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Fifty shades of employment

Personal injury meets course-and-scope-of-employment and independent contractor issues

By Craig Peters
The Veen Firm, PC

An often overlooked source of responsibility in personal injury and wrongful death cases is the employer/employee relationship. There are two circumstances in particular where establishing an employer/employee relationship can significantly aid in the prospects of recovery in a plaintiff's case. The first occurs in those situations where a defendant employee does not have the ability to pay, but his or her employer does.

A second circumstance occurs when our client's employment has been mischaracterized as either being an independent contractor or the employer has assigned them to employment in a shell company with no assets. Let's look at each of these situations.

Vicarious responsibility

The basic rule in California is that an employer is responsible for the acts of their employee when the employee is acting within the scope of their employment. An employee is acting within the scope of their employment if their acts are reasonably related to the kinds of tasks that the employee was employed to perform, or if their acts are reasonably foreseeable in light of the employer's business or the employee's job responsibilities.[1] This is generally a question of fact for the jury[2] and the burden is on the plaintiff to show that the act was committed by the employee within the scope of his employment.[3]

In California, the scope of employment has been broadly interpreted under the respondeat superior doctrine.[4] The courts have done away with the traditional rule that respondeat superior only applies if the employee's actions are motivated in whole or in part by a desire to serve the employer's interests.[5] In fact, cases have held that conduct which violates an employer's express orders or an employee's official duties may still be within the scope of employment. The courts have also held that even willful or malicious acts may be within the scope of employment.[6]

While the CACI instruction is worded somewhat restrictively, there are plenty of cases that one can use to expand the reach of vicarious liability under the scope of employment theory.[7] The courts have attempted to help clarify circumstances in which an employee has mixed business acts with personal acts by trying to draw a line between minor deviations from the employer's business and substantial departures from the employer's business.[8] As opposed to creating much clarity, the court's attempts to clarify have only created sufficient ambiguity such that lawyers on both sides of this issue will have plenty to argue.

Auto accidents

Perhaps the greatest area of expansion in California law has happened to the long standing "going-and-coming rule."[9] Under this rule, when an employee was driving to work, and home from work, the employer had no vicarious responsibility. This is still the basic rule, however, the exceptions have created greater responsibility for the employers under certain circumstances.

Vehicle use exception

CACI 3725 used to be mistitled the Required Vehicle Exception. This poor titling of the jury instruction would lead one to reasonably believe that an employer must actually require the employee to have a vehicle available for use in order for the exception to apply. As was always true, but was made clear and explicit in the *Moradi* case,[10] the vehicle use exception to the going-and-coming rule applies where the presence of the employee's vehicle at the worksite, or with the employee, provides some direct or incidental benefit to the employer.

The benefit to the employer can be realized under at least two different circumstances. First, the employee has agreed to make the vehicle available as an accommodation to the employer or, second, the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available. In both circumstances, the employer receives a benefit. Whether the benefit is realized or not is immaterial.

Consider the circumstance where someone works as a maintenance engineer and goes to work at the same building every day, but the employer has off-site facilities that it would want the employee to go to if something needed repairing. The employer asks the employee to have their car available to do those off-site fixes. The fact that the employee never does an off-site fix is immaterial. The benefit to the employer is that the vehicle was available, if needed. The reasoning for this rule was succinctly stated in the *Smith* case, a workers' compensation matter from 1968, that is as true today, as it was nearly 50 years ago.[11]

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"An employer must be conclusively presumed to benefit from employee action reasonably directed towards the execution of the employer's orders or requirements. For purposes of vicarious liability, an employer cannot request or accept the benefit of an employee's services and concomitantly contend that he or she is not performing service growing out of and incidental to the employment."

This concept, regularly attributed by defense attorneys to only being applicable in workers' compensation situations, is now unquestionably applicable in plaintiffs' personal injury cases based on the *Moradi* case.[12] The court cites regularly and approvingly to the *Hinman v. Westinghouse* case from 1970.[13] The *Moradi* case made clear to all that when allocating the risks and benefits that are derived from an employee using a vehicle that has a benefit to the employer, the risks are most appropriately allocated to the employer. This issue, just as with general employer vicarious responsibility, is a question of fact to be determined by the jury.

The jury will weigh whether the employee's use of a vehicle was too infrequent to confer a sufficient benefit on the employer so as to make it unreasonable to require the employer to bear the cost of the employee's negligence, or whether there was a benefit to the employer, though not necessarily at the time the person was driving, but as a result of the employee's vehicle availability to aid the employee in doing their job and thereby conferring a benefit on the employer.[14] This particular rule should be crafted into a special instruction at the time of trial regarding the presumed benefit to the employer.

