," there being no testimony or other evidence to show that the duty of keeping the walk clean rested with the subcontractor. *Id.* at 888, 167 N.W. at 613. *See also* Arne v. Western Silo Co., 214 Iowa 511, 517, 242 N.W. 539, 542 (1932); 56 C.J.S. *Master & Servant* § 3(2) (1948).

20. 234 Iowa 1036, 1043, 13 N.W.2d 40, 43 (1944).

21. *Id.* at 1042, 13 N.W.2d at 43. Nonetheless, an agreement between the parties is required, so that the mere belief of a workman, though founded on reasonable cause, that he is an employee of the party charged will not estop that party from denying such master-servant relationship. Johnson v. Owen, 33 Iowa 512, 515 (1871).

22. 192 Iowa 890, 181 N.W. 872 (1921).

23. *Id.* at 919, 181 N.W. at 884.

24. *See* text accompanying note 2 *supra*.

dependent contractor is immune from liability for the tortious acts of the contractor or his servants, in that "[u]nless the employer has the right to direct the means and manner of doing the work, and has the right of control over the employee, the doctrine of *respondeat superior* is not applicable."[25] But also as mentioned,[26] this mere determination that the parties stand in a relationship of contractee-independent contractor has been held at the common law to be insufficient in many situations to preclude the liability of the employer. While the precise rationale for imposing liability on the contractee in these situations is not always clear,[27] some delineation can be and has been made among the cases, so that the employer's liability may be said to be imposed in two very broad categories of instances; namely, where there exists (1) negligence on the part of the employer, and (2) negligence on the part of the independent contractor, yet there is present a non-delegable duty owed by the employer. This latter category of situations involving an employer's non-delegable duty is frequently subdivided further, a distinction being drawn between those situations wherein the work to be done is specially, peculiarly, or inherently dangerous, and those situations wherein the work is not so denominated.[28]

A. *Harm Caused by the Negligence of the Employer*

The Iowa court has long held that an employer will be held to answer—notwithstanding that work is done by an independent contractor, and apart from any question of *respondeat superior*—where the harm arising from the work is occasioned by the employer's own negligence or wrongdoing in connection with the work to be done.[29] Correctly viewed, instances of employer liability falling within this category present "apparent" rather than "real" exceptions to the general rule of non-liability, for the employer is not being asked to answer vicariously for the harm caused by another. Rather, the employer is merely being held to answer directly for his personal failure to exercise reasonable care.[30] The Iowa decisions have recognized several duties of an employer giving rise to such liability.

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25. *In re* Amond's Estate, 203 Iowa 306, 308, 210 N.W. 923, 924 (1926).

26. *See* text accompanying note 3 *supra*.

27. "[The] exceptions making the employer liable overlap and shade into one another; and cases are comparatively rare in which at least two of them do not appear. The method of decision then has been almost invariably to state and rely upon both or all, as alternative or cumulative grounds." PROSSER, *supra* note 1, at 469. For a recent example in Iowa wherein the court determined the contractee's liability under multiple exceptions, see *Giarratano v. Weitz Co.*, 259 Iowa 1292, 147 N.W.2d 824 (1967).

28. *See generally* RESTATEMENT (SECOND) OF TORTS § 409, comment *b* at 371 (1965).

29. Kellogg v. Payne, 21 Iowa 575, 578-79 (1866): "[I]f a person employ another, although by express and independent contract, to erect a nuisance, or do any other work directly or necessarily injurious to a third person, he will be liable to such third person for damages resulting from the nuisance, or work. But this liability rests [apart from] the principal of *respondeat superior*."

30. Note, *The Independent Contractor Rule and Its Exceptions—May A Contractee Owe Differing Duties to Certain Classes of Persons Injured by an Independent Contractor?* 31 MONT. L. REV. 117, 118 (1969).

