



The Public Policy Reasons Why A Premises Owner Should Not Be Liable for Injuries to An Employee Of An Independent Contractor



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There can be little doubt that premises owners are increasingly becoming target defendants in current asbestos-exposure cases. Indeed, most of the traditional asbestos defendants, *i.e.* miners and manufacturers of asbestos-containing insulation products, are now bankrupt. Today, most plaintiffs who are suing premises owners were at one time employees of independent contractors, hired by the premises owner, when the alleged asbestos exposure occurred.

The general rule, although rife with exceptions, is that premises owners who hire independent contractors to do work on their property are not liable for injuries sustained by employees of the independent contractor. This article offers several public policy reasons in support of the foregoing general rule and examines the reasons why the rule should not be eviscerated.

The General Rule of Non-Liability for Premises Owners: Employer of Independent Contractor Is Not Liable for Injuries to Employees of the Independent Contractor

The general rule is that the employer of an independent contractor is not liable for the negligence of the contractor or his employees.¹ By deductive reasoning, the premises owner/employer is similarly not obligated to protect employees of an independent contractor from hazards that are incidental to or part of the very work the contractor was hired to perform.² Furthermore, regarding the employer, or premises owner as the case may be, the law traditionally imposes no duty of care to such employees with respect to working conditions arising during the progress of the independent contractor's work.³

At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work.⁴ This general rule of nonliability is rooted in the common law of England. Indeed, the first case recognizing the independent contractor's defense for a landowner dates back to 1826.⁵

The general rule is also documented in the *Restatement (Second) of Torts*.⁶ Section 409 of the *Restatement*, which is found in Chapter 15 "Liability of an Employer of an Independent Contractor," states the following:

Except as stated in §§ 410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

Although many reasons exist to support the foregoing rule, the one most commonly accepted is that, "since the employer has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it."⁷ Indeed, the issue of the right of control over the means, methods and modes of performing the work is central to the general rule of nonliability. One court defined the rationale for the rule as follows:

The reasoning was that the work performed was the enterprise of the contractor, who, as a matter of business convenience, would be better able than the person employ-

ing the contractor to absorb accident losses incurred in the course of the contracted work. This could be done, for instance, by indirectly including the cost of safety precautions and insurance coverage in the contract price.⁸

Public Policy Reasons that Support the General Rule

In today's premises liability case, the following scenario is typical: an industrial manufacturer or utility is sued as a premises owner by an employee who was allegedly exposed to asbestos-containing materials while he worked for an independent contractor on a construction project at the plant. That scenario begs the question: Why should a plaintiff, because he was an employee of an independent contractor and not of the premises owner, be placed in a better position from a recovery standpoint by not being bound by the exclusive remedy of an applicable Workers' Compensation Act? In fact, there is no sound public policy reason why an employee of an independent contractor ought to be allowed to make an "end run" around the exclusive remedy provision of workers' compensation laws and seek broader compensation from the premises owner.

Indeed, there are several strong public policy reasons that militate against such a distinction. Accordingly, a premises owner's liability should be limited to those third parties other than employees of independent contractors. Otherwise, the illogical and unfair result would be that the hiring entity, whose work in progress did not create the risk that caused the injury, is subjected to greater liability than the independent contractor itself.⁹

In *Privette v. Superior Court*,¹⁰ an employee of an independent contractor sued the property owner for injuries he sustained while transporting a bucket of hot tar up a ladder. The California Supreme Court held that none of the exceptions to the general rule provided a basis to seek recovery of tort damages from the person who hired the independent contractor. The court found compelling the fact that the employee's injury was already com-

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pensable under the workers' compensation scheme. The court stated the rationale for its ruling as follows:

When an independent contractor causes injury to the contractor's own employee, the Act's "exclusive remedy" provision shields the contractor from further liability for the injury. Yet, under the expansive view of the peculiar risk doctrine that has been adopted in California and a minority of other jurisdictions, the person who hired the independent contractor can, for the same injury-causing conduct of the contractor, be held liable in a tort action for the injuries to the contractor's employee. Because this expansive view produces the anomalous result that a nonnegligent person's liability for an injury is greater than that of the person whose negligence actually caused the injury, it has been widely criticized ... Indeed, most courts that have considered the issue have refused to extend the peculiar risk doctrine to allow such an employee to recover tort damages from the person who hired the contractor. [citations omitted].

