COMMENTS

The Peculiar Risk Doctrine: A Criticism of Its Application in California

INTRODUCTION

In California injured construction workers have a unique opportunity[1] to circumvent the usually limited[2] and inadequate[3] worker's compensation[4] awards by recovering against third party employers[5] under

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[1] Eight jurisdictions (California, District of Columbia, Iowa, Michigan, Missouri, North Dakota, South Dakota, and Tennessee) allow injured subcontractors' employees to recover against third party employers under the peculiar risk doctrine. *See, e.g.*, Lindler v. District of Columbia, 502 F.2d 495 (D.C. Cir. 1974); Hagberg v. City of Sioux Falls, 281 F. Supp. 460 (D.S.D. 1968); Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979); Giarrantano v. Weitz Co., 259 Iowa 1292, 147 N.W.2d 824 (1967); Thon v. Saginaw Paint & Mfg. Co., 120 Mich. App. 745, 327 N.W.2d 551 (1982); Mallory v. Louisiana Pure Ice & Supply Co., 320 Mo. 95, 6 S.W.2d 617 (1928); Peterson v. City of Golden Valley, 308 N.W.2d 550 (N.D. 1981); International Harvester Co. v. Sartain, 32 Tenn. App. 425, 222 S.W.2d 854 (1948).

[2] *See* W. KEETON, D. DOBBS, R. PROSSER & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, § 80, at 574 (5th ed. 1984) [hereafter PROSSER & KEETON]. The authors state:

> It is recognized that this remedy is in the nature of a compromise, by which the worker is to accept a limited compensation, usually less than the estimate which a jury might place upon his damages, in return for an extended liability of the employer, and an assurance that he will be paid.

Id.

[3] For a discussion of the inadequacy of worker's compensation benefits, see Berkowitz, *Workmen's Compensation Income Benefits: Their Adequacy & Equity*, in 1 SUPPLEMENTAL STUD. FOR THE NAT. COMMISSION ON ST. WORKMEN'S COMPENSATION LAWS 189 (1973).

[4] *See* CAL. LAB. CODE § 3600(a) (West Supp. 1988) (stating that worker's compensation is exclusive remedy that injured employees have against employers for injuries arising out of and in course of employment).

[5] *See* Currie, Stephenson & Beck, *The Contractor Contemplating Litigation and*

the "peculiar risk" doctrine.[6] This doctrine imposes liability on third party employers for torts of the subcontractors working under them. Peculiar risk situations arise most frequently in the construction industry because the work site in a construction project commonly poses danger to workers.[7] These dangers arise from construction work in hazardous areas such as in trenches, on scaffolds, or around heavy equipment.[8]

Peculiar risk situations also commonly arise in the construction industry because of the nature of relationships needed to complete a construction project.[9] A landowner or developer hires a general contractor to coordinate a project.[10] The general contractor then hires subcontrac-

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Its Alternatives: An Overview, in CONSTRUCTION LITIGATION: REPRESENTING THE CONTRACTOR (R. Cushman, J. Carter & A. Silverman eds. 1985) [hereafter CUSHMAN & SILVERMAN]. In the construction industry, a landowner ordinarily hires a general contractor. *Id.* The general contractor hires subcontractors. *Id.* Thus, with respect to the subcontractors' employees, a landowner or a general contractor is a "third party employer." *Id.* at 5.

Under California law, an injured worker's compensation claim does not affect her right of action against any third parties. *See* CAL. LAB. CODE § 3852 (West Supp. 1988). Section 3852 states: "The claim of an employee . . . for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer." *Id.*

[6] The peculiar risk doctrine is an exception to the general rule that third party employers are not liable for the torts of independent contractors. *See, e.g.*, Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 510, 595 P.2d 619, 623, 156 Cal. Rptr. 41, 45 (1979). The *Aceves* court held that "evidence that the demolition company failed to take special precautions to avoid the special risk involved was sufficient to support verdict against the building owner under the peculiar risk doctrine." *Id.*

[7] California Supreme Court and appellate court decisions resolving peculiar risk doctrine issues involve injured workers at construction sites, excavations, and other work sites with potential dangers of physical harm to workers. For a general overview of California "peculiar risk" decisions, see Costan, *Peculiar Risk in Construction Contracts*, 10 L.A. LAW. No. 10, at 11 (1988); Faust, *Restating the Peculiar Risk Rule*, 14 W. ST. U.L. REV. 479 (1987). *See generally* Philo, *Revoke the Legal License to Kill Construction Workers*, 19 DE PAUL L. REV. 1 (1969) (commenting on rising incidence of construction-related injuries to workers).

[8] *See infra* notes 110-13 and accompanying text.

[9] *See* CUSHMAN & SILVERMAN, *supra* note 5, at 5. The authors state: "[Owners] employ a single general contractor, who in turn employs and coordinates various subcontractors . . . ." *Id. See generally* A. SOKOL, CONTRACTOR OR MANIPULATOR (1968) (describing general contractor as one who subcontracts separate material and labor needs).

