Legal Backgrounder

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CALIFORNIA HIGH COURT MUDDLES STANDARD FOR WORKPLACE TORT SUITS

by

Lynn A. Bersch

In a pair of decisions rendered January 31, 2002, the California Supreme Court ruled that businesses hiring independent contractors may be liable for workplace injuries suffered by the contractors' employees. In *Hooker v. Department of Transportation*, 27 Cal.4th 198 (2002), and *McKown v. Wal-Mart Stores, Inc.*, 27 Cal.4th 219 (2002), the Court held that a business hiring an independent contractor may be liable to the contractor's employees for workplace injuries to the extent the hiring business "affirmatively contributes" to the injuries by either exercising retained control over worksite safety conditions or providing unsafe equipment.

Historical Background. As a general proposition, employees injured in the course of employment receive compensation and medical care through the workers' compensation system. The social bargain that underlies workers' compensation is that employees are compensated for work-related injuries on a no-fault basis, but are limited to workers' compensation remedies and cannot seek other redress against their employers for work-related injuries.

Over the past ten years, the California Supreme Court has been called upon several times to reconcile the policies underlying workers' compensation with traditional tort concepts of third party liability when a worker is injured while performing work for an employer that has itself been hired as an independent contractor. The Court has recognized the inequity in permitting liability against the hiring business when the contractor employing the injured worker is protected from suit under the workers' compensation system. Until now, the Court rejected plaintiffs' attempts to avoid the exclusivity of the workers' compensation remedy and impose liability on the hiring business.

Lynn A. Bersch is a partner with the law firm Crosby, Heafey, Roach & May PC in San Francisco. She is an employment litigator whose practice is dedicated to protecting the interests of employers in the courts, before administrative agencies, and through pre-dispute counseling and training. She is an active member of the Defense Research Institute's Employment Law Committee.

In *Privette v. Superior Court*, 5 Cal.4th 689 (1993), a building owner hired a contractor to install a new roof. An employee of the roofing contractor was injured when he fell off a ladder and was burned by the hot tar he was carrying. In addition to collecting workers' compensation benefits through his employer, the employee sued the building owner for liability under the tort doctrine of peculiar risk. Specifically, the employee alleged liability under Restatement Second of Torts § 416, which provides that one who hires an independent contractor to do inherently dangerous work and requires that the contractor take special precautions to avoid the peculiar risk, can be liable to those injured by the contractor's failure to exercise reasonable care to take the required precautions.

Similarly, in *Toland v. Sunland Housing Group, Inc.*, 18 Cal.4th 253 (1998), an employee of a construction subcontractor who was injured when a wall fell on him sought to hold the general contractor liable on a peculiar risk theory. In *Toland*, however, the employee brought suit under Restatement Second of Torts § 413, which imposes liability on the hirer of an independent contractor hired to do inherently dangerous work when the hiring contractor fails to require that special precautions be taken to avoid the peculiar risk and the contractor's negligence causes injury.

The California Supreme Court recognized that the injuries in both *Privette* and *Toland* resulted primarily from the failure of the injured worker's employer to take special precautions in performing inherently dangerous work. The Court barred the employee in each case from suing the hiring party, recognizing that liability for the building owner and general contractor would be vicarious in nature and that it would create an anomaly if it limited liability against the employer to workers' compensation, while at the same time imposing liability on the hiring party whose liability was merely derivative of the employer's.

In 2001, the Court rejected a bolder attempt to circumvent workers' compensation exclusivity. In *Carmargo v. Tjaarda Dairy*, 25 Cal.4th 1235 (2001), an employee of a trucking company that had been hired to scrape and haul away manure was killed when the tractor in which he was working rolled over. His family sought to hold the dairy liable for the death under Restatement Second of Torts § 411 on the theory that the dairy negligently hired the trucking company by whom the decedent was employed. Following its reasoning in *Privette* and *Toland*, the Court held that an employee of an independent contractor may not maintain a negligent hiring action against the hiring company. The Court reasoned that the policies underlying workers' compensation exclusivity should apply equally to the hirer and permitting such actions would provide an unfair windfall to employees of independent contractors by allowing tort recovery for injuries caused by the employer's failure to provide a safe working environment.

Another Bite at the Apple. The *Hooker* and *McKown* cases presented yet two more theories for imposing liability on hirers of independent contractors. *Hooker* involved a crane operator employed by a contractor that the California Department of Transportation (CalTrans) hired to construct an overpass. During the construction, the operator retracted the outriggers on the crane periodically to allow other construction and CalTrans vehicles to pass. The operator was killed when he failed to re-extend the outriggers on the crane before swinging the boom. His wife collected workers' compensation benefits from the contractor's insurer and sued CalTrans for negligent exercise of retained control under Restatement Second of Torts § 414. Evidence indicated that CalTrans was responsible for obtaining contractor compliance with all safety laws and regulations and for construction zone traffic management.

The Court in *Hooker* drew a distinction between the derivative nature of the liability in *Privette, Toland*, and *Carmargo*, and liability based on affirmative conduct by the hiring party. The Court held

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that the hirer of an independent contractor may be liable for injuries to the contractor's employees if the hirer (1) retains control over the manner of performance of the contracted work *and* (2) exercises the retained control in such a manner as to affirmatively contribute to the injury. In explaining its holding, the Court expressly approved the reasoning of an appellate court decision holding that no liability lies where "(1) the sole factual basis for the claim is that the hirer failed to exercise a general supervisory power to require the contractor to correct an unsafe procedure or condition of the contractor's own making, and (2) there is no evidence that the hirer's conduct contributed in any way to the contractor's negligent performance by, e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise." 27 Cal.4th at 210-211 (quoting *Kinney v. CSB Construction, Inc.,* 87 Cal.App.4th 28, 36 (2001)).

