By Daniel L. Germain

A Status Report on the Peculiar Risk Doctrine in California

Does hirer liability apply if an independent contractor is not insured?

On January 31, 2002, the California Supreme Court handed down two long-awaited decisions involving the liability of hirers of independent contractors for injuries sustained by employees of independent contractors under the "peculiar risk doctrine." In its holdings, the supreme court opened a narrow window of hirer liability after almost a decade of decisions that all but precluded these claims.

In *Hooker* v. *Department of Transportation*,[1] the court ruled that a hirer of an independent contractor may be held liable to an employee of the contractor only if the hirer's exercise of retained control affirmatively contributed to the employee's injuries. Similarly, in *McKown* v. *Wal-Mart Stores, Inc.*,[2] the court ruled that a hirer may be held liable to an injured employee of an independent contractor if the hirer provides unsafe equipment that affirmatively contributes to the employee's injuries. These two cases are rare departures from the supreme court's steady march away from hirer liability under the peculiar risk doctrine.

In three earlier decisions issued during the last decade—*Privette* v. *Superior Court*,[3] *Toland* v. *Sunland Housing Group, Inc.*,[4] and *Camargo* v. *Tjaarda Dairy*[5]—the supreme court ruled in favor of hirers and against employees of independent contractors under the peculiar risk doctrine. In these rulings, the court's decision to preclude hirer liability was based, in part, upon the fact that injured employees are covered under the workers' compensation system, which affords employees automatic recovery for on-the-job injuries.

One issue these cases did not address is the question of hirer liability if the independent contractor fails to maintain workers' compensation coverage for its employees. Is an otherwise innocent hirer then afforded the same liability protection? Although no published California case has directly addressed this issue, sufficient information can be gleaned from past decisions of the supreme court to forecast how the court might resolve this issue.

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For many years, California followed the minority view that a hirer who engages an independent contractor to perform "inherently dangerous" work can be held liable in tort, regardless of fault, when the contractor's employee is injured on the job.[6] This theory of liability, known as the peculiar risk doctrine, was grounded in the *Restatement (Second) of Torts*.

According to Section 413 of the *Restatement*, a person who hires an independent contractor to do inherently dangerous work, but who fails, contractually or otherwise, to take special precautions to avoid the peculiar risk, may be liable for injuries caused by such failure. Courts often refer to Section 413 liability as "direct" liability, because it is the failure to do some affirmative act that led to the injury.

Under Section 416 of the *Restatement*, a person who hires an independent contractor may still be liable even if the hirer provides for special precautions but the contractor fails to exercise reasonable care to take such precautions, and someone is injured as a result. Courts often refer to liability under Section 416 as "vicarious" because the hirer's liability flows from the independent contractor's failure to take precautions.

The theory behind the imposition of liability, without a finding of fault, was to ensure that employees who are injured while performing inherently dangerous work receive adequate compensation for their injuries, that the person who benefits from the work (most commonly, a landowner) bears responsibility for any risk of injury to others, and that adequate safeguards are taken to prevent injuries.[7] However, in a series of cases beginning with *Privette* in 1993, the California Supreme Court substantially narrowed this liability.

The Rise and Fall of the Peculiar Risk Doctrine

In *Privette*, the defendant hired an independent roofing contractor to install a new roof on his property.[8] During the work, the roofer's employee, Contreras, was instructed to carry buckets of hot tar up a ladder to the roof for installation.[9] While performing the task, Contreras fell from the ladder and was severely burned by the hot tar.[10] Contreras subsequently filed for workers' compensation benefits, and he sued the landowner, Privette, for vicarious liability under the peculiar risk doctrine, pursuant to Section 416.[11] The trial court denied Privette's motion for summary judgment, and the court of appeal denied his writ petition.[12]

After granting review, the California Supreme Court unanimously held for the first time that a hirer may not be held liable for injuries to an independent contractor's employee, in part, because the workers' compensation system provides for the automatic recovery of benefits for injuries "arising out of and in the course of the employment."[13]

Privette invokes the common law rule that a hirer employing an independent contractor is not ordinarily vicariously liable for torts committed by the contractor. The court then examined the historical roots and the evolution of the peculiar risk doctrine. As the court pointed out: "Over time, the courts have, for policy reasons, created so many exceptions to this general rule of nonliability that 'the rule is now primarily

important as a preamble to the catalog of its exceptions.'"[14]

At first, liability was only extended to innocent bystanders or neighboring property owners who were injured by the acts of an independent contractor hired by the landowner to perform work on the property. Over time, a minority of jurisdictions, including California, expanded liability to allow a hired contractor's employees to seek recovery from the property owners for on-the-job injuries.[15] Although acknowledging that California followed the minority position by extending liability to hirers of independent contractors whose employees are injured on the job, the *Privette* court was persuaded to abandon that approach and to preclude liability under the peculiar risk doctrine.