1. *Care of Premises*

Generally speaking, the employer is said to be under a duty to exercise reasonable care in the selection of a competent, experienced, and careful contractor,[31] and if the work is to be done on his premises, the employer is under the obligation to use ordinary care to keep the premises in a reasonably safe condition.[32] In *Greenwell v. Meredith Corp.*,[33] the plaintiff, an employee of an independent contractor hired to install a blower system in the defendant's plant, was injured in a fall from a ladder while on the premises of the contractee. The plaintiff alleged negligence on the part of Meredith Corporation in several particulars. Meredith contended it owed no duty to the plaintiff, in that he was the employee of an independent contractor who alone was in full charge of all details of the work to be performed. The court rejected the contention, stating that an employee of an independent contractor comes within the business-invitee class while on the premises of the owner, and that as to an invitee the defendant was under a duty to take reasonable care to ascertain the actual condition of the premises and, having discovered that condition, either make it reasonably safe by repair or give warning of the actual condition or risk involved.[34]

Similarly, where the employer supplies the necessary machinery to an independent contractor engaged to do a job, and that machinery is defective—especially where the employer is under an obligation to keep it in repair—the employer will be held liable for injuries to the contractor's employees occasioned by the defective machinery.[35] But liability will not attach to the employer where both premises and machines are in good condition when turned over to the independent contractor engaged to do the work, and it is incumbent on the contractor to keep them in repair.[36]

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31. 41 AM. JUR. 2d *Independent Contractors* § 26 (1968); 57 C.J.S. *Master & Servant* § 592 (1948); PROSSER, *supra* note 1, at 469; RESTATEMENT (SECOND) OF TORTS § 411 (1965).

32. 41 AM. JUR. 2d *Independent Contractors* § 27 (1968); 57 C.J.S. *Master & Servant* § 603 (1948).

33. 189 N.W.2d 901 (Iowa 1971).

34. *Id.* at 905. An employee of a subcontractor doing work contracted to be done by it is an invitee of the general contractor as well. Giarratano v. Weitz Co., 259 Iowa 1292, 1308-09, 147 N.W.2d 824, 834 (1967); Steele v. Grahl-Peterson Co., 135 Iowa 418, 422-23, 109 N.W. 882, 883-84 (1906).

35. Kelleher v. Schmitt & Henry Mfg. Co., 122 Iowa 635, 639, 98 N.W. 482, 483 (1904); Neimeyer v. Weyerhaeuser, 95 Iowa 497, 502, 64 N.W. 416, 418 (1895). But see the result in *Blackford v. Sioux City Dressed Pork, Inc.*, 254 Iowa 845, 850, 118 N.W.2d 559, 562 (1962), where in an action by an employee of one under contract with the defendant to clean its machinery for injuries sustained when he became caught in a machine, it was stated that even though the defendant-owner may have been negligent in failing to guard the machine properly or in other ways specified, the primary duty to see that the work was done properly rested with the contractor under the contract, so that an action for indemnification of the defendant would lie against the independent contractor.

36. Kelleher v. Schmitt & Henry Mfg. Co., 122 Iowa 635, 639, 98 N.W. 482, 483 (1904); Hughbanks v. Boston Inv. Co., 92 Iowa 267, 277, 60 N.W. 640, 644 (1894); Miller v. Minnesota & N. Ry., 76 Iowa 655, 658-59, 39 N.W. 188, 190 (1888).

2. *Retention of Control*

Where the employer exercises some supervisory control over the independent contractor—but less than that necessary to subject him to liability as a master—liability may still be imposed on the employer where that control which is retained is not exercised with reasonable care, and serves as the proximate cause of injury.[37] The expression of this principle as found in the *Restatement (Second) of Torts*[38] was recently relied on by the Iowa court in *Giarratano v. Weitz Co.*[39] In *Giarratano*, an action was brought by the estate of a deceased employee of a roofing subcontractor against the defendant-general contractor for breach of a duty allegedly assumed by it in contracting to take all necessary precautions for the safety of employees on the work.[40] The employee was killed when he either slipped or tripped and fell through the roof. Although conceding that the subcontractor was an independent contractor and that one who employs this type of contractor is generally not liable for the latter's torts,[41] the court noted that there was substantial evidence pointing to a retained control arising from the contract provision regarding specific safety responsibilities, creating a duty on the part of the general contractor to control the subcontractor so far as the safety of the workmen was concerned. For this reason the court concluded that "the general contractor may be liable for his own negligence in failing to exercise the retained control, and this liability is not under the doctrine of *respondeat superior*."[42] It should be noted that of equal significance in *Giarratano* is the court's decision that the decedent-employee of the subcontractor, though not a party to the contract between the subcontractor and the defendant, was nevertheless a member of a class for whose benefit the contract was made, so that the decedent's representative could maintain an action directly against the defendant-general contractor for failure to perform the duty asumed by it under the contract.[43]

