Finding employer liability to unearth maximum case value

When the defendant driver's policy is inadequate, a critical analysis of employment status is necessary

By Laura F. Sedrish and Randi Thompson

Unfortunately, we often have cases where there is a death or such a serious injury that it tugs at your heartstrings, only to find out that there is a minimal or no insurance coverage to pay your client. Many drivers are illegally uninsured, and the minimum insurance limits in California of $15,000 is grossly insufficient for even modest personal-injury claims.

There may, however, be additional coverage that may not seem obvious at first, which may be available for your client's claim. If you can prove that the defendant was in the "course and scope of employment" at the time of the incident, his or her employer can be held vicariously liable under the doctrine of "respondeat superior."

Respondeat superior is a form of strict liability; the employee's conduct is imputed to the employer, making the employer per se responsible for its employee's conduct, notwithstanding the employer's exercise of due care in its hiring, training, or supervision of the negligent employee.

The key is finding "course and scope" in your case. Every case with damages potentially in excess of the wrongdoer's primary policy limits should be carefully vetted under this course-and-scope analysis. Triggering an employer's coverage takes investigation, due diligence, and finesse. In addition, we all must pay close attention to, and thoroughly understand, CACI Instructions Series 3700 (Vicarious Liability) in their entirety, as well as the relevant case law.

This article provides a framework of essential questions to ask to help you better and more readily identify potential employer "deep pockets," and the legal tricks to help impute liability on the employer.'

What was the defendant's employment status at the time of the incident?

For an employer to be held accountable for the defendant's acts, the plaintiff must prove that the defendant was an employee, agent, or ostensible employee of the employer at the time of the incident, and *not* an "independent contractor." (*Asplund v. Selected Investments in Fin'l Equities, Inc.* (2000) 86 Cal.App.4th 26, 45-49.) Subject to a few public-policy exceptions, hirers cannot be held vicariously liable for the wrongdoing of their independent contractors. (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1107; *Privette v. Superior Court* (1993) 5 Cal.4th 689.)

However, just because the defendant may consider himself/herself, or prefer to be called, an "independent contractor" (and even answers "No" in response to Form Interrogatory 2.11), or conversely, the company deems the defendant an independent contractor, these self-serving declarations are not conclusive under the law. Rather, the *factual nature* of the relationship must be examined with the key inquiry being whether the hirer had the right to control the *detailed manner and means* by which the work was to be performed, rather than just the right to specify the result.

An employer must have "the right to exercise complete or authoritative control . . . rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179.) One strong indication of the right to control is that the hirer can discharge the worker without cause. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531.)

Secondary to the hirer's right to control the work, the California Supreme Court endorsed the following additional factors, which are explicitly set forth in CACI 3704, as being indicative of an employment relationship:

- The hirer supplied the equipment, tools and place of work;
- The defendant paid by the hour rather than by the job;
- The hirer was in business, and the work being done by the worker was part of the regular business of the company;
- The worker was not engaged in a distinct occupation or business;
- The kind of work performed by the worker is usually done under the direction of a supervisor rather than by a specialist working without supervision;
- The kind of work performed by the worker does not require a specialized or professional skill;
- The services performed by the worker were to be performed over a long period of time;
- The parties believed that they had an employer-employee relationship.

These individual "*Borello* factors" are not to be applied mechanically as separate tests but are intertwined and depend on their particular combinations.

(*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351.)

Likewise, if the driver is considered an "agent" or "ostensible" agent, a company may also be vicariously liable for the tortious act by the driver within the course and scope of the agency. (See CACI 3701, 3705, and 3709.) The factors to be considered are the same as when determining whether an independent contractor is an employee, i.e., various factors are considered, but the right of control is pivotal. No formal agreement is necessary to create an agency relationship; agency may result from the manifestation of consent by one person to another that the other will act on his behalf and subject to his control, and consent by the other to act. (*Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855.)

Exceptions to the employer-employee versus independent contractor analysis

An employment relationship can also be created via the special employment ("borrowed employee") rule, where an employee is "loaned" from one employer to another to perform services for the latter. (See CACI 3706 and 3707.) During the time of this special "transferred" employment, only the "borrowing" or "special" employer is exposed to respondeat superior liability … *unless* at the time of the incident, the borrowed employee was performing work for the *benefit of both* employers. (*State of Calif. ex rel. Department of Calif. Highway Patrol v. Sup. Ct.* (*Alvarado*) (2015) 60 Cal.App.4th 1002, 1008.) Again, the employer-employee relationship must be established with respect to the borrowed employee and the special employer, with the paramount consideration being whether the alleged special employer had the right to control and direct the detailed activities of the alleged borrowed employee, and the *Borello* factors set forth above.