Special Errand Exception

If the vehicle use exception does not apply, another avenue for vicarious responsibility of the employer is to establish whether the employee, while either on the way to work or on the way home, was running an errand for the employer. If one can establish that the employee is running an errand on behalf of the employer, then the employee's conduct is within the scope of his or her employment from the time they start the errand until they return from the errand or until they have completely abandoned the errand for personal reasons.

In general, these two exceptions ("vehicle use" and "special errand") to the going-and-coming rule get confused. The court in *Moradi* helped clarify when the analysis under the vehicle use exception should apply and when, as the defendants in the case were pushing for, an analysis under the special errand exception[15] should apply. Unlike in the vehicle use exception, the special errand exception has specific factors to be considered when determining whether the employee has completely abandoned their business errand. The factors include the intent of the employee; the nature, time and place of the employee's conduct; the work the employee was hired to do; the incidental acts the employer should reasonably have expected the employee to do; the amount of freedom allowed the employee in performing his or her duties; and the amount of time consumed in the personal activity.

The most common circumstances where a special errand exception applies are those instances where somebody travels irregularly for work and would be considered in the course and scope of their employment while traveling to a conference or seminar. Another common occurrence would be the employee who generally goes to an office, works all day, and goes home, in which case the going-and-coming rule would preclude liability for the employer when the employee is driving their vehicle, but under the special errand, the employer becomes responsible for the employee's driving when the employee leaves the office to have lunch and, while out having lunch, agrees to go to the post office to pick up stamps for the office. In that circumstance the special errand would apply and the driving to and the driving from the office while on the special errand would be covered under vicarious responsibility under the scope of employment.[16]

Telephone calls

A third circumstance in which vicarious responsibility applies to the employer for the acts of the employee are those circumstances in which the employee is driving their vehicle and is making a telephone call that's business-related. In this circumstance, we look to see whether, at the time of the accident, the person was on the phone making a business-related call (in which case the employer would be held responsible), or look to see during the total trip, whether the employee was regularly using his or her phone to conduct business, regardless of whether the travel was for a business purpose.[17]

In the circumstance where a single phone call for work-related purposes was made while driving a vehicle, during a day when the employee was not working for the employer, and sometime, minutes later after the call had ended, an accident occurred, the court has found no vicarious liability for the employer.

However, the court in *Miller* made clear that the determination as to whether a phone call that is work-related establishes vicarious liability is a factually determined issue, where we look at both the scope and the breadth of the activity by the employee in the time period relevant to the tortious conduct. A person making numerous work phone calls while driving their vehicle, whether the tortious conduct happens while the person is on the phone or not, may still give rise to vicarious liability based on the principals espoused in *Miller*.[18] Presumably this same principle would apply to work text messages or work emails that are sent while driving.

Client's employment mischaracterized

The other avenue where an employment relationship is helpful is when your own client has been mischaracterized in his employment. Oftentimes this can happen by him being referred to as an

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independent contractor when in fact he actually is an employee, or in a circumstance where an employer utilizes various different shell companies and the client has been mischaracterized as an employee of one of the shell companies that has no assets but does have workers' compensation, as opposed to the proper corporation, which has assets and doesn't have workers' compensation.

In both of these circumstances, the critical element is determining whether the true employer has workers' compensation insurance for your client. If they do not, your client has the advantage under the law in that the employer is presumptively responsible for any injuries that your client has received while working. Because the employer does not have workers' compensation insurance, the employer is not able to allocate employee fault to your client.[19]

The first step in this process is determining the employer for whom you believe your client actually worked. Under California law, once a plaintiff comes forward with evidence that he or she provided services for the employer, the employee has established a *prima facie* case that their relationship was one of employer/employee.[20] The fact that one is performing work and labor for another is *prima facie* evidence of employment, and such person is presumed to be a servant in the absence of evidence to the contrary.[21] Once the employee establishes a *prima facie* case, the burden then shifts to the employer to prove, if it can, that the presumed employee was an independent contractor.[22]

You should be careful when pursuing this avenue to pay close attention to CACI 3704. That instruction places the burden on the plaintiff to prove that the plaintiff was the employee of the defendant but instead of the simple showing of having provided services to the putative employer, CACI 3704 instead puts the entire burden of proving employment on the plaintiff, including presenting evidence of the *Borello* factors. This is contrary to the law as laid out in both the *Narayen* and *Yellow Cab* cases. Nevertheless, you will want to have evidence that helps support your client's position as it relates to the employment issues laid out in *Borello*. It is typically useful to emphasize two points when attempting to establish employment. In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, the court said "The most significant consideration is the putative employer's right to control work details."