The principles underlying the decision in *Giarratano* were recently reasserted in *Porter v. Iowa Power & Light Co.*,[44] although under the facts of *Porter* the two cases were distinguished, it being found in *Porter* that there were no safety obligations assumed by the general contractor under the terms of the contract. The court did, however, comment in *Porter* on the degree of control

37. 41 AM. JUR. 2d *Independent Contractors* § 29 (1968); 57 C.J.S. *Master & Servant* § 602 (1948). For an example of an early case in which liability was sought to be imposed under the theory of retained control by the employer, but in which this argument was rejected, see *Callahan v. Burlington & Mo. River R.R.*, 23 Iowa 562, 565 (1867).

38. RESTATEMENT (SECOND) OF TORTS § 414 (1965). "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." *Id.*

39. 259 Iowa 1292, 1300-01, 147 N.W.2d 824, 829-30 (1967).

40. *Id.* at 1298, 147 N.W.2d at 828.

41. *Id.*

42. *Id.* at 1301, 147 N.W.2d at 830.

43. *Id.* at 1306, 147 N.W.2d at 833.

44. 217 N.W.2d 221, 228 (Iowa 1974).

necessary to impose liability on the contractee under the claimed exception of "retained control," stating that the mere retention of a right by the employer to inspect and stop the work if not in conformance with the agreement is insufficient.[45]

3. *Creation of Nuisance*

A further instance where liability is imposed on the employer despite the fact that the work is done by an independent contractor arises where the injury is the direct or natural result of the work itself; that is, the harm is occasioned not by the way the work is done, but rather by the fact that it is done at all. At issue is work involving either the commission of a trespass, or the creation of a nuisance.[46] An example of the latter is *Shannon v. Missouri Valley Limestone Co.*[47] In *Shannon*, an action was brought to enjoin the defendant from using a road which ran by the plaintiff's homes for the reason that the dust created by the constant passing of the trucks constituted a nuisance. The lower court ordered the company to treat the road surface, and required the individual trucks to cover their loads and to maintain a minimum distance apart when traveling on the road. The company on appeal argued that the truck operators were independent contractors, and that it exercised insufficient control over them to be held liable. The court agreed that the truck operators were indeed independent contractors, but stated that the general rule of an employer's non-liability is subject to exceptions; among them, where the work contracted to be done is likely to create a nuisance.[48]

4. *Illegal or Unlawful Activity*

By way of further exception, where the work contracted to be done is illegal, unlawful, or wrongful in itself, the mere fact that it is performed by an independent contractor will not render the employer immune from liability if injuries result from the performance of the task.[49] "It is certainly not the law that one may contract with another with the view of having him do something illegal and accomplish his ends, and then shield himself behind the rules as to independent contractor."[50] In Iowa, the leading case is *Hough*

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45. *Id.* at 230.

46. 41 AM. JUR. 2d *Independent Contractors* §§ 44, 45 (1968); 57 C.J.S. *Master & Servant* § 587 (1948); RESTATEMENT (SECOND) OF TORTS § 427B (1965). It should be noted that this exception to nonliability of the employer for work likely to involve a nuisance is usually classified under those sections dealing with the employer's vicarious liability for the torts of his independent contractor. (*See generally* discussion at division II, B *infra*). However, the Iowa court has seen the employer's liability for damages arising from the creation of a nuisance as resting apart from the doctrine of *respondeat superior*. *See* note 29 *supra*. Unaffected under either approach is the employer's ultimate responsibility.

47. 255 Iowa 528, 122 N.W.2d 278 (1963).

48. *Id.* at 532, 122 N.W.2d at 280.

49. 41 AM. JUR. 2d *Independent Contractors* § 34 (1958); 57 C.J.S. *Master & Servant* § 588 (1948).