Peculiar risk

Additionally, there are public-policy exceptions to the general principle that an employer is not liable for an independent contractor's acts. In auto cases, the exception to look out for is the "peculiar risk" doctrine. (CACI 3708.) Even if drivers are independent contractors, if they were engaged in a dangerous activity presenting a "peculiar risk" of injury to others, vicarious liability may be imposed. (See *A. Teichert & Son, Inc. v. Sup. Ct.* (1986) 179 Cal.App.3d 657, 661-662 [vicarious liability imposed on employer when an independent contractor was transporting a heavy and dangerous load, which required special precautions to anchor the load to the truck and thus presented a "peculiar risk" of injury to others, but not for failing to inspect the brakes or driving in excess of the speed limit]; and *American States Ins. Co. v. Progressive Cas. Ins. Co.* (2009) 180 Cal.App.4th 18, 30-31 [hauling dirt at a construction site whose entrance required the truck to make a U-turn while driving westbound in eastbound lanes, encroach on two pedestrian crosswalks, jumping a curb and driving across a sidewalk, all without flagmen, presented a "peculiar risk" of injury to pedestrians, imposing liability on the employer, despite the independent contractor status of the driver].)

What about Uber/Lyft drivers after the passage of Prop 22?

Proposition 22 (Section 1. Chapter 10.5 (commencing with Section 7448) of Division 3 of the Business and Professions Code), known more formally as the "App-Based Drivers as Contractors and Labor Policies Initiative" ("Prop 22"), was designed to allow companies operating in the rideshare gig economy to avoid the "ABC test" in California. The ABC test, also known as Assembly Bill 5 (AB-5), took effect on January 1, 2020, and codified the presumption that a worker who performs services for a hirer is an employee for *purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission* (IWC), unless the employer can prove that all three of the following conditions are satisfied: (1) the worker is free from the control and direction of the hiring entity in connection with the performance of the work; (2) the worker performs work that is outside the usual course of the hiring entity's business; and (3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

With the passage of Prop 22 in November 2020, both ride-hail (i.e., Uber, Lyft) and delivery drivers became exempt from the ABC test requirements (which resulted in them being classified as employees) and are now specifically classified as independent contractors (see Article 2 of Prop 22).

Transportation network companies will argue that this "independent contractor" classification conclusively establishes that they may not be held vicariously liable for their driver's negligence. However, the ABC test (which Prop 22 overturned) was explicitly limited to classification for purposes of wages and benefits, and the case law is undeveloped. We should argue that Prop 22 classification is similarly limited to wage classification and is not controlling in third-party personal injury cases.

Agency is also another way to impose liability on the TNC, which only requires that the TNC give the driver the authority to act on its behalf, which would continue to hold the TNC vicariously liable for the driver's negligence. (CACI 3705.) In addition, note that Prop 22 continues to require TNCs to maintain automobile liability insurance of at least $1,000,000 per occurrence for third-party claims caused by the negligence of their drivers, notwithstanding the new classification. In addition, there may be excess or umbrella coverages, and the policy language must be carefully reviewed to determine the applicability of any additional coverage (push them on the 4.1 response and the production of the policies themselves).

Moreover, there is also the argument of *direct negligence* against the TNC for the

breach of its duties for its failure to comply with the statutory safety standards and policies and procedures set forth in the law, including failing to conduct requisite background checks, provide or require the requisite safety training to its drivers, and failing to comply with the anti-discrimination and other public safety standards as required by Article 5 of Prop 22.

Was the defendant driver in the course and scope of employment?

Assuming the driver is an employer, agent, or fulfills the requirements of the "peculiar risk" doctrine, one must then analyze the particular conduct to determine whether the defendant driver was in the course and scope of employment at the time of the incident. This includes making a factual investigation to determine whether:
(1) The act was either *required* by the employer or "*incidental*" (i.e., reasonably related to the employee's duties, or engendered by or arising from "or be an "outgrowth" of the employee's work) ("nexus" test"); or
(2) The employee's misconduct was *reasonably foreseeable* by the employer (even if not "required" or "incidental.

If the employee's conduct meets *either* test, the employer is vicariously liable even in situations where the employee acted maliciously and/or intentionally and the employer did not authorize the conduct. (*Crouch v. Trinity Christian Ctr. of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1015.)