The court reasoned that, under the Workers' Compensation Act, all employees are automatically entitled to recover benefits for injuries arising out of and in the course of employment.[16] The court specifically cited Labor Code Section 3716, which the court described as "setting up an uninsured employers fund to provide benefits for employees not covered by workers' compensation insurance."[17] The court reasoned that the workers' compensation scheme achieves the same purpose as the peculiar risk doctrine by ensuring that an employee's injuries will be compensated regardless of fault.[18]

The court concluded that to permit injured employees to recover from both the workers' compensation system and the hirer of the contractor under the peculiar risk doctrine would contravene public policy, because employees could potentially receive an "unwarranted windfall"—an opportunity, the court points out, denied to other workers.[19] Additionally, hirers would be exposed to liability without the opportunity to seek equitable indemnity from the negligent contractor because the workers' compensation system shields the contractor from potential liability.[20]

After *Privette*, lower courts disagreed about the viability of the peculiar risk doctrine in situations in which the hirer made no provision for the use of special precautions on the job as set forth in *Restatement* Section 413.[21] Apparently, some lower courts believed that hirer liability protection only existed under the scenario laid out in Section 416, when the hirer of an independent contractor makes provisions "in the contract or otherwise" that special precautions be taken with regard to the peculiar risk involved, as was the case in *Privette*.[22] In *Toland*, the supreme court stepped in to clarify whether the hirer could be held liable for injuries sustained by the independent contractor's employee if the hirer failed to make provisions for the use of special precautions.

In *Toland*, the plaintiff was an employee of a framing subcontractor who was injured when a heavy framed wall fell on him.[23] The plaintiff filed suit against the developer, alleging that raising the wall created a peculiar risk of injury for which the developer should have required the subcontractor to take special precautions.[24] The developer moved for summary judgment under *Privette.* The trial court granted the motion, and the court of appeal affirmed.

On review in the supreme court, the defendant contended that under Section 416 of the *Restatement*, it should not be held vicariously liable, because the injury did not result from the hirer's negligence. Plaintiff argued that under Section 413, direct liability should be found, because the hirer failed to provide special precautions in light of the peculiar risk of the work.

In rejecting the plaintiff's arguments, the court concluded that there was no meaningful distinction between the factual situations addressed by the two sections of the *Restatement* for purposes of imposing liability under the peculiar risk doctrine.[25] In reaching this conclusion, the court again relied upon the policy consideration enunciated in *Privette.* The court stated, "Imposing on the hiring person a liability greater than that incurred by the independent contractor (the party with the greatest and most direct fault) is equally unfair and illogical whether the hiring person's liability is premised on the theory of section 413…or the theory of section 416…."[26]

Although *Toland* put to rest the question of liability with respect to the two factual scenarios set forth under Sections 413 and 416, several lower courts continued to question whether an employee of an independent contractor could assert claims against the hirer of the contractor under a different tort-based theory of liability.[27] Once again, the supreme court stepped in to answer this question.

In *Camargo*, the family of a deceased worker, who was fatally injured when his tractor tipped over while driving over a large mound of manure, brought suit against the hirer of his employer, alleging liability under the theory of "negligent hiring" as set forth in *Restatement (Second) of Torts* Section 411.[28] The plaintiffs contended that the dairy was liable for the worker's death, because it was negligent in hiring the contractor, which failed to determine whether the employee was qualified to operate the tractor safely.[29] In rejecting the plaintiffs' theory of liability, the supreme court relied upon two policy considerations cited in *Privette*:[30] the exclusivity of the workers' compensation system and the unwarranted windfall that employees of independent contractors would get (the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment).

Against this backdrop, the supreme court this year addressed the application of the peculiar risk doctrine when the hirer affirmatively contributes to the employees' injuries. In *Hooker* v. *Department of Transportation,*[31] a crane operator employed by a general contractor hired by Caltrans was killed when the crane he was operating tipped over.[32] His widow filed suit against Caltrans, alleging that it was liable for her husband's death because Caltrans "retained control" over the worksite.[33] Specifically, the plaintiff relied upon the existence of a Caltrans safety manual that set forth various guidelines for job-site safety.[34] Caltrans's motion for summary judgment under *Privette* and *Toland* was granted by the trial court, but the court of appeal reversed. The supreme court granted review to consider the issues that arise when the hirer retains control of the worksite.