50. Hough v. Central States Freight Serv., Inc., 222 Iowa 548, 557, 269 N.W. 1, 5 (1936).

v. Central States Freight Service, Inc.,[51] an action involving injuries to the occupant of an auto which collided with a trailer truck at a time when the truck was proceeding in a direction opposite of that in which it was permitted to haul in Iowa. The court held that the defendant-Central States shoud be made to answer as a joint tortfeasor for the plaintiff's injuries caused by the trucker's negligence, even though the trucker was an independent contractor. The court held that the evidence showed knowledge on the part of the defendant that the truck operator had an Iowa permit to operate in but one direction and meant to violate the Iowa law to escape the mileage tax, but with this knowledge employed him anyway. In such a situation, explained the court, the employer "is participating in the doing of an illegal act and the defense of 'independent contractor' in such a case is not admissible as an excuse to deny liability."[52]

5. *Other Areas of Liability*

Other exceptions to an employer's immunity which may profitably be listed under this category of liability based on personal fault arise where the employer fails to provide in the contract or otherwise for the taking of precautions against dangers involved in work entrusted to the contractor;[53] where the employer ratifies the acts of the independent contractor through the acceptance of the completed work or otherwise;[54] and where the injury-causing work is done in accordance with defective plans or specifications provided by the employer.[55]

B. *Harm Caused by the Negligence of the Independent Contractor*[56]

Not all of the harm for which the employer of an independent contractor may be held accountable can be attributed to the employer's own negli-

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51. 222 Iowa 548, 269 N.W. 1 (1936).
52. *Id.* at 559, 269 N.W. at 7.
53. RESTATEMENT (SECOND) OF TORTS § 413 (1965); Giarrantano v. Weitz Co., 259 Iowa 1292, 1308, 147 N.W.2d 824, 834 (1967). *See also* Wood v. School Dist., 44 Iowa 27, 30 (1876), note 85 *infra*.
54. 41 AM. JUR. 2d *Independent Contractors* § 36 (1968); 57 C.J.S. *Master & Servant* §§ 594, 595 (1948). *See also* Winslow v. Commercial Bldg. Co., 147 Iowa 238, 124 N.W. 320 (1910). "[W]hen the contract was performed and the completed work accepted by the defendant, the relation of owner and independent contractor was dissolved, and thereafter could in no manner affect the obligation of such owner as an employer [to provide his employees with a reasonably safe place to work.]" *Id.* at 242, 124 N.W. at 321.
55. 57 C.J.S. *Master & Servant* § 589 (1948). *See also* Brous v. Wabash R.R., 160 Iowa 701, 142 N.W. 416 (1913).

> It is further argued by appellant that, if the diversion of the stream was the act of the independent contractor who graded and contstructed the roadbed, the defendant would not be liable for the resultant injury to the plaintiff . . . . The point is not well taken. . . . [Even] if independent contractors, there is no evidence of any kind that they did not perform their contract in strict accordance with the plans and specifications furnished by the company or by its engineer in charge.

Id. at 707, 142 N.W. at 418.

56. *See generally* 41 AM. JUR. 2d *Independent Contractors* §§ 37-47 (1968); PROSSER, *supra* note 1, at 470; RESTATEMENT (SECOND) OF TORTS §§ 416-29 (1965).

gence or wrongdoing. Frequently the injury or damage suffered has been caused by the actions of the independent contractor alone, and yet for policy reasons the employer is not permitted to escape responsibility. The employer's liability in these situations is vicarious, and not unlike the liability of a master for the negligence of his servant. Such vicarious responsiblity for the conduct of the contractor is rooted in some relationship with the public or with the particular plaintiff which imposes on the employer a duty which cannot be delegated to the contractor or any other third party, and hence a liability for the failure to perform that duty.[57] This non-delegable duty, as it is called, may be created by statute, contract, franchise, or charter, or it may arise under the common law.[58] Speaking of the latter source of the duty, Dean Prosser has noted: "It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[59]

The exception is said[60] to have evolved from the case of *Rylands v. Fletcher*,[61] wherein a landowner who employed an engineer to construct a reservoir upon his land was held strictly liable for injuries caused to adjoining land when the reservoir failed to contain the water it collected. Liability was decreed even though the landowner was in no way at fault and no negligence was shown to exist on the part of the contractor. While strict liability is not imposed in most modern cases involving a non-delegable duty, vicarious liability for the negligence of the independent contractor is imposed. As a general statement, the employer who owes a positive duty cannot escape that duty by delegating it to a contractor, and is answerable for injuries resulting from the contractor's nonperformance or negligent performance thereof.[62]

Within this broad category of non-delegable duty, further classification distinguishes between situations wherein the work to be done is specially, peculiarly, or inherently dangerous, and situations wherein the work is not denominated as being of a "dangerous" nature. Duties falling within this latter "nondangerous" heading shall be considered herein as simply "non-delegable," without further qualification.