Specific questions for not-so-obvious situations

- **Was the driver engaging in a social activity or function endorsed or "of benefit to" the employer?** Although after-hours social activities and recreational pursuits are ordinarily deemed deviations from employment, if a social or recreational activity on the employer's premises is: (a) carried out with the employer's stated or implied permission, and (b) provides a benefit to the employer *or* has become customary, an employee engaged in such activities (even if after hours) is still acting within the course and scope of employment. (See CACI 3724 and 3726; *Rodgers v. Kemper Const. Co.* (1975) 50 Cal.App.3d 608, 619-621; *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 816.) In addition, attendance at social functions may fall within the "special errand" rule if the function is connected with the employment and intended to benefit the employer who requested or expected the employee to attend. (*Boynton v. McKales* (1956) 139 Cal.App.2d 777, 789.)
- **Did the driver make a "minor deviation" vs. "substantial departure" of the employment?** Minor deviations for personal reasons, during the employee's normal employment activities, do not take the employee outside the scope of employment (compared to when an employee substantially departs from normal work duties for purely private reasons). (See CACI 3723; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004-1005, 47 CR2d 478, 487.) On the other hand, a deviation that is "so material or substantial as to amount to an entire departure from the employee's duties" will. (*Halliburton Energy Services, Inc. v. Department of Transp.* (2013) 220 Cal.App.4th 87, 95.)
- **Was the driver conducting a "side" business at the time?** An employer may even be liable for a tort committed by an employee conducting a "side" business "where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of the injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004.)
- **What time of day did the incident occur (e.g., rush hour)? Is there a possibility that the driver was "going and coming" from work?** Under the "going and coming" rule, employers are generally not liable for the negligence of their employees when they are either commuting to the workplace or commuting home from their jobs. (*Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301.) However, there are several exceptions to this rule, including:
  - **Required vehicle exception:** *Did the employer provide or require the employee to have a vehicle as an express or implied condition of employment?* If so, the employee is in the scope of employment while commuting to and from work. This exception applies even if the employee's actual use of the vehicle for work-related purposes is infrequent and is independent from the "special errand" exception discussed below. (CACI 3725; *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 895, 907-908.) In addition, minor deviations from the employee's commute for personal reasons do not take the employee outside the scope of employment under the "required vehicle" exception. However, an employee who substantially departs from his or her commute for purely private reasons is not acting within the scope of employment (hence, no vicarious liability). (*Id.* at 901-907.)
  - **Incidental benefit exception:** *Did the employee's trip confer an "incidental benefit" upon the employer?* The California Supreme Court held that the employer's payment of the employee's commuting expenses to a remote and temporary worksite, coupled with payment for commuting time, conferred an incidental benefit upon the employer by enlarging the employer's labor market. This

justified rendering the employer vicariously liable for injury caused by the employee while performing that commute. (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 962-963.)

Subsequent cases, however, have construed this exception narrowly. (See *Newland v. County of Los Angeles* (2018) 24 Cal.App.5th 676, 693-696, [employee used his vehicle for work-related purposes from time to time, no "incidental benefit" liability as matter of law where no evidence that employer derived any direct or incidental benefit from employee's driving to and from work on day of accident]; *Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1107-1111 [employer who did not pay commuting expenses or time not liable where Afghan-American hired to work 3-1/2 days as role player in military exercises caused fatal vehicle accident while returning home approximately 500 miles away]; *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1, 11-12 [payment of transportation allowance does not itself produce significant employer benefit justifying vicarious liability].)

- **Special errand exception:** *Was the defendant "coming or going" on a special (business) errand incident to his or her regular duties or at the employer's specific order or request?* In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand. (CACI 3726.) The "special errand" rule covers any activity that indirectly or incidentally benefits the employer: e.g., picking up or returning tools used on the job; or a trip during which the employee responds to a service call for the employer's business; or a trip to attend an out-of-town business conference. (*Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th at 435-439; See also, *Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th 961, 969 [holding that when an employee is paid only for hours worked at a jobsite but is required to drive to the company's yard to pick up a company vehicle and materials to travel to the jobsite, the drive from the employee's home to the yard was arguably a business errand for the employer's benefit; the analysis turns on whether the employee's "workplace" is the yard or the jobsite].)