As one court observed, the "principal" who hires an independent contractor should be subject to no greater liability "than its [independ-

ent contractor] agent," whose exposure for injury to an employee is limited to providing workers' compensation insurance ... Other courts have reasoned that the rule of workers' compensation exclusivity, which shields an independent contractor who pays workers' compensation insurance premiums from further liability to its employees for on-the-job injuries, should equally protect the property owner who, in hiring the contractor, is indirectly paying for the cost of such coverage, which the contractor presumably has calculated into the contract price. Therefore, these courts have concluded, the property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when workers' compensation statutes already cover those injuries. [citations omitted].¹¹

Hence, what the California Supreme Court noted is the disparity between allowing an employee of an independent contractor to sidestep the workers' compensation bar based simply on the fortuity that the employee was hired by an independent contractor rather than the premises owner. Clearly, such a result was not contemplated by the drafters of the various Workers' Compensation Acts; nor is such a result within the ambit of fundamental concepts of tort law.

Another court noted similar reasoning in a tentative draft of the *Restatement (Second) of Torts* that also concluded that an employer's liability should not extend to an independent contractor's employees who are injured as a result of the negligently performed contracted work:

Furthermore, some courts cite to a Special Note in the Tentative Draft # 7 of the *Restatement (Second) of Torts* (1962) to support the exclusion of contractor's employees from protection under all the exceptions ... The tentative draft contained similar lan-

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guage to the adopted version of the *Restatement*, and used words such as “others,” “third persons” and “the public” to describe those persons to whom the employer owed a duty. The “Introductory Note” to the chapter of the draft containing the exceptions stated:

The other class of plaintiffs not included in this Chapter consists of the employees of the independent contractor. As the common law developed, the defendant who hired the contractor was under no obligation to the servants of the contractor, and it was the contractor who was responsible for their safety. The one exception which developed was that the servants of the contractor doing work upon the defendant’s land were treated as invitees of the defendant, to whom he owed a duty of reasonable care to see that the premises were safe. This is still true. See § 343. In other respects, however, it is still largely true that the defendant has no responsibility to the contractor’s servants. One reason why such responsibility has not developed has been that the workman’s recovery is now with relatively few exceptions regulated by workmen’s compensation acts, the theory of which is that the insurance out of which the compensation is to be paid is to [be] carried by the workman’s own employer, and of course premiums are to be calculated on that basis. While workmen’s compensation acts not infrequently provide for third party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is to be expected that the cost of the workmen’s compensation insurance will be included by the con-

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tractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.

Again, when the Sections in this Chapter speak of liability to ‘another’ or ‘others,’ or to ‘third persons,’ it is to be understood that the employees of the contractor, as well as those of the defendant himself, are not included. Id. at 17-18 (emphasis added).

The Special Note was never adopted by the American Law Institute and is therefore not authoritative. It is evidence, however, of the intent of the *Restatement* to limit an employer’s liability under the exceptions. The final version of the *Restatement* leaves the meaning of the words “others,” “another,” and “the public” undefined in order for each state to interpret the provisions according to their case law and workers’ compensation statutes.¹²

Obviously, there are numerous other public policy concerns that support the general rule of nonliability besides the anomaly of the workers’ compensation issue. For instance, to allow an independent contractor’s employees who incur work-related injuries, which are compensable under the workers’ compensation system, to also seek damages from the premises owner results in a potential windfall for these employees. In

essence, it allows a certain, distinct class of employees to reap a double recovery for the same injury.

Moreover, to allow recovery by employees of independent contractors penalizes employers who hire experienced independent contractors with trained employees — often members of the building trades unions — to safely perform highly-skilled, and sometimes dangerous work. Ostensibly, members of these unions are expected to be knowledgeable and to have been trained, not merely in the mechanics of their trade, but also the health and safety aspects of performing their work in the construction environment. In fact, by advancing an exception to the general rule of nonliability, an employer is instead encouraged to use its own employees perhaps with less specialized skills, training and experience. As illustrated by one court, to allow an employee of an independent contractor to use an exception to the general rule creates an inconsistent glitch in the law:

The anomaly is apparent now. By permitting employees of independent contractors to invoke the inherently dangerous doctrine, the law takes the distorted position of (1) rewarding landowners who, despite their own lack of expertise, choose to perform work negligently resulting in injury to workers, (2) increasing risks to innocent third parties and (3) punishing landowners who seek expert assistance in an effort to avoid liability for injury!¹³

Likewise, encouraging the hiring of professionals with specialized training actually promotes the safety to the general public, as well as to those performing the work.