[10] CUSHMAN & SILVERMAN, *supra* note 5, at 5.

tors[11] to complete specific portions of the project.[12] The subcontractors finally hire construction workers to physically complete their respective portions of the construction.[13] The combination of hazardous working conditions,[14] working relationships involving third party employers, and an inadequate worker's compensation system, lays the foundation for California courts to apply the peculiar risk doctrine.

In California the peculiar risk doctrine does *not* require an abnormally great risk of physical harm to workers.[15] Instead, a peculiar risk of harm exists when a "special, recognizable"[16] danger inherently exists in the work itself.[17] California courts' definition of a peculiar risk of

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[11] Many courts refer to third party employers' contractors as "independent contractors," while some other courts refer to them as "subcontractors." *Compare* Jimenez v. Pacific W. Constr. Co., 185 Cal. App. 3d 102, 229 Cal. Rptr. 575 (1986) *and* Caudel v. East Bay Mun. Util. Dist., 165 Cal. App. 3d 1, 211 Cal. Rptr. 222 (1985) *with* Shephard & Morgan v. Lee & Daniel, Inc., 31 Cal. 3d 256, 643 P.2d 968, 182 Cal. Rptr. 351 (1982) *and* Elder v. Pacific Tel. & Tel. Co., 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977). Since a general contractor's employees are usually other contractors, it seems logically consistent to call these contractors "subcontractors," instead of "independent contractors." Thus, although some cited court language may refer to third party employer's contractors as "independent contractors," this Comment will refer to them as "subcontractors."

[12] *See* CUSHMAN & SILVERMAN, *supra* note 5, at 5.

[13] *See* Comment, *The Peculiar Risk Doctrine: High Rise Benefits For California Construction Workers*, 19 LOY. L.A.L. REV. 1495, 1496 (1986). The author states: "A construction worker is often employed by a subcontractor of the general contractor, who in turn works under a contract with the landowner who is developing the construction project." *Id.*

[14] *See infra* notes 110-13 and accompanying text.

[15] *See* CALIFORNIA JURY INSTRUCTIONS § 13.21.4 (C. Loring ed. 1986). Section 13.21.4 states:

> The term "peculiar risk" of bodily harm is a risk:
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> 1. Which is peculiar to the work done,
> 2. Which arises out of the character of the work or place where the work is to be done, and
> 3. Against which a reasonable person with the knowledge and experience of the defendant would recognize the necessity of taking special precautions.
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> The term "peculiar risk" does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an *abnormally great risk*. It has reference only to a special, recognizable danger arising out of the work to be done.

Id. (emphasis added).

[16] *Id.*

[17] *See, e.g.*, Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 408, 403 P.2d 330, 339 (1965). The *Welker* court emphasized that "the law will not allow one who has a piece of work to be done that is necessarily or inherently dangerous to escape liability

harm parallels the majority of states'[18] definition.[19] However, California courts deviate from the majority view by extending the peculiar risk doctrine to allow injured subcontractors' employees to recover against third party employers.[20]

The peculiar risk doctrine initially protected only neighboring lands and bystanders outside a landowner's premises when a landowner hired a contractor to perform work on the landowner's premises.[21] Early

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to persons or property negligently injured in its performance by another to whom he has contracted such work." *Id.* (quoting S.A. Gerrard Co. v. Fricker, 42 Ariz. 503, 506-07, 27 P.2d 678, 680 (1933)).

[18] The majority of jurisdictions considering the application of the doctrine have held that employees of subcontractors cannot recover from third party employers. *See, e.g.*, Corban v. Shelby Oil Co., 256 F.2d 775 (5th Cir. 1958) (Arkansas); Hurst v. Gulf Oil Corp., 251 F.2d 836 (5th Cir. 1958) (Texas); Cordova v. Parrett, 146 Ariz. 79, 703 P.2d 1228 (1985); Florida Power & Light Co. v. Price, 170 So. 2d 293 (Fla. 1964); Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952); Peone v. Regulus Stud Mills, Inc., 113 Idaho 374, 744 P.2d 102 (1987); Johns v. N.Y. Blower Co., 442 N.E.2d 382 (Ind. Ct. App. 1982); King v. Shelby Rural Elec. Coop, 502 S.W.2d 659, *cert. denied*, 417 U.S. 932 (1973); Vertentes v. Barletta Co., 392 Mass. 165, 466 N.E.2d 500 (1984); Conover v. Northern States Power Co., 313 N.W.2d 397 (Minn. 1981); Sierra Pac. Power Co. v. Rinehart, 99 Nev. 557, 665 P.2d 270 (1983); Gibilterra v. Rosemanor Homes, Inc., 19 N.J. 166, 115 A.2d 553 (1955); New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976); Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 189 A.2d 271 (1963); Tauscher v. Puget Sound Power & Light Co., 96 Wash. 2d 274, 635 P.2d 426 (1981); Potter v. City of Kenosha, 268 Wis. 361, 68 N.W.2d 4 (1955); Jones v. Chevron U.S.A., Inc., 718 P.2d 890 (Wyo. 1986).

