

RECENT DEVELOPMENTS IN THE PRIVETTE DOCTRINE

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A. Peculiar Risk Doctrine. In California and other jurisdictions, courts have devised a doctrine under which a property owner is liable for injuries to a worker as a result of the condition of the property, even if the owner was not otherwise negligent. This is called the "Peculiar Risk Doctrine." Under the doctrine of peculiar risk, one injured by inherently dangerous work performed by a hired contractor can seek tort damages from the person who hired the contractor. The doctrine provides an exception to the common law rule that an individual who hires an independent contractor is generally not liable for injuries to others caused by the independent contractor's negligence in performing the hired work. This exception was created in the late 19th Century to ensure that innocent third parties injured by inherently dangerous work performed by an independent contractor for the benefit of the hiring person could sue not only the contractor, but also the hiring person, so that in the event of the contractor's insolvency, the injured person would still have a source of recovery. *See, Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 257-258.

Sections 413 and 416 in the Restatement Second of Torts both set forth theories of peculiar risk liability. Under Section 413, a person who hires an independent contractor to do inherently dangerous work, but who fails to provide in the contract that special precautions be taken to avert the peculiar risks of that work, can be liable if the contractor's negligent performance of the work causes injury to others. Under Section 416, even if the hiring person has provided for special precautions in the contract, the hiring person can nevertheless be held liable if the contractor fails to exercise reasonable care to take such precautions and the contractor's performance of the work causes injuries to others. *Toland, supra*, 18 Cal. 4th at 256, 257. In standard jury instructions in use in California, the doctrine is described as follows:

BAJI 13.21. Employer of Independent Contractor - Liability for Work With Peculiar Risk of Harm. Ordinarily, a person or general contractor who hires an independent sub-contractor to do work, is not liable for the acts or omissions of the independent sub-contractor or its employees.

However, if the person or general contractor should recognize that the work is likely to create, during its progress, a peculiar or special risk of bodily harm to others unless special precautions are taken, then the person or general contractor is liable for bodily harm caused to them by the failure of the independent [sub-]contractor to exercise reasonable care to take such precautions.

This is true, even though the person or general contractor has provided for those precautions in the contract or otherwise unless that person or general contractor has taken reasonable precautions against that risk.

BAJI 13.21.4. "Peculiar Risk" "Special Risk" Defined.

The term "peculiar risk" or "special risk" of bodily harm is a risk:

1. Which is peculiar to the work to be done,
2. Which arises out of the character of the work or the place where the work is to be done, and
3. Against which a reasonable person with the knowledge and experience of the defendant would recognize the necessity of taking special precautions.

The term "peculiar risk" or "special risk" does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work to be done.

B. The Privette Doctrine. The major exception to the Peculiar Risk Doctrine occurs in instances where the injured employee of a subcontractor is covered by workers compensation. In those instances, absent proof of independent fault on the part of the owner or general contractor, the fault of the subcontractor employer is not imputed to the owner or general contractor, and absent proof of independent fault, the owner or general contractor is relieved of liability.

In *Privette v. Superior Court* (1993) 5 Cal.4th 689, the California Supreme Court held the peculiar risk doctrine does not extend to a hired contractor's employees. The rationale was that the workers' compensation system covers those injuries. Later, in *Toland*, *supra*, 18 Cal.4th 253, the California Supreme Court held that employees of hired contractors were barred from seeking recovery against the hiring person, irrespective of whether the theory of recovery under the peculiar risk doctrine was based upon direct or vicarious liability. These two seminal cases form the basis for the "Privette Doctrine," which stands for the proposition that an employee of an independent contractor may not recover personal injury damages from the person or entity which retained his or her employer, unless the owner or general contractor had retained control over the instrumentality of the injury, i.e., no vicarious liability of the owner or general contractor for the negligent conduct of the subcontractor.

The underlying rationale expressed by the court in these and subsequent appellate decisions is that the workers' compensation system provides adequate benefits to such persons,

and allowing an independent recovery would give employees of independent contractors an unwarranted windfall, something that is denied other workers; namely, the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment. Since that time, there have been decisions which have refined various issues, including the retention of control over the job site and negligent hiring of the employer of the injured worker. These more recent decisions are discussed below.

C. *McKown v. Wal-Mart Stores, Inc.* In *McKown v. Wal-Mart Stores, Inc.*, 27 Cal 4th 219 (2002), the California Supreme Court ruled that when a hiring company provides faulty equipment to a contractor's employee, the hiring company could be held liable for injuries caused by equipment provided by the hiring company.

McKown was an employee of an independent contractor hired by Wal-Mart Stores, Inc., to install sound systems in its stores. The work required the use of forklifts. Wal-Mart requested that Wal-Mart forklifts be used wherever possible. The forklift consisted of a work platform along with a four-foot extension to raise the platform. The extension was supposed to be chained to the forklift and the platform chained to the forklift for the extension. However, in this case, only one chain securing the extension to the forklift was provided by Wal-Mart. While working on the platform, McKown hit a ceiling pipe, and the platform disengaged from the extension, and McKown fell to the floor. A jury found McKown's employer 55% at fault, Wal-Mart 23% at fault, the manufacturer of the equipment 15% at fault, and McKown 7% at fault.

