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Breaking the bonds of workers' compensation

OBTAINING MAXIMUM RECOVERY FROM THIRD PARTIES FOR INJURED WORKERS

It is elementary law that, where the "conditions of compensation" exist (Lab. Code, § 3600), an employee who is injured in the scope of his employment because of the negligence of his employer or a fellow employee ordinarily may not bring an action in tort against the wrongdoer; the exclusive remedy being benefits under the workers' compensation system. (Lab. Code, §§ 3601 (fellow employees) and 3602, subd. (a) (employers).) Workers' compensation is based on a no-fault system that allows the injured employee to receive benefits regardless of whose fault it was.

But in exchange for guaranteed remuneration, workers' compensation benefits are limited. Unlike tort damages, they are not designed to make the injured person "whole." Benefits are usually limited to payment of many medical expenses, some wage replacement, and retraining when appropriate. They do not compensate the injured worker for all lost past and future wages or lost earning capacity, nor do they pay the worker for noneconomic damages, such as pain and suffering, loss of enjoyment of life, emotional distress and mental anguish, loss of consortium, and so forth. Punitive damages also are not available. Additionally, workers' compensation benefits do not compensate the injured worker's spouse or domestic partner for the loss of consortium that is fully compensable in a traditional tort action.

Because workers' compensation benefits are notoriously and woefully inadequate for fully compensating the injured worker – or compensating the family of a deceased worker for their loss – it is essential that counsel explore all possible avenues of potential civil liability in addition to worker's compensation benefits, whether it be against the employer, a fellow employee, or a third party.

Civil liability of an employer

Labor Code section 3602, subdivision (a) provides that workers' compensation benefits are generally an employee's exclusive remedy against an employer for injuries sustained while on the job. The threshold question is, of course, whether the injured or deceased person was indeed an employee of the employer. (Lab. Code, § 3600.) This issue most often arises when a distinction is being made about whether the injured or deceased person was an employee of the employer – in which case the exclusive remedy provisions would apply – or an independent contractor – who would be free to file a tort action.

Labor Code section 3351 defines "employee" as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully

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employed ….” An independent contractor, on the other hand, is defined by Labor Code 3353 as one “who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not to the means by which such result is accomplished.”

Workers’ compensation is a no-fault system that permits the injured worker to collect limited benefits for on-the-job injuries without having to prove negligence or other fault of the employer. Indeed, workers are allowed to collect workers’ compensation benefits even if their injuries were due to their own negligence. However, there are several exceptions to this exclusivity rule that allow injured employees to bring a civil tort action against the employer and to recover all the traditional damages available in a civil action.

These are some examples of the common grounds for bringing a traditional civil tort action against the employer:

- The employer does not carry workers’ compensation insurance (“fails to secure the payment of compensation”), in which case the worker or his dependents can collect benefits from the uninsured workers’ compensation fund and sue the employer at common law (Lab. Code, § 3706);
- The employer willfully physically assaults the employee or ratifies an assault on the employee by another worker (Lab. Code, § 3602, subd. (b)(1));
- The employer knowingly removed or failed to install a point of operation guard on a power press or authorized its removal or failure to install where he knew or should have known such action or inaction would probably cause serious injury or death, and the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and this information was conveyed to the employer (Lab. Code, § 4558);
- The employee’s injury is aggravated by the employer’s fraudulent concealment of the existence of the injury and its connection with the injury, in which case the employer’s liability is limited to the aggravation that is proximately caused by the employer’s fraudulent concealment; however, the employer has the burden of proof on the apportionment between the original injury and the subsequent aggravation thereof (Lab. Code, § 3202, subd. (b)(2));
- Where the employee’s injury or death is proximately caused by a defective product made by the employer and sold, leased, or otherwise transferred for valuable consideration to a third person, and that product is thereafter provided for the employee’s use by a third person (Lab. Code, § 3602, subd. (b)(3)).

Unlike a workers’ compensation claim for benefits, unless it is an action against an employer for not having workers’ compensation insurance, in a civil tort action the injured worker bears the burden of proving that the employer was negligent or otherwise at fault. The employer can raise the employee’s own negligence or assumption of risk as the sole or a contributing cause of the injury to reduce or nullify its exposure.

If the action is against the employer for failing to secure the payment of compensation, an injured employee or his dependents may bring an action at law against the employer for damages as if the workers’ compensation exclusivity rule did not apply. In such an action, there is a rebuttable presumption that the injury to or death of the employee was a direct result of the employer’s negligence. The employer cannot raise the defense of the employee’s contributory negligence or assumption of the risk of the hazard complained of, or that the injury was caused by a fellow servant. (Lab. Code, § 3708.)