[19] *See* RESTATEMENT (SECOND) OF TORTS § 416 (1965). The majority of jurisdictions have adopted the *Second Restatement* § 416's definition of third party employers' liability under the peculiar risk doctrine. *See supra* note 18. Section 416 states:

> One who employs an independent contractor to do work which the employer would 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.

Id.

[20] *See* Comment, *supra* note 13, at 1498. The author states: "[S]ince 1962, California has taken the minority position that employees *are* covered by the peculiar risk doctrine." *Id.* (emphasis in original).

[21] *See, e.g.*, Chicago v. Robbins, 67 U.S. 418, 426-27 (1862) (holding landowner liable to injured pedestrian for failure to require subcontractor to provide lights and guards for work conducted on public sidewalk); Bower v. Peate, 1 Q.B.D. 321, 326 (1876) (stating that landowner cannot relieve herself of responsibility by employing someone else to perform work on her land).

American and English courts imposed a nondelegable duty[22] on the landowner, unless special precautions were taken, when work foreseeably created an unreasonable risk of harm to neighboring property or bystanders.[23] Thus, a cautious landowner, as third party employer, could not avoid liability to others simply by entering into an agreement with a contractor requiring the contractor to take special precautions.[24]

After courts held landowners liable under the peculiar risk doctrine, the drafters of both editions of the *Restatement of Torts* followed suit, incorporating the courts' application of this doctrine in their chapter on independent contractor liability.[25] Consistent with earlier cases that narrowly applied the peculiar risk nondelegable duty,[26] the *Restatement* drafters explicitly stated that courts should not allow injured independent contractors' employees to recover against third party employers under the peculiar risk doctrine.[27]

Most jurisdictions have accepted the *Second Restatement*'s reasoning.[28] These jurisdictions support their position with the following arguments. First, an employer in the construction industry usually has no control over the manner of a subcontractor's work.[29] Thus, courts

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[22] *See supra* note 21; *see also* RESTATEMENT (SECOND) OF TORTS § 409 comment b (1965). A "nondelegable duty" within the context of the peculiar risk doctrine applies to third party employers. *Id.* A third party employer's nondelegable duty is a class of exceptions to the general common-law rule that an employer is not liable for the torts of her subcontractors. *Id.*

[23] *See supra* note 21.

[24] *See Bower*, 1 Q.B.D. at 326. *Bower* states:

> [A] man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself from responsibility by employing some one [sic] else.

Id.

[25] *See* RESTATEMENT (SECOND) OF TORTS §§ 413, 416 (1965). The peculiar risk of harm exceptions to employer nonliability are in these sections. The sections are in Chapter 15, "Liability of an Employer of an Independent Contractor."

[26] *See supra* notes 21 & 24 and accompanying text.

[27] *See* RESTATEMENT (SECOND) OF TORTS ch. 15 special notes, at 17-18 (Tent. Draft No. 7, 1962). The *Restatement* drafters acknowledged that worker's compensation provides for third party liability, but they stated that "it has not been regarded as necessary to impose such liability upon one who hires the contractor." *Id.*

[28] *See supra* note 18 and accompanying text.

[29] *See* Peone v. Regulus Stud Mills, Inc., 113 Idaho 374, 379, 744 P.2d 102, 107 (1987). The *Peone* court stated:

should not impose liability on a general contractor for a subcontractor's tortious acts.[30] Second, courts should not apply the peculiar risk doctrine in construction site accidents because juries cannot accurately distinguish between "peculiar risks" of harm and "abnormally dangerous" risks of harm.[31] Third, states have enacted worker's compensation systems to compensate all injured employees.[32] Since third party employers indirectly pay worker's compensation premiums, they should not also face tort liability from injured workers.[33]

Despite the contrary weight of authority that limits application of the peculiar risk doctrine,[34] California courts continue to allow construction workers to recover against third party employers for signifi-

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> To begin with, the rationale of the independent contractor exception, *as well as criticisms of it*, are most soundly based on issues of knowledge and secondary or indirect costs of avoiding accidents. The decision to place liability on one group of potential defendants stems from the recognition that, because of greater knowledge about or ability to reduce safety risks, the placement of liability on this group will keep the number and costs of accidents, both in economic and human terms at a minimum.

Id. (emphasis added) (quoting Sierra Pac. Power Co. v. Rinehart, 99 Nev. 557, 561, 665 P.2d 270, 274 (1983)). The *Peone* court concluded by stating that "Haynes Logging [the subcontractor] is in a better position to reduce the risks of injury." *Id.*

[30] *See id.*

[31] *See* Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 404, 403 P.2d 330, 339 (1965). The *Welker* court emphasized:

> In a job of this magnitude — fifteen to sixteen millions dollars worth of construction — it would be inconceivable that there would not be injury to workmen were there not an extensive safety program having many facets. It is probably inconceivable in any event that work of this magnitude could be performed without some personal injury to the employees. Every excavation presents some danger and every construction job has certain inherent dangers. A multistory building has inherent dangers associated with the law of gravity and certain precautions must be taken to cope with these dangers or injury to employees is probable. The same can be said of most hammering, cutting, digging, welding and/or transporting equipment. And every major construction job has its own peculiar dangers arising from special jobsite factors, or the combinations of work that must be performed.