The supreme court began its analysis by reviewing its prior decisions in *Privette*, *Toland*, and *Camargo*.[35] The court then reviewed the decisions of other state courts that have addressed the issue.[36] Finding little guidance, the court concluded that other states are evenly divided on the question of whether an employee of a contractor may sue the hirer of the contractor for negligent exercise of retained control.[37]

The court then reviewed two California appellate decisions—*Grahn* v. *Tosco Corporation*[38] and *Kinney* v. *CSB Construction, Inc*.[39] The court noted that although these two cases found that under certain circumstances a hirer may be held liable to an employee of a contractor under a theory of retained control, the courts disagreed on whether mere retention of control was sufficient to create liability or whether something more, such as active participation, must be shown.[40] Whereas the *Grahn* court found that a hirer may be held liable when the hirer retains sufficient control over the work of the independent contractor to be able to prevent or eliminate the dangerous condition through the exercise of reasonable care, the *Kinney* court found that mere retention of control of safety conditions was not enough. Instead, the court found that to establish liability the plaintiff must show that the hirer affirmatively contributed to the use of methods or procedures that caused the injury.[41]

Adopting the more nuanced approach in *Kinney*, the supreme court found:

> Imposing tort liability on a hirer of an independent contractor when the conduct [of the hirer] has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Pri* -

vette, *Toland* and *Camargo* because the liability of the hirer in such a case is *not* "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term.[42]

In rejecting Caltrans's argument that hirers should never be held liable under the peculiar risk doctrine, the supreme court specifically dismissed the contention that workers' compensation exclusivity should prevail because the contract price paid by the hirer would have taken into account the added cost of coverage. The court concluded that the contract price could not have reflected the cost of injuries that are attributable to the hirer's affirmative conduct and the contractor has no way of calculating an increase in the costs of coverage attributable to the conduct of third parties.[43] However, based upon its finding that Caltrans did not affirmatively contribute to the accident, the court affirmed the motion for summary judgment.[44]

Similarly, in a companion case issued the same day, *McKown* v. *Wal-Mart Stores, Inc.*,[45] the supreme court ruled that a hirer may be held liable for injuries sustained by the employee of an independent contractor if the hirer provides the worker with tools that affirmatively contribute to the injury-causing event.[46] In *McKown*, the plaintiff was severely injured while operating a forklift provided to him by Wal-Mart, the hirer of his employer.[47] At trial, the jury returned a verdict against Wal-Mart and other defendants, finding that Wal-Mart was negligent in providing unsafe equipment and was 23 percent at fault.[48] The court of appeal affirmed, finding that *Privette* and *Toland* did not bar recovery when the hirer provides unsafe equipment to the employee of an independent contractor.[49] Closely tracking and repeatedly referring to its detailed analysis in *Hooker*, the court found that "the hirer's affirmative contribution to the employee's injuries eliminates the unfairness in imposing liability where the contractor is primarily at fault."[50]

Uninsured Contractors

The supreme court has never been called upon to specifically determine whether the peculiar risk doctrine applies to a hirer that engages an uninsured independent contractor whose employee is injured on the job. Nevertheless, the supreme court's opinions regarding the application of the peculiar risk doctrine give substantial guidance as to how it might resolve the issue.

Nowhere, in its lengthy decisions in *Privette*, *Toland,* and *Camargo*, does the supreme court state that its holdings do not apply if the independent contractor had no workers' compensation coverage. Instead, throughout those cases, the court repeatedly refers to the redundancy of the peculiar risk doctrine because the workers' compensation "statutory scheme" and workers' compensation "system of recovery" apply.[51] Those repeated references to the workers' compensation "scheme" and "system" are no mistake. Indeed, as the court acknowledges, even when an employer fails to obtain or maintain workers' compensation insurance coverage, an injured employee may still receive compensation under the state's uninsured employers fund. This fund was established by the legislature "to create a source of benefits to the employee who otherwise would receive no benefits, because of the failure or refusal of his or her employer to obtain workers' compensation liability coverage."[52]

Moreover, in addition to the right to receive compensation from the uninsured employers fund, the injured employee may also sue the uninsured employer for damages pursuant to Labor Code Section 3706. In addition, under Labor Code Section 3708 the employer is presumed negligent and the ordinary affirmative defenses of contributory negligence and assumption of risk are unavailable. Thus, California law guarantees that an employee of an uninsured employer is compensated regardless of the employer's lack of insurance coverage or ability to pay.