Fellow employees

An employee generally is not directly or indirectly liable in a civil action for injuries to or death of a fellow employee while acting within the scope of his employment. The two exceptions to this rule of nonliability are:

1. Where the injury to or death of the employee is proximately caused by the willful and unprovoked physical assault of the other employee (Lab. Code, § 3601, subd. (a)(1)); or
2. The injury to or death of the employer is proximately caused by the fellow employee’s intoxication. (Lab. Code, § 3601, subd. (a)(2).)

Third-party liability

Much more frequent than civil tort actions against a worker’s employer or fellow employee are actions against third parties. The fact that an employee has made a claim for or received workers’ compensation benefits does not affect the right (or the right of a deceased employee’s dependents) to bring a civil action for all damages proximately resulting from the injury or death against any person other than the employer. (Lab. Code, § 3852.)

Some of the examples of third-party liability are so obvious and have been written about so frequently that to repeat them here seems superfluous. These include where a worker is injured or killed due to:

- an automobile accident caused by a third party while the worker is acting within the course and scope of employment, for example, making deliveries or running errands for the employer;
- dangerous conditions of property owned or maintained by another, resulting in the worker being injured on the premises of another due to, for instance, an unlevel surface, a hidden danger, a slippery or icy floor or walkway, or a loose stair board;
- being bitten by a dog while making a delivery to a customer’s home;
- a defective forklift, skip loader, delivery van or truck;
- the defective design or manufacture of a machine that results in injury to the employee;
- defective tools, for example, a power saw, drill, or staple gun; and
- exposure to toxic substances, such as asbestos, lead-based paint, arsenic, or other poisonous or toxic gases, fumes, or substances.

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An often-overlooked third-party action involves medical malpractice committed by the doctor the employer or its insurance company sends the injured worker to for evaluation and treatment of a work-related injury. While doctors are not liable for the nature and extent of the employee's original injuries, they are liable for any negligent act(s) that aggravate the seriousness of the injury or result in an injury to another part of the employee's body.

Failure to pursue a third-party action in such cases where it is warranted could be considered prima facie malpractice.

The peculiar-risk doctrine

At common law, a person who hired an independent contractor was generally not liable to third parties for injuries caused by the contractor's negligence in performing the work. The rationale for this rule was that a person who hired an independent contractor had no right of control over the mode of performing the work contracted. The courts developed so many exceptions to this rule that more than one court has commented that "the rule is now primarily important as a preamble to the catalog of its exceptions." (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 252.)

One of these exceptions is for contracted work that imposes some inherent risk of injury to others, that is, a "peculiar risk." Under the peculiar-risk doctrine, a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's work causes injuries to third persons. A peculiar risk is not one that is abnormal to the type of work being done, nor is it a risk that is abnormally great. It simply means a special recognizable danger arising out of the work itself, a "special risk." The peculiar risk arises from either the nature or the location of the work and is one that a reasonable person would recognize the necessity of taking special precautions to avoid injuring others.

Although the peculiar-risk doctrine is often defined as being the imposition of a nondelegable duty, it is in effect a form of vicarious liability. The purpose of the peculiar-risk doctrine is to ensure that persons injured by an independent contractor's performance of an inherently dangerous activity on the owner's land do not have to depend on the contractor's solvency to receive compensation for their injuries. After compensating the injured victim, the owner can then seek indemnification from the independent contractor. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659; *Privette v. Superior Court* (1993) 5 Cal.4th 689, 694.)

Employers of independent contractors

Privette v. Superior Court (1993) 5 Cal.4th 689 is an important case in California regarding the liability of a hirer of an independent contractor for work-related injuries suffered by the independent contractor or its employees. In *Privette*, the Supreme Court concluded:

> When . . . the injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis of the employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries.

(*Id.* at p. 702.)

In the years since *Privette* was decided, the Supreme Court has decided many cases that have extended its reach and made it increasingly difficult to rely on the peculiar-risk doctrine. In *Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, the Court effectively revised the rationale for the *Privette* doctrine to be one of presumed delegation. That is, there is a strong presumption under California law that the hirer of an independent contractor delegates to the contractor all responsibility for workplace safety and is therefore not liable for on-the-job injuries suffered by the independent contractor or its employees.

By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort-law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort-law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements. (*Ibid.*)

There are two exceptions to the rule that the hirer of an independent contractor is not liable for the injuries to or death of an employee working for the independent contractor:

1. If the hirer of an independent contractor retained control over safety conditions at a worksite and negligently exercised that retained control in a manner that *affirmatively contributes* to the worker's injury (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198); or
2. The landowner that hires an independent contractor is liable to that contractor's employee if the landowner knew or should have known of a latent or concealed preexisting hazardous condition on the property, the independent contractor did not know of and could not have reasonably discovered the hazardous condition, and the landowner failed to warn the contractor of the hazard. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664.)