Another public policy reason against liability of a premises owner to an employee of an independent contractor based on the peculiar risk doctrine is the lack of equitable indemnity. Typically, if a premises owner is held liable under the peculiar risk doctrine for injuries to innocent by-standers or adjoining landowners, the premises owner usually can obtain equitable indemnity from

the independent contractor. However, when the injured person is an employee of an independent contractor, the applicable workers' compensation scheme shields the independent contractor from an action seeking equitable indemnity.¹⁴ As one court recognized, "affixing liability without indemnification places an onerous burden on someone who is 'fault-free.'"¹⁵

Lastly, allowing employees of independent contractors to circumvent the applicable Workers' Compensation Act completely eviscerates the "compensation bargain" that is the basis of the Act itself. The workers' compensation system is a legislatively created "settlement" of claims between injured workers and their employers wherein both sides have given up certain common-law rights to create the societal goal of the Act. As such, the "employee gives up the right to sue the employer for negligently inflicted injuries, in exchange for sure and certain benefits for all workplace injuries, regardless of fault."¹⁶ The release of a servant for its underlying negligent conduct correspondingly releases a master's vicarious liability based upon the same conduct. By that same rationale, the underlying negligent conduct of the independent contractor would be statutorily released; hence, there can be no vicarious liability of the employer based upon the conduct. Simply put, to allow this special "exemption" for independent contractor employees seriously undermines the Act. Additionally, the aspect of consistency of results among injured workers is disturbed by the extreme variability of results from negligence suits against premises owners.

Conclusion

In summary, the particular facts that arise in any given asbestos personal injury suit will determine which, if any, public policy arguments are available for adherence to the general rule of non-liability of the premises owner. The following represents a list of public policy reasons against allowing an employee of an independent contractor to sue a premises owner/employer of an inde-

pendent contractor under the appropriate circumstances:

1. Workers' Compensation Act provides injured employees with a legislatively determined remedy;
2. Workers' Compensation Act assures compensation, which is the primary purpose underlying vicarious liability in the *Restatement (Second) of Torts*;
3. Employers who hire experienced independent contractors are penalized;
4. Employers are encouraged to use their own, perhaps less skilled, trained, specialized and experienced employees;
5. Many landowners have no expertise and using lesser skilled labor could pose danger to general public, as well as to those employees performing the work;
6. Employees of independent contractors are allowed to recover potential windfall;
7. Exceptions to general rule creates a new "class" of employees with more superior rights and remedies available;
8. Premises owner not responsible for injury cannot obtain equitable indemnity from negligent independent contractor because of workers' compensation shield;
9. The "settlement" theory of workers' compensation is disturbed; and
10. The consistency of results basis of workers' compensation is disturbed.

Endnotes

¹ *Rowley v. Mayor and City Council of Baltimore*, 505 A.2d 494 (Md. 1986).

² See, e.g., *Dow v. Louisiana Land and Exploration Co.*, 77 F.3d 342 (10th Cir. 1996) (applying Wyoming law).

³ 65A C.J.S. *Negligence* § 535 (2000) (citing

Ramirez v. Alabama Power Co., 898 F. Supp. 1537 (M.D. Ala. 1995), aff'd, 86 F.3d 1170 (11th Cir. 1996) and *Mead Coated Board, Inc. v. Dempsey*, 644 So. 2d 872 (Ala. 1994)).

⁴ *Privette v. Superior Court*, 854 P.2d 721, 724 (Cal. 1993) (citing W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 71, at 509 (5th ed. 1984)).

⁵ *Rowley*, 505 A.2d at 496 n.4 (citing *Laugher v. Pointer* (King's Bench 1826) 5 B. & C. 903, 108 Eng.Rep 204).

⁶ *Restatement (Second) of Torts* § 409 (1965).

⁷ *Rowley*, 505 A.2d at 497 (citing W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 71, at 509 (5th ed. 1984)).

⁸ *Privette*, 854 P.2d at 724 (citations omitted).

⁹ See *supra*, *Privette*, 854 P.2d at 729 ("[T]he property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when worker's compensation statutes already cover those injuries.").

¹⁰ 854 P.2d 721 (Cal. 1993).

¹¹ *Privette*, 854 P.2d at 727-728 (citations omitted).

¹² *Rowley v. Mayor and City Council of Baltimore*, 505 A.2d 494, 501-503 (Md. 1986) (citations omitted) (emphasis original).

¹³ *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 388 (Mo. 1991).

¹⁴ See, *Privette*, 854 P.2d at 729-730 (citations omitted); see also, *Grahn v. Tosco Corp.*, 58 Cal.App.4th 1373, 68 Cal.Rptr.2d 806 (Cal. Ct. App. 1997), *disapproved by*, *Camargo v. Tjaarda Dairy*, 35 P.3d 1096, 1102 (Cal. 2001).

¹⁵ *Privette*, 854 P.2d at 730 (citation omitted).

¹⁶ *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 453-454 (N.D. 1994).