1. *Non-Delegable Duty*

Predominant among the duties recognized to be nondelegable in Iowa is the duty of an employer or general contractor to provide workmen with a safe place to work. In *Winslow v. Commercial Building Co.*,[63] an employee of the defendant fell while superintending the painting of a fire escape at-

57. PROSSER, *supra* note 1, at 470.
58. *Id.*
59. *Id.* at 471.
60. F. BOHLEN, STUDIES IN THE LAW OF TORTS 432-37 (1926).
61. L.R. 3 H.L. (E. & I. App.) 330 (1868).
62. *See generally* 57 C.J.S. *Master & Servant* § 591 (1948).
63. 147 Iowa 238, 124 N.W. 320 (1910).

tached to the defendant's building. From the evidence it appeared that the escape had not been properly fastened to the building when it was first erected and gave way beneath the plaintiff. Although the escape had been constructed by an independent contractor, the court would not allow the employer to escape liability, stating: "There is nothing better settled in the law of master and servant than that the duty of the master to provide the servant a reasonably safe place to work is absolute and nondelegable. The obligation cannot be shifted from the master to a fellow servant or to any other third person."[64] In *Giarratano v. Weitz Co.*,[65] discussed earlier,[66] a similar conclusion regarding the responsibility of the employer in providing workmen with a safe place to work was drawn—only in *Giarratano*, the duty was one assumed by contract. There, the court held that the defendant-Weitz Company assumed a duty under its agreement with the roofing subcontractor to provide for the safety of the workmen, and that this obligation was not one it was entitled to delegate.[67]

Other examples of non-delegable duties which have been recognized by the Iowa court include the duty of a landlord to maintain his building in a reasonably safe condition for the use of tenants, and to exercise care to see that this duty is performed,[68] and the duty of a landowner to exercise ordinary care and skill in the construction of a building upon his property.[69]

2. *Work Which Is Specially, Peculiarly, or Inherently Dangerous*

Vicarious liability for the harm caused by an independent contractor is more readily imposed on the employer in situations where the work being done is dangerous in the absence of some special precautions,[70] or is inherently dangerous.[71] Exactly where the one concept takes up and the other leaves off is not clear. If a distinction is to be made, it is that the "special precautions" exception most properly applies where, from the nature of the work, the employer should anticipate the need for some specific precaution, while the "in-

64. *Id.* at 241, 124 N.W. at 321.
65. 259 Iowa 1292, 147 N.W.2d 824 (1967).
66. *See* text accompanying notes 38-43 *supra.*
67. Giarratano v. Weitz Co., 259 Iowa 1292, 1305, 147 N.W.2d 824, 832 (1967).
68. Cramblitt v. Percival-Porter Co., 176 Iowa 733, 737, 158 N.W. 541, 543 (1916).
69. Goodwin v. Mason & Seabury, 173 Iowa 546, 549-52, 155 N.W. 966, 967-68 (1916). *See also* Connolly v. Des Moines Inv. Co., 130 Iowa 633, 105 N.W. 400 (1905). "The duty of exercising reasonable care for the safety of the public is an absolute duty which rests upon every owner of fixed property, and if he delegates this duty to an agent or servant, he is answerable for the negligence of that agent or servant, under the rule of respondeat superior. He cannot shift the responsibility by exercising care in the selection of his servant." *Id.* at 635, 105 N.W. at 401.
70. 41 AM. JUR. 2d *Independent Contractors* § 40 (1968); 57 C.J.S. *Master & Servant* § 590(a) (1948); PROSSER, *supra* note 1, at 472-74; RESTATEMENT (SECOND) OF TORTS § 416 (1965).
71. 41 AM. JUR. 2d *Independent Contractors* § 41 (1968); 57 C.J.S. *Master & Servant* § 590(b) (1948); PROSSER, *supra* note 1, at 472-74; RESTATEMENT (SECOND) OF TORTS § 427 (1965). *See also* 51 CALIF. L. REV. 245 (1963).