In both *Privette* and *Toland*, the supreme court specifically referred to the uninsured employers fund. In *Privette*, the court explained its decision to prohibit the application of the peculiar risk doctrine to hirers of independent contractors by discussing the workers' compensation system itself. The court stated: "The workers' compensation system was created to provide, in the words of our state Constitution, 'for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment….'"[53] According to the court, "Under the Workers' Compensation Act…all employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.'"[54]

The court then referred to the uninsured employers fund, established under Labor Code Section 3716, which provides for "setting up an uninsured employers fund to provide benefits for employees not covered by workers' compensation insurance."[55]

If the supreme court had intended to limit the application of *Privette* only to cases in which the employer maintained workers' compensation insurance coverage, it would

not have referred to the uninsured employers fund. Any doubt about the court's thinking on this issue was put to rest by *Toland*.

In *Toland*, the court once again specifically referred to the uninsured employers fund, which the court described as providing "workers' compensation benefits to workers employed by uninsured employers."[56] The *Toland* court distinguished the vastly different situations of neighboring property owners or innocent bystanders who may be injured by the negligence of an independent contractor from that of contractor's employees.[57] The *Toland* court stated, "The neighboring landowner or innocent bystander may have no other source of compensation for injuries resulting from the contractor's negligence in doing the inherently dangerous work. In contrast, an employee of the negligent contractor can, for workplace injury caused by the contractor's negligence, recover under the workers' compensation system regardless of the solvency of the contractor."[58]

Thus, by repeatedly referring to the uninsured employers fund in discussing the application of the peculiar risk doctrine to hirers of independent contractors, the supreme court signaled that employees of uninsured contractors may not recover from the hirers of independent contractors under the peculiar risk doctrine any more than employees of contractors carrying workers' compensation insurance may.[59] This distinguishes employees from innocent bystanders and neighboring landowners, who "may have no other source of compensation for their injuries resulting from the contractor's negligence" except from the hirer of the contractors.[60]

In the two most recent decisions involving the peculiar risk doctrine, *Hooker* and *McKown*, the court again did not address whether the doctrine applies when the injured worker's employer is uninsured. However, by rejecting the argument that hirers should never be liable for injuries sustained by an independent contractor's employees, the court demonstrated a more nuanced analysis that focuses upon the level of involvement of the hirer in the injury-causing event—to what extent the hirer "affirmatively contributed" to the employee's injuries.

In the case of an uninsured independent contractor, when there is no allegation that the hirer affirmatively contributed to the employee's injuries (whether by retained control or the provision of defective equipment), there is no direct relationship between the employee's injuries and any act or omission by the hirer. Thus, there is no rationale for holding the hirer vicariously liable for injuries sustained by a worker.

It should also be noted that the supreme court depublished a court of appeal decision

that found in favor of an injured employee. In *Andreini* v. *Superior Court,*[61] the defendant homeowners hired a licensed contractor to perform touch-up painting on their home.[62] While performing the job, one of the contractor's employees, Solorio, was injured when he fell off the roof of the property.[63] Thereafter, Solorio sued the homeowners for negligence under the peculiar risk doctrine.[64] During the litigation, the homeowners' motion for summary judgment was denied.[65]

The homeowners then petitioned the court of appeal for a writ of mandate directing the trial court to grant summary judgment.[66] The First Appellate District, Division Two, issued a published decision denying the homeowners' petition.[67] The court of appeal ruled, as a matter of law, that *Privette* does not apply when the contractor carries no workers' compensation insurance.[68]

The homeowners then petitioned the supreme court for review.[69] Nineteen days after issuing its opinion in *Toland*, the supreme court denied the petition for review and ordered *Andreini* depublished.[70] Although speculation about the reasons that the supreme court depublishes a particular decision is done at great peril, surely the court did not depublish *Andreini* merely because of some simple procedural flaw. *Andreini* was depublished because the court disagreed with its clear holding that a hirer may be held liable under the peculiar risk doctrine when the employee of an independent contractor has no workers' compensation insurance.