Id.

[32] *See* Jones v. Chevron U.S.A., Inc., 718 P.2d 890, 899 (Wyo. 1986) (stating that landowner should not have to pay for injuries caused by contractor when worker's compensation system already covers those injuries).

[33] *See id.* The *Jones* court noted that the owner has in a sense already assumed financially responsibility for the injuries because the independent contractor passes along his worker's compensation costs to the owner. *Id.*

[34] *See supra* note 18 and accompanying text.

cantly different reasons.[35] California courts have thus departed from the majority of jurisdictions' application of the doctrine.

This Comment seeks to answer why California has departed from the majority view and whether this action is wise. Part I examines the history and policies supporting the doctrine.[36] Parts II and III then survey the growth and limits of the doctrine in California and in other jurisdictions, and Part IV criticizes California's approach.[37] Finally, this Comment proposes that California courts should not apply the doctrine against general contractors.[38]

This Comment's proposal does not completely reject California's application of the doctrine. Convincing policy reasons underlie California's and the minority of jurisdictions' liberal application of the doctrine. Thus, California courts should continue to allow injured construction workers' recovery against landowners and developers in peculiar risk situations.

I. Development of the Peculiar Risk Doctrine

A. Origins of the Peculiar Risk Doctrine

In California injured construction workers can successfully recover against third party employers if a jury finds that a peculiar risk of harm caused the worker's injury.[39] California courts instruct juries that a peculiar risk of harm is a special and recognizable risk of physical harm inherent in the work itself.[40] Thus, even an ordinary or customary[41] risk of harm may qualify as a peculiar risk of harm.[42] Furthermore, judges instruct juries to distinguish a "peculiar risk" of harm from an "abnormally great" risk of harm.[43]

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[35] *See infra* notes 118-22 and accompanying text.

[36] *See infra* notes 44-73 & 118-22 and accompanying text.

[37] *See infra* notes 74-122 and accompanying text.

[38] *See infra* text accompanying notes 148-57.

[39] *See, e.g.*, Mackey v. Campbell Constr. Co., 101 Cal. App. 3d 774, 785, 162 Cal. Rptr. 64, 69 (1980). The *Mackey* court stated that: "whether the work is likely to create a peculiar risk . . . is ordinarily a question to be resolved by the trier of fact." *Id.*

[40] *See supra* note 15 and accompanying text.

[41] "[A] usage in violation of the law can never grow into a valid custom." Anderson v. L.C. Smith Constr. Co., 276 Cal. App. 2d 436, 81 Cal. Rptr. 73 (1969) (quoting 49 Cal. Jur. 2d *Usages and Customs* § 19 (1959)).

[42] *See* Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 587, 591 P.2d 503, 508, 153 Cal. Rptr. 213, 218 (1979). Even the fact that an activity involves a danger ordinary to particular work does not preclude finding a peculiar risk. *Id.*

[43] *See supra* note 15 and accompanying text.

American and English courts originally created this nebulous[44] peculiar risk of harm concept to cure unjust results from applying the general rule protecting third party employers from liability for their contractors' torts.[45] Although courts still recognize this third party employer nonliability rule, they have carved away its significance through numerous exceptions.[46] Courts and legal scholars now acknowledge that this general rule applies only in rare cases not fitting into any exception.[47] However, third party employer nonliability exceptions rarely apply when the injured party is an employee.[48]

Landowners were the first victims to fall under the third party employer nonliability exceptions.[49] Courts imposed a nondelegable duty on landowners to take reasonable precautions against injuries when the landowner hired a subcontractor to perform work on the land pursuant to a public contract.[50] Courts also imposed a nondelegable duty on landowners when they were subject to a statutory nondelegable duty.[51] Courts argued that if they did not create nonliability exceptions, landowners could potentially shield themselves from all liability resulting from work done on their premises merely by hiring contractors.[52]

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[44] *See* Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 408, 403 P.2d 330, 339 (1965). The *Welker* court stated that it "believe[d] that the distinctions being made are *nebulous* at best and become so highly confusing as to be undesirable when applied to employees of an independent contractor doing construction work." *Id.* (emphasis added).

[45] *See supra* notes 21-24 and accompanying text.

[46] *See* Walker v. Capistrano Saddle Club, 12 Cal. App. 3d 894, 898, 90 Cal. Rptr. 912, 914 (1970) (quoting RESTATEMENT (SECOND) OF TORTS § 409 (1965)). The *Walker* court stated that exceptions to the nonliability general rule applied only "[when] no good reason is found for departing from [them]." *Id.* For a more comprehensive discussion of landowner-contractor liabilities, see Brooks, *Tort Liability of Owners and General Contractors for On-the-Job Injuries to Workmen*, 13 UCLA L. REV. 99 (1965).

[47] *See* PROSSER & KEETON, *supra* note 2, at 510.

[48] *See infra* notes 134-36 and accompanying text.

[49] *See, e.g.*, Chicago v. Robbins, 67 U.S. (2 Black) 418 (1862); Bower v. Peate, 1 Q.B.D. 321 (1876).