herently dangerous" exception applies where the danger involved in the work calls for a whole set of precautions, against a number of hazards.[72]

a. *Work Dangerous Absent Special Precautions*

The special precautions exception is said[73] to be exemplified by the case of *Bower v. Peate*,[74] in which the defendant employed an independent contractor to dig a new foundation for his house. Adequate precautions to shore up the plaintiff-adjoining owner's foundation were not taken, undermining the plaintiff's building. In allowing recovery against the contractee, the court formulated the exception as follows:

> [A] man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else . . . .[75]

The type of activity necessary to invoke the application of the special precautions exception need not harbor such risk as was involved in *Bower v. Peate*, however. As noted in the *Restatement*, "it is not essential that the work which the contractor is employed to do be in itself an extra-hazardous or abnormally dangerous activity, or that it involve a very high degree of risk to those in the vicinity. It is sufficient that it is likely to involve a peculiar risk of physical harm unless special precautions are taken, even though the risk is not abnormally great."[76]

In *Pace v. City of Webster City*,[77] the plaintiff was injured by falling into an excavation across a public sidewalk. The ditch had been dug by an independent contractor, with the defendant-city having taken no active part in the work. It was held that the city was under a positive duty to keep its streets in repair, and that it was incumbent on the city, "having notice of an excavation involving danger to a traveler on the street to safeguard the same no matter who in fact created the danger."[78] So also in *Prowell v. City of Waterloo*,[79] where during the night the plaintiff ran against and fell over a wire strung across the sidewalk by the contractor to prevent passers-by from walking

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72. RESTATEMENT (SECOND) OF TORTS § 416, comment *a* at 395 (1965).
73. PROSSER, *supra* note 1, at 472.
74. 1 Q.B. 321 (1876).
75. *Id.* at 326. A potential application of this exception in Iowa involving a situation almost identical to *Bower* was obviated when the court held that those employed to do the foundation work on the employer's building were in fact his agents and were not independent contractors, hence rendering the employee liable as a master. *See* Wright v. Goldheim, 184 Iowa 1041, 169 N.W. 343 (1918).
76. RESTATEMENT (SECOND) OF TORTS § 416, comment *d* at 397 (1965).
77. 138 Iowa 107, 115 N.W. 888 (1908).
78. *Id.* at 110, 115 N.W. at 889. *See also* Bennett v. Town of Mount Vernon, 124 Iowa 537, 100 N.W. 349 (1904). "If the matter involved was one of positive duty to the plaintiff, then, of course, the defendant-town could not relieve itself by delegating the work to an independent contractor." *Id.* at 541, 100 N.W. at 350.
79. 144 Iowa 689, 123 N.W. 346 (1909).

into fresh concrete, it was found that the city was under a non-delegable duty to maintain its streets in safe condition. The court concluded that the erection of the wire barrier, by creating a dangerous condition, imposed on the city the duty to see that danger to passersby be prevented by proper warning lights.[80] In *Giarratano v. Weitz Co.*,[81] noted earlier,[82] the supreme court adopted the expression of the *Restatement (Second) of Torts*[83] on the special precautions exception, holding the duties outlined therein are owed by a principal contractor to workmen of an independent contractor on the job.[84] Still other cases have recognized the general principle excepting the employer from non-liability where the work done is dangerous in the absence of special precaution, but under the facts have found the exception not to be determinative.[85]

b. *Work Inherently Dangerous*

Besides the situation of work dangerous in the absence of special precautions, the employer of an independent contractor cannot escape liability where the work involves a risk, recognizable in advance, of physical harm to others which is inherent in, or a natural consequence of, the work itself.[86] A similar conclusion is mandated in the case of work involving abnormally dangerous activity.[87] The position of the *Restatement (Second) of Torts* on the inherent danger exception has been recently adopted in Iowa.[88]