Wal-Mart appealed, arguing that an employee of an independent contractor was barred from pursuing a lawsuit against it. The Court of Appeal affirmed the trial court. On review, the California Supreme Court, in affirming the decision that liability should be imposed, noted that it had previously held that an employee of a contractor may not sue the hirer of the contractor under any theory of peculiar risk doctrine. However, in this case, the evidence supported the conclusion that Wal-Mart had directed the contractors to use the Wal-Mart equipment whenever possible. This avoided the extra expense of renting a forklift from someone else. The Court did not feel it was unfair to impose liability upon Wal-Mart in this situation. Wal-Mart affirmatively contributed to the employee's injuries by providing a forklift that was unsafe. Furthermore, imposing liability in this situation did not violate the spirit of the workers' compensation

exclusivity rule. The Court therefore affirmed the judgment of the Court of Appeal

D. Hooker v. Department of Transportation. In *Hooker v. Department of Transportation* 27 Cal. 4th 198 (2002), decided the same day as *McCown*, the California Supreme Court found no liability to exist on the part of defendant property owner, reversing the Court of Appeal's prior reversal of trial court's grant of summary judgment. The underlying theory of liability was the defendant owner's negligent retention of control.

The plaintiff, Roseanne Hooker, was the widow of Paul Hooker, a crane operator for a general contractor hired by Caltrans to construct an overpass. During construction, Paul had retracted the outriggers on his crane to let traffic pass and was killed when he failed to re-extend the outriggers before swinging the boom, causing the crane to tip over and throw him to the pavement. Plaintiff sued Caltrans in tort for negligent retention of control, which is a specie of the "peculiar risk" doctrine found in the Restatement of Torts, §§ 414.

The trial court granted Caltrans' motion for summary judgment on the ground that a hirer of an independent contractor is not liable to the contractor's employees (as opposed to innocent bystanders) under that theory. The Court of Appeal reversed the summary judgment, and Caltrans appealed to the California Supreme Court.

The Supreme Court reversed the Court of Appeal, relying on *Privette*, *Toland*, and, *Camargo v. Tjaarda Dairy*, 25 Cal. 4th 1235 (2001). In each of those cases, the Court held that a contractor's employee may not sue the hirer of the contractor under the peculiar risk doctrine. The Court also adopted the approach taken previously by the First District Court of Appeal in *Kinney v. CSB Construction, Inc.*, 87 Cal. App. 4th 28 (2001), in which the Appellate Court held that a hirer will only be liable to its contractor's employee if it retains the ability to control safety and that retention of control affirmatively contributed to the employee's injuries. In other words, the hirer will be liable if its exercise of the retained control *affirmatively contributed* to the employee's injury. Citing *Privette* and *Toland*, the Court reasoned that it would be unfair to hold a hirer liable merely due to its retention of control because that would subject the hirer to greater liability than the contractor who actually caused the injury, but whose liability would be limited under worker's compensation laws. The Court also reasoned that it is fair to impose liability where the hirer's retention of control contributed to the injuries of a contractor's employee (as

opposed to other peculiar risk torts for which the Court held there is no such liability) because the hirer's responsibility is direct, rather than merely vicarious or derivative.

E. Camargo v. Tjaarda Dairy. In *Camargo v. Tjaarda Dairy*, 25 Cal. 4th 1235 (2001), Albert Camargo was killed when his tractor rolled over as he was driving over a large mound of manure in a corral belonging to Tjaarda Dairy. Camargo was an employee of Golden Cal Trucking, and Golden Cal Trucking was an independent contractor Tjaarda Dairy had hired to scrape the manure out of its corrals and haul it away in exchange for the right to purchase the manure at discount. Camargo's heirs sued Tjaarda Dairy and Perry Tjaarda on a theory that defendants were negligent in hiring Golden Cal Trucking because Golden Cal had failed to determine whether Camargo was qualified to operate the truck safely.

The trial court granted the defendant's motion for summary judgment based on the Privette Doctrine. On appeal, the Fifth Appellate District held that a cause of action for negligent hiring survives the Privette Doctrine. The Supreme Court reversed the Court of Appeal and upheld the trial court's decision of "no vicarious liability." The court found that under a theory of negligent hiring based on Rest. §§ 411, the Tjaarda Dairy had no direct responsibility for the injury, having exercised no control over the work performed by Golden Cal. The court also said that under those circumstances it would be unfair to impose civil liability on Tjaarda Dairy when the responsible employer's liability was limited to that provided by workers' compensation.. The Court felt that the same considerations which led it to bar liability under the peculiar risk doctrine in other situations applied likewise to this situation with regard to a theory of negligent hiring. The Court therefore reversed the Court of Appeal judgment and remanded the matter for further proceedings consistent with the opinion.