[50] *See, e.g.*, Delgado v. W.C. Garcia & Assocs., 212 Cal. App. 2d 5, 27 Cal. Rptr. 613 (1963) (imposing nondelegable duty on landowner with contractual obligation with city to construct sewer lines).

[51] *See* Golden v. Conway, 55 Cal. App. 3d 948, 128 Cal. Rptr. 69 (1976); CAL. CIV. CODE § 1714(a) (West Supp. 1987) (imposing statutory nondelegable duty of reasonable care in management of property); RESTATEMENT (SECOND) OF TORTS § 424 (1965).

[52] *See* Bower v. Peate, 1 Q.B.D. 321, 326 (1876) (contracting landowner cannot absolve herself of liability for consequences of work done on her land merely by hiring contractor).

The courts in *Chicago v. Robbins*[53] and *Bower v. Peate*[54] first cured the problems created by the third party employer nonliability general rule. In *Robbins*, the United States Supreme Court found a landowner liable to an injured pedestrian for failure to require a subcontractor to provide lights and guards for work conducted on a public sidewalk.[55] Similarly, English courts began carving exceptions to the employer nonliability general rule.[56] In *Bower*, a landowner hired a subcontractor to build a home on his land.[57] The subcontractor's excavation on the landowner's premises damaged a neighbor's home.[58] The court in *Bower* held that the landowner could not relieve himself of certain duties to neighboring lands, arising out of an activity on the landowner's property, by employing a contractor.[59] Thus, courts originally created exceptions to the third party employer nonliability rule only when a subcontractor's work caused injuries to bystanders or property *outside* a landowner's premises.[60]

B. First Restatement*'s Interpretation of the Peculiar Risk Doctrine*

More than 50 years after *Bower* and *Robbins*, the drafters of the *First Restatement of Torts* interpreted a landowner's nondelegable duty to prevent injuries to others as a duty to take precautions against a peculiar risk.[61] The *First Restatement* illustrated three applications of

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[53] 67 U.S. (2 Black) 418 (1862).

[54] 1 Q.B.D. 321 (1876).

[55] *Robbins*, 67 U.S. at 427. The *Robbins* court reasoned:

> [When an owner] fails to provide with his contractor for the very matter which, if left undone, would make it a nuisance; is told of the dangerous condition of the area; has a direct supervision over it . . . and yet, when an injury is suffered by the very nuisance which he has created for his own benefit, . . . insists that he is not in fault [, then, if] the owner of fixed property is not responsible in such a case as this, it would be difficult ever to charge him with responsibility.

Id.

[56] *See, e.g.*, *Bower*, 1 Q.B.D. at 326.

[57] *Id.* at 324.

[58] *Id.*

[59] *Id.* at 326.

[60] *See supra* text accompanying notes 55-59.

[61] *See* RESTATEMENT (FIRST) OF TORTS § 416 (1934). Section 416 stated:

> One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a *peculiar risk of bodily harm* to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions.

the peculiar risk doctrine: demolition of buildings, tearing down walls, and excavation work.[62] None of these illustrations included employees as parties who could recover under the peculiar risk provisions.[63]

C. Second Restatement's *Interpretation of the Peculiar Risk Doctrine*

In comparison to the *First Restatement*, the *Second Restatement* presented a broader definition of a peculiar risk of harm,[64] and illustrated additional examples of peculiar risk situations.[65] The *Second Restatement*'s drafters changed the *First Restatement*'s requirement that a work condition "necessarily create" a risk of harm to a work condition "likely to create" harm.[66] The drafters also provided additional examples of peculiar risk situations, such as when an employer employs a contractor to transport giant logs, but the contractor fails to anchor the logs to her truck.[67] The *Second Restatement* also included a section providing that third party employers have a duty to take special precautions in work known to be inherently dangerous.[68] The *Restatement* drafters acknowledged that the differences between a "peculiar risk" and an "inherently dangerous" work situation were theoretical at best, but practically identical.[69] Despite all these changes, the *Second*

Id. (emphasis added).

[62] *Id.* § 413 comment a (1934).

[63] *See id.*

[64] *See infra* note 66 and accompanying text.

[65] *See infra* text accompanying note 67.

[66] RESTATEMENT (SECOND) OF TORTS § 416 (1965). Section 416 currently states:

> One who employs an independent contractor to do work which the employer would 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.

Id. (emphasis added).

[67] *See id.* § 413 comment d app. (1966).

[68] *See id.* § 427 (1965). Section 427 states:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Id.