In *Brous v. Wabash Railroad*,[89] the court held that where the railroad company, in the course of constructing its roadbed, had the bed of a stream changed

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80. *Id.* at 691-92, 123 N.W. at 347.
81. 259 Iowa 1292, 147 N.W.2d 824 (1967).
82. *See* text accompanying notes 38-43, 65-67 *supra*.
83. RESTATEMENT (SECOND) OF TORTS § 416 (1965).
> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Id.
84. Giarratano v. Weitz Co., 259 Iowa 1292, 1308, 147 N.W.2d 824, 834 (1967).
85. *See, e.g.*, Wood v. School Dist., 44 Iowa 27 (1876). "[I]f the work is dangerous of itself, unless guarded, and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard it himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor. In the case at bar, the work to be done was not dangerous . . . ." *Id.* at 30.
86. RESTATEMENT (SECOND) OF TORTS § 427 (1965).
> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Id. *See also* note 71 *supra*.
87. RESTATEMENT (SECOND) OF TORTS § 427A (1965). "One who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by the activity." *Id.*
88. Giarratano v. Weitz Co., 259 Iowa 1292, 1308, 147 N.W.2d 824, 834 (1967).
89. 160 Iowa 701, 142 N.W. 416 (1913).

and this change caused the overflow of the plaintiff's land, it was no defense to show that the work was performed by an independent contractor:

> [T]he change of the stream from its natural channel was something of open and notorious character which could not have well escaped the observation of the company, and it could not avail itself of such conditions and maintain its roadbed in the natural channel, and avoid liability for the injurious consequences, if any, to adjacent owners by the plea that this interference with the stream was the act of its contractors.[90]

A similar conclusion was reached in the case of *Watson v. Mississippi River Power Co.*[91] In *Watson*, the plaintiff-owner of property sued for damage to his buildings caused by the blasting and removal of large amounts of rock. The court held as being of no defense to the suit the fact that the actual blasting was done by an independent contractor hired to do the work: "The work being intrinsically dangerous and, even when properly done, liable to be attended with injurious, if not destructive, results to the buildings and property in the city in the immediate neighborhood of which the blasting was to be done, defendant could not relieve itself from liability by delegating the work to a contractor."[92]

Somewhat an anomaly to the decisional law in Iowa is the case of *Callahan v. Burlington & Missouri River Railroad*,[93] wherein the defendant-railroad let out the grading work of its roadbed to an independent contractor, but by its contract specifically called for the clearing of the land by burning. Servants of the contractor allowed the fire to spread from the railroad's right-of-way resulting in the loss of timber and wood by the plaintiff. The court held that the plaintiff was not entitled to recover from the railroad, stating that the negligence in the burning, if any, did not rest with the defendant, as the persons responsible were servants of the subcontractor and not under the defendant's control.[94] The thrust of the decision was a lack of personal negligence on the part of the contractee, with the railroad's potential vicarious liability for the dangerous work passing relatively unnoticed.[95] It is rather doubtful that the same result would be obtained in modern times.

III. Conclusion

It cannot now be said that the position of the independent contractor in Iowa is that of a "servant" for purposes of the employer's liabilty for the tortious acts of the contractor. It is clear from the case law, however, that the excep-

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90. *Id.* at 707, 142 N.W. at 418.
91. 174 Iowa 23, 156 N.W. 188 (1916).
92. *Id.* at 36, 156 N.W. at 193.
93. 23 Iowa 562 (1867).
94. *Id.* at 565.
95. The court states only that "[t]he petition does not allege that the burning of the wood, brush, etc., was in itself an act necessarily dangerous to the property of appellant, but avers that the damages resulted because the act was carelessly and negligently done." *Id.* at 566.

tions to the general rule of the employer's non-liability are numerous to the point of overshadowing the rule itself. Furthermore, as exemplified by its decision in *Giarratano v. Weitz Co.*,[96] the Iowa supreme court appears receptive to the clarification as well as extension of the rules imposing liability on the employer of the independent contractor. To what extent this liability will expand in the years ahead is a matter for conjecture only, but the trend is without doubt one of expansion.

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96. 259 Iowa 1292, 147 N.W.2d 824 (1967).