  Note that even if the activity qualifies as a "special errand," the employee will be deemed outside the scope of employment if, at the time of the accident, he or she had *completed* or *totally abandoned* the employer's business for personal reasons. Employees simultaneously pursuing both a business errand and a personal objective are within the scope of employment. (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931-934.)
- **Work-related cell phone calls:** *Were there any work-related phone calls during the trip?* If the employee is on a work-related call at the moment of the accident, course and scope is established. If the call occurs at another time during the commute, there is a "gray area" with vicarious liability falling along a continuum, depending on the time devoted to work calls during the commute, and whether it can be fairly regarded as "personal." (See *Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1063 [a call less than one minute approximately eight minutes before the accident did not trigger an exception to the going and coming rule].)"
- **Work-related risk exception:** *Did the injury inflicted during the employee's commute arise from a work-related risk endangering others?* If the risk is created within the scope of the employee's employment, vicarious liability follows the employee until the work-spawned risk dissipates. (*Bussard v. Minimed, Inc.* (2003) 105 Cal.App.4th 798, 804-806 [auto collision caused by ill employee who left work early after exposure to pesticide fumes].)
- **Employer pays for commute time:** *Was the employee being compensated for his or her commuting time?* If so, then the employee's conduct is within the course and scope of employment as long as the employee is actually going to the workplace or returning home. (CACI 3727.)

WARNING: Was the defendant driver "on-call"?

The fact an employee might be "on-call" at all times for an employer does *not* create a continuous "scope of employment." Rather, in determining "scope of employment," the focus is on the *specific activity* performed by the employee *at the time of the tortious act* – not on the overall nature of the employment relationship. (*Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1, 12.)

Practice note: Workers' compensation law is not controlling on course-and-scope issues in third-party auto cases. The phrase "arising out of and in the course of employment" in workers' compensation law is considerably broader than the concept of "scope of employment" in tort law. Workers' compensation cases take a particularly liberal approach, with the result that practically *any* work-related activity (so long as reasonably foreseeable)

is found to be "arising out of and in the course of employment." Although workers' compensation cases can be helpful in determining the status of the employment relationship (i.e., *Borello*), they are *not* controlling precedent on whether an employee is found to be in the course and scope of employment.

Negligent hiring, training, supervision or entrustment

Was the employer directly negligent in the hiring, training, and/or supervision of the defendant driver or in entrusting the vehicle?

Remember, even if the employer denies the employment relationship and/or vicarious liability, there may be cases where the employer can be sued on *other* theories as well – e.g., *direct* liability for negligent entrustment, negligent supervision or perhaps negligent hiring – where the fault is the employer's *own* failure to act with due care. (See CACI 426.) Consider:

- Was the employer directly negligent in entrusting a dangerous instrumentality to someone unfit to operate it? (E.g., motor vehicle, heavy machinery, tools.) (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 573-573.)
- Was the employer directly negligent for the hiring and retaining of staff? Negligent hiring occurs where an employer knows or should know that an employee is unfit or creates a risk of a particular harm, and that harm materializes. (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.)
- Was the employer negligent in the training and supervision of the defendant? Look to the policies and procedures (or lack thereof).

Although *Diaz v. Carcamo* (2011) 51 Cal.App.4th 1148, 1157-1158, holds that direct employer negligence drops from the case if the employer admits vicarious liability, if there is an *independent* basis for holding the employer directly liable it will usually be to plaintiff's advantage to plead *both* the vicarious *and* independent liability theories.

Was the defendant driver a permissive user of the vehicle?

Even if there is no vicarious or direct liability of an employer, if the employer is the owner of the vehicle and grants permissive use of the vehicle to the defendant driver, the employer's insurance coverage likely applies. Always research all available policies, not just the driver's policy.

Practice note: If the employer is arguing the defendant driver was not in the course and scope of employment at the time of the incident but was driving a vehicle owned by the employer, it may be beneficial to stipulate that you will strike your vicarious liability allegations in exchange for a stipulation that the employer's commercial insurance applies (especially if liability is admitted) in order to streamline the issues and avoid a motion for summary judgment/adjudication.

Conclusion

There are myriad ways for a plaintiff to find additional available coverage for a traffic collision. It is your duty to make a sufficient inquiry as to whether an employment or agency relationship can be established, and whether an argument can be made that the driver was in the course and scope of employment at the time of the incident.

If there is no such relationship, there may be an argument for direct negligence of the employer, for e.g., negligent hiring, training, and supervision. The CACI Instructions and "Sources and Authority" are highly instructive. When you are presented with a possible course-and-scope case, the best practice is to review the CACI Instructions and notes and prepare an outline of all of the areas of inquiry that may be applicable to your case. These inquiries are very fact-intensive; therefore, thorough knowledge of the current state of the law and pointed, intentional, and well-drafted discovery are critical.


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