[69] *See id.* § 416 comment a. Comment (a) discusses this distinction, if any:

Restatement's "peculiar risk" and "inherently dangerous" sections did not allow an injured subcontractor's employee recovery against third party employers.[70]

The *Second Restatement* drafters explicitly intended to limit those who could recover under the peculiar risk doctrine. A proposed "special note" to the chapter on liability for the conduct of subcontractors stated that the rules, including peculiar risk situations, were inapplicable to a defendant's own employees or to the subcontractor's employees.[71] The special note's proponents reasoned that because the contract price paid by a third party employer included worker's compensation insurance premiums, these employers already had incurred the cost of injuries to subcontractors' workers.[72] However, the drafters could not feasibly incorporate this limitation into the *Second Restatement* text because of different approaches states took in applying worker's compensation systems.[73]

II. "PECULIAR RISK" DECISIONS IN MOST JURISDICTIONS

Shortly after the *Second Restatement*'s publication, the majority of jurisdictions judicially incorporated the *Second Restatement*'s reasoning to deny recovery to injured subcontractors' employees from third party

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> There is a close relation between the rule stated in this Section and that stated in § 427, as to dangers inherent in or normal to the work. The two rules represent different forms of statement of the same general rule, that the employer remains liable for injuries resulting from dangers which he should contemplate at the time that he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them. The rules stated in the two Sections have been applied more or less interchangeably in the same types of cases and frequently have been stated in the same opinion as the same rule, or as different phases of the same rule. The rule stated in this Section is more commonly stated and applied when the employer should anticipate the need for some specific precaution, such as a railing around an excavation in the sidewalk. The rule stated in § 427 is more commonly applied where the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting, or painting carried on upon a scaffold above the highway.

Id.

[70] *See* RESTATEMENT (SECOND) OF TORTS ch. 15 special notes, at 17-18 (Tent. Draft No. 7, 1962); *see also* 39 A.L.I. PROC. 246 (1962) (statement of William Prosser) ("[I]t appears undesirable, if not impossible, to state anything at all about what the liability is to employees of an independent contractor.").

[71] *See supra* note 70.

[72] *See id.*

[73] *See id.*

employers under the peculiar risk doctrine.[74] The court in *Welker v. Kennecott Copper Co.*[75] provided the first extensive discussion of the *Restatement*'s interpretations and illustrations of the doctrine.

The *Welker* court concluded that a subcontractor's workers may not recover from third party employers.[76] The court reasoned that the *Second Restatement* drafters intended to apply its peculiar risk sections[77] to only completed works, not to transitory conditions during construction.[78] The *Welker* court further stated that a third party employer should not have a greater liability to a subcontractor's employees than she would to her own employees had she hired them to perform the work.[79] Next, the *Welker* court reasoned that since a third party employer directly or indirectly pays for worker's compensation premiums, she should not face liability for workers' injuries.[80] Finally, the court justified its conclusion by underscoring the peculiar risk doctrine's undesirability, since "every major construction job has its own peculiar dangers arising from special job site factors, or the combinations of work that must be performed."[81]

In addition to the *Welker* decision, *Conover v. Northern States Power Co.*[82] exemplifies the majority of jurisdictions'[83] limited application of the peculiar risk doctrine.[84] In *Conover* a third party employer

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[74] *See, e.g.*, Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 405, 403 P.2d 330, 339 (1965). The *Welker* court stated that "the duties outlined in §§ 413, 416, 422 and 427 of the *Restatement of Torts* are not owed to employees of an independent contractor." *Id.* For cases in other jurisdictions referring to the *Second Restatement*, see *supra* note 18.

[75] 1 Ariz. App. 395, 403 P.2d 330 (1965). In *Welker*, a trench collapsed and killed an employee working inside the trench at the time of the collapse. *Id.* at 397, 403 P.2d at 332-33.

[76] *Id.* at 408, 403 P.2d at 339.

[77] RESTATEMENT (SECOND) OF TORTS §§ 413, 416, 423, 427 (1965).

[78] *Welker*, 1 Ariz. App. at 402, 403 P.2d at 337 (referring to *Second Restatement* ch. 15, introduction to third party employer nondelegable duties).

[79] *Id.* at 408, 403 P.2d at 339. The court referred to *First Restatement* § 416 comment c which states: "The liability imposed by the rule . . . is no greater than that to which the employer would be subject if he retained the taking of these precautions in his own hands.").

[80] *Id.* at 408, 403 P.2d at 339.

[81] *Id.*

[82] 313 N.W.2d 397 (Minn. 1981).

[83] *See supra* note 18 and accompanying text.

[84] *See, e.g.*, Peone v. Regulus Stud Mills, 113 Idaho 374, 744 P.2d 102 (1987); Jones v. Chevron U.S.A., Inc., 718 P.2d 890 (Wyo. 1986) (citing *Conover* in support of restricted application of peculiar risk doctrine).

hired a subcontractor to repair power line poles.[85] While repairing a power pole, the subcontractor's employee sustained an injury when the power pole broke.[86] The injured construction worker sought recovery against the general contractor under the peculiar risk doctrine.[87] The *Conover* court refused to hold the third party employer liable to an injured subcontractor's worker under this doctrine.[88]

The *Conover* court reasoned that each party should be liable for its own conduct according to its separate duties of care.[89] Thus, because the subcontractor had a nondelegable duty to provide a safe workplace for its employees, the court continued, extending the peculiar risk doctrine to the subcontractor's employer imposes one duty too many.[90] Finally, the court stated that extending a peculiar risk liability to subcontractor's employers would not realistically keep construction work sites safer.[91]

Courts in most jurisdictions[92] state additional reasons for prohibiting injured construction workers from recovering against third party employers under the peculiar risk doctrine.[93] Many courts state that a third party employer should not have to pay for injuries caused by a subcontractor when a worker's compensation system already covers those injuries through the subcontractor's insurance premiums.[94] A

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[85] *Conover*, 313 N.W.2d at 400-01.

