

## What Went Wrong

True Stories  
from the Trenches

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### Jobsite Liability

It seems like another typical day at the office. Then you get a phone call from one of your job sites — somebody has been hurt in your area of the project. You hop in your truck to get to the job as soon as possible, to begin your investigation — this article will discuss the current state of the law regarding liability for job-site accidents, so you can begin to assess your company's potential exposure.

### Peculiar Risk Of Harm

The first inquiry you must make is the status of the injured person (and who he/she is). If the injured individual is a member of the general public, or your work has damaged adjoining property, then the "peculiar risk of harm" doctrine will apply. An owner, the general contractor, or a subcontractor, will be liable if the injuries arose from a portion of the work that posed a "substantial risk of injury" that required special precautions. If the precautions were not taken by the responsible subcontractor, then the owner and the other subcontractors will be liable. A classic example is a pedestrian who gets lost at night and falls into a trench that was not properly barricaded by the subcontractor performing the work.

This doctrine no longer applies to workers who receive compensation benefits due the decision of *Privette v. Superior Court*, 5 Cal. 4th 689 (1993). In *Privette*, a roofing crew failed to pump enough tar to the roof they were working on, so the plaintiff was asked by his foreman to get another five gallons of tar up to the roof. Rather than bring the tar pot back and pump the needed amount up to the crew, plaintiff decided to fill two five gallon buckets with tar and climb up a ladder with both buckets in his hands. Needless to say, plaintiff did not make it to the roof. Plaintiff then sued the owner of the building claiming that the re-roofing of the structure posed a substantial risk of injury unless special precautions were taken. The Superior Court held that since the injured worker received Workers'

Compensation benefits, and the owner was precluded by the Labor Code from suing the employer for indemnity, public policy dictated that the doctrine should not be used to impose liability on an innocent owner. The appellate courts then struggled, trying to find the limits of this new doctrine.

### Retained Control

The Supreme Court then issued two decisions in 2002 that set additional guidelines for job site liability. In *Hooker v. Department of Transportation*, a crane operator was working in very tight space on an overpass project. A CalTrans engineer was assigned to the crane operations to decide when the operator had to bring the outriggers in to allow traffic to pass. One afternoon, the CalTrans inspector instructed the operator to bring the outriggers in, which the operator did. Unfortunately, the operator failed to extend the outriggers again before he began the next pick. During that lift, the crane fell over and tumbled down the hill, killing the operator, because the outriggers had not been extended.

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The family of the operator argued that CalTrans was directing the operations of the crane operator, and therefore was liable for his death, under the legal theory that one who hires an independent contractor — but who *retains control* of any part of the work — is liable for any injuries caused by its failure to exercise its control with reasonable care. The Supreme Court refused to impose liability and held that the “hirer” must do more than *retain control* over worksite safety conditions. The hirer must *retain control* in a manner that affirmatively contributed to the injury of the employee. The inspector’s conduct did not contribute to the death of the operator. The sole cause was the operator’s forgetfulness.

In *McKown v. Wal-Mart Stores*, 27 Cal. 4th 219, a two-man crew arrive at a Wal-Mart store to install ceiling speakers. Wal-Mart instructed the crew to use a fork lift that had a work platform attachment. The crew did as it was told. Unfortunately, the attachment only had one safety hook instead of two. When the crew used the platform, it fell off the raised forks because of the lack of a second safety hook. Wal-Mart argued that it was not liable because it did not retain sufficient control over the work. The Supreme Court disagreed and held that if the hirer negligently furnishes unsafe equipment to the contractor, the hirer affirmatively contributed to the injury of the employee and is negligent.

In 2005, the Supreme Court held that a hirer would be liable for a contractor employee’s injuries, even if it did not retain control over the work, if

- (1) the hirer knew or should have known of a concealed pre-existing hazardous condition,
- (2) the contractor does not know nor could it ascertain the danger, and
- (3) the hirer fails to warn the contractor.

## Regulatory Violations

The analysis of your potential exposure does not end with these cases dealing with retained control. The state legislature enacted a statute that allowed use of Cal-OSHA regulations in a suit by an injured worker. In *Elsner v. Uveges*, the Supreme Court held that the intent of this legislation was to increase civil and criminal sanctions against those who maintained unsafe working conditions.

In the case, *Elsner* was a carpenter who was injured when scaffolding erected by the general contractor failed. The general contractor argued that the scaffolding was built to the applicable custom and practice in the industry. Plaintiff had a safety expert testify at trial that the scaffolding did not comply with Cal-OSHA standards, even though there was no citation issued by Cal-OSHA.

The court agreed with plaintiff, and found that the new statutory scheme did allow the admission of Cal-OSHA regulations. If there was testimony that the standards were breached, then the defendant had to prove that it was not negligent for breaching the standards because circumstances prevented compliance or justified non-compliance. If the defendant could not meet this standard, then liability would be imposed by the court, and the only issue for the jury was the amount of plaintiff’s damages.

The courts continue to look at regulatory violations as the grounds for liability of contractors. An appellate court found that a gasoline bulk plant facility was potentially liable to an employee of an independent contractor for burns sustained during fuel-tank cleaning operations. The California Fire Code required a bulk plant to have fire extinguishers within 75 feet of the storage tank. It appeared that there were no fire extinguishers present within that zone. Plaintiff submitted a doctor’s declaration that his injuries would have been less severe had there been fire extinguishers present. The court held that the bulk facility could be liable if it breached its regulatory duties and affirmatively contributed to plaintiff’s injuries.

## Conclusion

As you conduct your investigation, you must keep in mind the three common theories injured workers use against the defendants, Peculiar Risk, Retained Control and Regulatory Violations. Of the three, the regulatory violations theory is the most dangerous because your defense will be limited to whether you could not have met the standards because of the circumstances of the job. This burden of proof is difficult to meet.

We come back to a point that has been stressed in the past in these articles. Safe work practices must be maintained at all times in order to properly protect your company from a suit by an injured worker. Even if the injured worker is your employee, if he/she sues another company, your company will probably have to assume the defense and indemnity of that defendant under the indemnity provisions of your contract or the additional insured endorsement issued on your policy. The costs associated with such an endeavor could easily run into the six figures. Do your best on job site safety and you may be able to avoid this risk. ♦

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