In *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, the Supreme Court refused to carve out a third exception to the *Privette* doctrine. The Court held that a landowner is not liable for injuries to an independent contractor or its workers that result from a known hazard on the premises where there were no reasonable safety precautions that the independent contractor could have adopted to avoid or minimize the hazard.

The Supreme Court emphasized that its holding does not apply to unknown and undiscoverable hazards. Rather, the ruling is limited to hazards on the premises of which the independent contractor is aware or should reasonably detect. Landowners can rely on the expertise of their independent contractors, who are in a better position to determine whether they can protect

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themselves and their workers against a known hazard on the worksite and whether their work can be performed safely despite the hazard.

Special employees

In a number of situations, especially those involving construction, an employer (the "general employer") may lend an employee to another employer (the borrowing, or "special employer") to work. As the United States Supreme Court stated back in 1909, "[o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation." (*Standard Oil v. Anderson* (1909) 212 U.S. 215, 220.)

In California, when a general employer lends an employee to another employer and relinquishes *all* right to control over the employee's activities, a special-employment relationship arises between the borrowing employer and the employee. (*State of Calif. ex rel. CHP v. Superior Court* (2015) 60 Cal.4th 1002.) During the period of time the employee works for the special employer, the special employer becomes solely liable for the borrowed employee's job-related torts under the doctrine of respondeat superior.

When the employee of a general employer becomes a special employee of another employer, the question arises as to what remedies may be available to the special employee if the employee suffers injury from the negligence of the special employer or its employees. In such a situation, if injured workers are found to be special employees of the borrowing employer, they cannot bring a common-law tort action against the special employer or its employees for injuries caused by their negligence under the exclusivity provisions and fellow-servant rule provisions of the Labor Code.

Similarly, a regular employee of the special employer cannot bring an action for personal injuries against the special employee or the general employer for injuries resulting from the special employee's negligence in the scope of employment. However, if workers are not deemed to be a special employee of the borrowing employer, they may file a common-law tort action for injuries negligently inflicted by the borrowing employer or its employees.

The special-employment relationship and its consequent imposition of liability upon the special employer flow from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved is not sufficient. While the right to control is an important element in determining whether a worker is a special employee, it is not alone determinative. The following factors are also considered by California courts in determining whether or not a worker is a "special employee":

1. Whether the person performing the work is engaged in a distinct occupation or business;
2. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
3. The skill required in the particular occupation;
4. Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
5. The length of time for which the services are to be performed;
6. The method of payment, whether by time or by the job;
7. Whether or not the work is a part of the regular business of the principal; and
8. Whether or not the parties believe they are creating the relationship of employer-employee.

(*State of Calif. ex rel. CHP v. Superior Court*, *supra*, 60 Cal.4th at 1013-1014; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532.)

Evidence of the following factors tend to *negate* the existence of a special relationship; where the employee is:

1. Not paid by and cannot be discharged by the borrower;
2. A skilled worker with substantial control over operational details;
3. Not engaged in the borrower's usual business;
4. Employed for only a brief time; and
5. Using tools and equipment furnished by the lending employer.

(*State of Calif. Ex rel. CHP*, *supra*, 60 Cal.4th at 1014; *Marsh v. Tilley Steel Co*. (1980) 26 Cal.3d. 486, 492-493.)

Additionally, where the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other. (*State of Calif. ex rel. CHP v. Superior Court*, *supra*, 60 Cal.4th at 1008; *Marsh v. Tilley Steel Co.*, *supra*, 26 Cal.3d at 494-495.)

Is it worthwhile to pursue a third-party claim?

Because the workers' compensation insurance carrier and/or employer will be seeking reimbursement in one way or another for benefits paid to an employee who is injured by the negligence of a third party, before agreeing to represent the employee in a third-party case, counsel must ask whether it is worthwhile and in the best interests of the client.

If the employee's injuries are relatively minor, it may not make economic sense for the employee to file a third-party lawsuit, because after the lawyer has been paid a contingent fee and the insurer or employer has been reimbursed for the benefits paid to the employee, the employee's recovery may be minimal or even nothing.

While it may be enticing to the lawyer to accept the case and take a third or 40% fee of the recovery, if the client is going to wind up with only a nominal sum unless the lawyer is willing to reduce the fee, it may not be in the client's best interests to

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prosecute the case. In cases involving more serious injuries or death, the potential net recovery to the client even after the carrier or employer and the attorney have been paid will likely justify the acceptance of the case for prosecution.

Both attorneys who handle workers' compensation cases and those who practice general personal-injury law must be aware of the potential for civil tort claims against employers, fellow employees, and third parties in the case of a worker who was injured or killed on the job, to ensure that injured workers and their families are fully and fairly compensated for the injuries or the family's loss.

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