[86] *Id.*

[87] *Id.* at 403.

[88] *Id.* at 397 (holding that independent contractor's employer could not be vicariously liable under nondelegable duty theory of negligence of contractor).

[89] *Id.* at 405.

[90] *Id.* at 404.

[91] *See id.* at 406. The *Conover* court reasoned that the "contractor, who is supposed to be on the jobsite supervising, may have less incentive to provide a safe workplace if the employer is indirectly paying his workers' compensation premiums and, in addition, the contractor has subrogation rights against the employer." *Id.*

[92] *See supra* note 18 and accompanying text.

[93] *See, e.g.*, Jones v. Chevron U.S.A., Inc., 718 P.2d 890 (Wyo. 1986) (holding that defendant oil company could not be held vicariously liable to employees of independent contractor for any negligence of independent contractor).

[94] *Id.* at 899. The *Jones* court stated:

> [I]f a *bystander* is injured by the negligence of a financially irresponsible contractor, the owner may be the bystander's only source of recompense. The bystander is a totally innocent third party having no involvement in the work; and, if it is inherently dangerous and likely to cause harm, the owner undertaking the work should be responsible for the harm. The *employee*, on the other hand, is covered by worker's compensation even if the contractor is insolvent. The owner should not have to pay for injuries caused by the contractor when the worker's compensation system already

third party employer already assumes financial responsibility for construction workers' injuries because the subcontractor passes along worker's compensation costs to a third party employer.[95] Furthermore, if a third party employer does not retain control of a work site, and loses the ability to control the risks involved in a project, she should not have to pay for the injuries sustained by a subcontractor's employees.[96]

A court that is representative of the majority of jurisdictions acknowledges that a third party employer should not have the option to escape liability by simply hiring a contractor.[97] However, the same court rebutted this concern by stating that "the reverse should apply too."[98] If a third party employer hires employees directly, instead of hiring a subcontractor, then the employer will not normally have any tort liability for her employees' injuries.[99] Thus, a third party employer should not face greater liability as a result of hiring a subcontractor.[100] Furthermore, allowing a subcontractor's employee to recover against third party employers under the peculiar risk doctrine would result in an "anomalous and fortuitous"[101] recovery, inconsistent with the goals of the worker's compensation system.[102]

III. California Courts' Adoption of the Peculiar Risk Doctrine

California courts have steadfastly rejected the majority view and the *Second Restatement*'s proposed limited application of the peculiar risk doctrine.[103] In California, courts instruct juries that a subcontractor's

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covers those injuries.

Id. (emphasis added).

[95] *See supra* note 32 and accompanying text.

[96] *See Jones*, 718 P.2d at 899. The *Jones* court stated that "if the owner maintains control over the work and exercises that control negligently, he can be directly liable to the employee for his own negligence." *Id.*

[97] *See* Peone v. Regulus Stud Mills, 744 P.2d 102 (Idaho 1987) (holding owner of timber right not liable for injuries sustained by logging contractor's employee).

[98] *Id.* at 106.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] The California Constitution once stated that the purpose of worker's compensation is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." Cal. Const. art. XX, § 21 (1897, amended 1918, repealed June 8, 1976).

[103] *See, e.g.*, Van Arsdale v. Hollinger, 68 Cal. 2d 245, 256-57, 437 P.2d 508, 515-16, 66 Cal. Rptr. 20, 27 (1968). The California Supreme Court reversed a jury verdict in favor of a third party employer because the employer had a nondelegable duty. *Id.*

injured employee seeking recovery against third party employers under the doctrine must satisfy two requirements.[104] First, the work that an employee engaged in must be likely to create a peculiar risk of harm unless special precautions were taken.[105] Second, an employer should have recognized that the work was likely to create a peculiar risk of harm.[106]

A. Peculiar Risk of Harm Requirement

Under the first requirement, a peculiar risk of harm is "peculiar to the work to be done . . . and is something other than the ordinary and customary dangers which may arise in the course of the work or of normal human activity."[107] Thus, the peculiar risk doctrine applies only to a "special, recognizable danger arising out of the work itself."[108] Moreover, a peculiar risk of harm does not necessarily constitute an abnormally great risk of harm.[109] Despite all these legal requirements defining a peculiar risk of harm, juries have found that a peculiar risk of harm may involve work near moving vehicles,[110] unusually heavy weight or objects,[111] great heights,[112] and trenches.[113]

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[104] *See* Jimenez v. Pacific W. Constr. Co., 185 Cal. App. 3d 102, 110, 229 Cal. Rptr. 575, 578 (1986). The court explained:

> The analysis of the applicability of the peculiar risk doctrine to a particular fact situation can be broken down into two elements: (1) whether work is likely to create a peculiar risk of harm unless special precautions are taken; and (2) whether the employer should have recognized that the work was likely to create such a risk.