Applying these principles to the case at bar, the Court rejected Hooker's claim. It held that although there was a triable issue of fact on whether CalTrans retained control over safety conditions at the worksite, CalTrans did not affirmatively contribute to the operator's death by permitting traffic to use the overpass while the crane was being operated. The Court acknowledged that CalTrans clearly permitted other construction vehicle traffic on the overpass and that such a practice required the crane to retract its outriggers to let the traffic pass. The Court declared, however, that CalTrans did not *direct* the crane operator to retract the outriggers, and simply allowing other traffic on the overpass during construction did not constitute an affirmative contribution to the crane operator's death. At most, the Court found, there was evidence that CalTrans was aware of an unsafe practice and failed to exercise retained authority to correct it.

In *McGown*, the plaintiff was employed by an independent contractor hired by Wal-Mart to install sound systems in its stores. Wal-Mart provided forklifts for the contractor's use and asked that the contractor use Wal-Mart's forklifts whenever possible in undertaking its work. The forklifts had platforms that were supposed to be chained to the forklift or its extensions. An employee of the contractor fell and was injured when an unchained platform disengaged from an extension. The employee sued Wal-Mart, claiming that it negligently supplied unsafe equipment.

Relying on the distinction between vicarious liability and liability arising from a party's own affirmative contribution to an injury, the Court declared that the there is nothing unfair about imposing liability in the latter instance. Finding that Wal-Mart's affirmative conduct in supplying unsafe equipment contributed to the injury, the Court let stand the verdict apportioning 23% fault to Wal-Mart. In so holding, the Court rejected Wal-Mart's contention that it should not be liable because it did not require the use of its forklifts. The Court rationalized that although the contractor understood that no such requirement existed, the contractor did not want to displease such a large customer and would have had to delay work to secure alternate equipment. Reasoning that Wal-Mart's affirmative contribution eliminates any unfairness, the Court also rejected Wal-Mart's argument that it should not be liable because it was not "primarily" responsible as indicated by the 23% apportionment of fault.

Parameters and Implications. The standards announced in *Hooker* and *McKown* provide uncertainty about the exclusive nature of the workers' compensation remedy for workplace injuries. Businesses that engage independent contractors can no longer assume that they will be afforded the same protections as the contractor if a contractor's employee is injured. The parameters that emerge from the latest pronouncements of the California Supreme Court include the following:

1. a hirer bears no liability to a contractor's employees under a theory in which the nature of the liability is vicarious or derivative of the contractor's act or omission;

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2. a hirer's retention of general control over the safety conditions at a worksite is not sufficient to give rise to such liability;

3. a hirer's omission in failing to require a contractor to prevent or correct an unsafe procedure or condition of the contractor's own making is not sufficient to give rise to such liability; or

4. a hirer who actively directs the manner of work, induces reliance on its oversight of safety, or provides unsafe equipment may be subject to liability.

The application of these principles in practice is unlikely to yield lines of liability and non-liability that can be relied upon with confidence. The decisions in *Hooker* and *McGown* were issued the same day by the same Court. The reasoning articulated in the two decisions, however, is pliable. The Court determined that no affirmative contribution arose from the conduct of the hiring party in *Hooker*, which *permitted* traffic to pass in the area of the crane, but did not *direct* the crane operator to retract the outriggings even though *permitting* traffic unquestionably *required* the operator to retract the outriggings. In contrast, the same Court determined in *McGown* that the hiring party's *request* to the contractor to use the hirer's forklifts did constitute an affirmative contribution even though the contractor understood that the use of the hirer's forklifts was not *required*.

The Court could just as easily have come to the opposite conclusions with regard to the semantics in each case. That is, it could have reasoned that p*ermitting* the flow of construction traffic in the area effectively was the same as the hirer *directing* the crane operator to retract the outriggers since retraction was required in order to permit the flow of traffic. It also could have decided just as easily that a hirer's *request* that a contractor use the hirer's equipment was tantamount to *permitting* the contractor to do so, as distinguished from a *directive* to do so. Just as it can be reasoned that the crane operator should be held responsible for his own failure to follow safe practices in re-extending the outriggers, it can be reasoned that the sound installer should be held responsible for failure to follow safe practices in checking whether the platform on which he was standing was safely secured. Either case could have been decided either way while still applying the principles expressed by the Court. The rationales expressed by the Court in *Hooker* and *McKown* simply do not provide solid guidelines for businesses hiring independent contractors.

Protective Measures. *Hooker* and *McKown* represent the first toe in the door for employees of independent contractors seeking to circumvent workers' compensation exclusivity. It remains to be seen how narrowly the courts will define what constitutes an "affirmative contribution" by a hirer and to what degree courts will mold the language of the cases to reach a result desired by the court. As a precautionary measure, those who engage independent contractors may be well-advised to define carefully, and in writing, the responsibility of each contractor for directing the work and protecting the safety of its employees. Retained control often will best be limited to general oversight and the setting of minimum safety standards with which the contractor is responsible for insuring compliance. Further protection for hirers can be obtained by including an indemnity clause requiring that the contractor indemnify the hirer for any losses or amounts incurred as a result of injuries to the contractor's employees.

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