It is likely that the supreme court would find that there simply is no rational basis to permit a worker to obtain a windfall of double recovery and to allow a class of individuals to thwart the reasonable limits imposed by the workers' compensation system, merely because the worker's employer failed to maintain workers' compensation coverage. This is especially true in situations in which the hirer was not responsible for the injury-causing event and played no role in the failure of the independent contractor to obtain or maintain workers' compensation coverage. ■

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[1] Hooker v. Department of Transp., 27 Cal. 4th 198 (2002).
[2] McKown v. Wal-Mart Stores, Inc., 27 Cal. 4th 219 (2002).
[3] Privette v. Superior Court, 5 Cal. 4th 689 (1993).
[4] Toland v. Sunland Hous. Group, Inc., 18 Cal. 4th 253 (1998).
[5] Camargo v. Tjaarda Dairy, 25 Cal. 4th 1235 (2001).
[6] Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 508 (1979); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 585-86 (1979); Van Arsdale v. Hollinger, 68 Cal. 2d 245, 250 (1968); Woolen v. Aerojet Gen. Corp., 57 Cal. 2d 407, 410-11 (1962); Ferrel v. Safway Steel Scaffolds, 57 Cal. 2d 651 (1962).
[7] Privette, 5 Cal. 4th at 691.
[8] *Id.* at 692.
[9] *Id.*

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 696-97.
[14] *Id.* at 693 (citing Van Arsdale v. Hollinger, 68 Cal. 2d 245, 252 (1968)).
[15] *Id.* at 696 (citing Woolen v. Aerojet Gen. Corp., 57 Cal. 2d 407 (1962); Ferrel v. Safway Steel Scaffolds, 57 Cal. 2d 651 (1962); Van Arsdale v. Hollinger, 68 Cal. 2d 245 (1968); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578 (1979); Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502 (1979)).
[16] *Id.* at 696-97 (citing LABOR CODE §3600(a)).
[17] *Id.* at 697.
[18] *Id.* at 691-92, 701.
[19] *Id.* at 699-700.
[20] *Id.* at 698.
[21] Toland v. Sunland Hous. Group, Inc., 8 Cal. 4th 253, 257 (1998). RESTATEMENT (SECOND) OF TORTS §413:

> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employee (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

[22] Toland, 8 Cal. 4th at 257. RESTATEMENT (SECOND) OF TORTS §416:

> 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.

[23] Toland, 8 Cal. 4th at 257.
[24] *Id.*
[25] *Id.* at 265.
[26] *Id.* at 270.
[27] Grahn v. Tosco Corp., 58 Cal. App. 4th 1373 (1997); Zamudio v. City and County of San Francisco, 64 Cal. App. 4th 445 (1999).
[28] "An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons." RESTATEMENT (SECOND) OF TORTS §411.
[29] Camargo v. Tjaarda Dairy, 25 Cal. 4th 1235, 1238 (2001).
[30] *Id.* at 1244-45.
[31] Hooker v. Department of Transp., 27 Cal. 4th 198 (2002).
[32] *Id.* at 202.
[33] *Id.* at 203.
[34] *Id.* at 202.
[35] *Id.* at 203-06.
[36] *Id.* at 206-08.
[37] *Id.* at 207.
[38] Grahn v. Tosco Corp., 58 Cal. App. 4th 1373 (1997).
[39] Kinney v. CSB Constr., Inc., 87 Cal. App. 4th 28 (2001).
[40] Hooker v. Department of Transp., 27 Cal. 4th 198, 208-09 (2002).
[41] *Id.* at 209.
[42] *Id.* at 211-12 (citations and footnote omitted).
[43] *Id.* at 213.
[44] *Id.* at 215.
[45] McKown v. Wal-Mart Stores, Inc., 27 Cal. 4th 219 (2002).
[46] *Id.* at 222.
[47] *Id.* at 222-23.
[48] *Id.* at 223.
[49] *Id.*
[50] *Id.* at 226.
[51] Privette v. Superior Court, 5 Cal. 4th 689, 692-97 (1993); Toland v. Sunland Hous. Group Inc., 18 Cal. 4th 253, 261 (1998); Camargo v. Tjaarda Dairy, 25 Cal. 4th 1235, 1239 (2001).
[52] DuBois v. Workers' Comp. Appeals Bd., 5 Cal. 4th 382, 389 (1993); LAB. CODE §3716.
[53] Privette, 5 Cal. 4th at 697 (citing CAL. CONST. art. XIV, §4).
[54] *Id.* at 696-97 (citing LAB. CODE §3600(a)).
[55] *Id.* at 697.
[56] Toland, 18 Cal. 4th at 261.
[57] *Id.*
[58] *Id.* (citing LAB. CODE §3716.)
[59] *Id.*
[60] *Id.*
[61] Andreini v. Superior Court (Solorio), 60 Cal. App. 4th 1415, 71 Cal. Rptr. 2d 153 (1998), *depublished* (May 13, 1998).
[62] *Id.* at 71 Cal. Rptr. 155.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 156.
[66] *Id.*
[67] *Id.* at 153.
[68] *Id.*
[69] *Id.*
[70] *Id.*