The Supreme Court of the State of California has emphasized that the pertinent question is "not how much control a hirer exercises, but how much control the hirer retains the right to exercise."[23] In determining how much control the hirer retains, the critical question is whether the employer has the right to discharge at will without cause.[24,25] The court has characterized the right to discharge at will without cause as strong or perhaps the strongest evidence of the right to control in support of an employment relationship. To the extent that you can get a specific jury instruction that cites to *Borello* and *Ayala* and emphasizes this particular point when helpful in your cases, the greater chance of success you will have at trial.

In many cases, you may find that there is a contract attempting to explicitly characterize your client as (1) either an employee of somebody else's company, or (2) specifically designating them as an independent contractor and not an employee. The court has been quite clear on such labels. The label placed by the parties on their relationship is not dispositive and "subterfuges are not countenanced."[26] It is useful to have this specific special jury instruction as well to disarm the potential effect of the parties' written agreement and characterization of their relationship. The key to success in this endeavor is how you frame the relationship between your client and the employer, or in cases where the tortfeasor is a defendant and has been mischaracterized as an independent contractor, properly framing the relationship between the defendant tortfeasor and his or her putative employer.

The new "gig economy"

A classic example of the circumstance in which you would want to characterize the defendant tortfeasor as an employee as opposed to an independent contractor is in the new "gig economy." Take the example of a start-up company that hires drivers to transport passengers, but claims the company is merely a technology application that connects drivers and passengers. The start-up will argue that the drivers are all independent contractors. But, in fact, they should be found to be employees based on a close analysis of the law and the facts. Despite a contract written by the start-up that says the drivers are independent contractors, the start-up holds the power to terminate the relationship at any time. Further, the start-up retains the right (the power) to control the way in which the drivers perform the details of their work, including what radio stations should be listened to, how to greet a potential passenger, the route to be driven, the type of car to be used, etc.

Conclusion

Taking the time to evaluate your case to determine whether there are employer-employee relationships that could benefit your client is a process that can reap great rewards. Whether it's a vehicle-related accident case in which an exception to the going-and-coming rule is available, using the defendants' employee status to hold the employer liable, or using your client's true status as an employee of a company, when on first glance it appears he was an independent contractor or an employee of a different company, are all potential avenues for ensuring fair recovery for your clients.

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Peters

Craig M. Peters is a trial attorney and the team leader of the Peters Trial Team at The Veen Firm. *His team litigates complex cases involving wrongful death as well as those with catastrophic life- or career-changing injuries.*

Endnotes

[1] CACI 3720; *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298; *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499, 509.
[2] *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 221; CACI 3722; *Flores v. Auto Zone West, Inc.* (2008) 161 Cal.App.4th 373, 381.
[3] *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721.
[4] *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004.
[5] *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 297.
[6] *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209. [*CMP – please check Lisa M./Mary M., reference was unclear –cd*]
[7] *Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 94; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1003-1004.
[8] CACI 3723;
[9] *Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435.
[10] *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886.
[11] *Smith v. Workers' Comp Appeals Board* (1968) 69 Cal.2d 814.
[12] *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 895.
[13] *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956.
[14] *Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447.
[15] *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907-908.
[16] *Felix v. Asai* (1987) 192 Cal.App.3d 926, 931-932; *Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 436.
[17] *Miller v. American Greeting Corp.* (2008) 161 Cal.App.4th 1055.
[18] *Miller v. American Greeting Corp.* (2008) 161 Cal.App.4th 1055, 1063.
[19] California Labor Code § 3708
[20] *Narayan v. EGL, Inc.* (9th Cir. 2010) 615 F.3d 895, 900.
[21] *Narayan v. EGL, Inc.* (9th Cir. 2010) 615 F.3d 895, 901.
[22] *Narayan v. EGL, Inc.* (9th Cir. 2010) 615 F.3d 895, 901; *Yellow Cab Coop, Inc. v. Workers' Comp Appeals Board* (1991) 226 Cal.App.3d 1288, 1294.
[23] *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 533.
[24] *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350.
[25] *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531.
[26] *Alexander v. Fed Ex Ground Package System, Inc.* (9th Cir. 2014) 765 F.2d 981, 989 (quoting *Borello*, 48 Cal.3d at 349).

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