Id.

[105] *Id.*

[106] *Id.*

[107] Stark v. Weeks Real Estate, 94 Cal. App. 3d 965, 971, 156 Cal. Rptr. 701, 708 (1979) (footnote omitted) (quoting Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 509, 595 P.2d 619, 623, 156 Cal. Rptr. 41, 45 (1979)).

[108] *Id.*

[109] *See supra* note 15 and accompanying text.

[110] *See, e.g.*, Castro v. State, 114 Cal. App. 3d 503, 507-09, 170 Cal. Rptr. 734, 736-37 (1981). In *Castro*, a fellow employee's truck backed-up, struck, and severely injured a worker who was working under the hood of his own vehicle. *Id.* The injured worker alleged that he could not hear the backing-up truck's warning bell due to the noise of nearby heavy equipment. *Id.*

[111] *See, e.g.*, Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979) (holding that 500-pound steel panel struck construction worker during demolition of one of the defendant's brewery plants); LaCount v. Hansel Phelps Construction Co., 79 Cal. App. 3d 754, 145 Cal. Rptr. 244 (1978) (holding that 100-ton concrete girder fell and struck subcontractor's employee who was attempting to install girder load for rapid transit subway station). In *Aceves*, The California Supreme

B. Employer's Recognition of the Peculiar Risk

The second requirement under the peculiar risk doctrine is that the third party employer should have foreseen a peculiar risk of harm and taken special precautions to avoid the harm.[114] The *Second Restatement* suggests that third party employers have no duty to take routine precautions against all ordinary and customary dangers.[115] However, California juries and courts have consistently imputed knowledge of peculiar dangers involved in a work site to a third party employer.[116]

C. California Courts' Reasoning

California courts have never stated that either the severity of a claimant's injury or a third party employer's wealth justifies broadly applying the peculiar risk doctrine.[117] Instead, California courts continue to allow construction workers to recover for other reasons. First, a third party employer primarily benefits from a construction worker's performance.[118] Second, a third party employer can select a subcontractor and can insist on one who is competent and financially responsible.[119] Third, a third party employer is in a position to demand indemnity

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Court affirmed the jury's finding that using a bulldozer to push a 500-pound steel panel was a "special and recognizable" danger. *Aceves*, 24 Cal. 3d at 510, 595 P.2d at 623, 156 Cal. Rptr. at 45.

[112] *See, e.g.*, Stilson v. Moulton-Niguel Water Dist., 21 Cal. App. 3d 928, 98 Cal. Rptr. 914 (1971).

[113] *See, e.g.*, Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979).

[114] *See supra* note 106 and accompanying text.

[115] RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

[116] *See, e.g.*, Widman v. Rossmoor Sanitation, Inc., 19 Cal. App. 3d 734, 747, 97 Cal. Rptr. 52, 59 (1971). "Unlike the ordinary person, . . . officials and employees were knowledgeable in all phases of construction work and recognized, or should have recognized, that [the work] was likely to create a peculiar risk." *Id.*

[117] No language appears in California court opinions discussing a claimant's severe injuries or a defendant's wealth as valid policy reasons for broadly applying the peculiar risk doctrine. Instead, California courts have broadly applied the peculiar risk doctrine for the policy reasons. *See infra* notes 118-22.

[118] Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 508, 595 P.2d 619, 622, 156 Cal. Rptr. 41, 44 (1979). The *Aceves* court stated that "the employer is the one who primarily benefits from the contractor's work . . . ." *Id.* (quoting Van Arsdale v. Hollinger, 68 Cal. 2d 245, 253, 437 P.2d 508, 513, 66 Cal. Rptr. 20, 25 (1968)).

[119] *Id.* at 508, 595 P.2d at 622, 156 Cal. Rptr. at 44. The court in *Aceves* stated that "the employer selects and is free to insist on a competent and financially responsible [subcontractor] . . . ." *Id.*

from a subcontractor.[120] Fourth, a third party employer is in the best position to procure insurance and to distribute its costs.[121] Finally, California courts emphasize the great public importance of the third party employer's duty of care.[122]

IV. CRITICISMS OF CALIFORNIA'S APPROACH

California courts' reasoning for allowing subcontractor's employees to recover against third party employers under the peculiar risk doctrine reflects a lack of understanding of the construction industry. By stating that a third party employer primarily benefits from a construction project, California courts fail to distinguish general contractors from landowners or developers.[123] The peculiar risk doctrine originally imposed a nondelegable liability on landowners hiring independent contractors.[124] Thus, the landowner became the third party employer. However, because most modern construction projects require an additional layer of employment,[125] the general contractor became the third party employer as well the landowner or developer. As a consequence, general contractors in California have unfortuitously inherited the potential liability of a third party employer[126] without enjoying the "primary" benefits of the construction project.[127]

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[120] *Id.* The *Aceves* court stated that: "the employer is in a position to demand indemnity from the contractor, the insurance necessary to distribute the risk is properly a cost of the employer's business . . . ." *Id.*

[121] *Id.*

[122] *Id.* The court stated that "the performance of the duty of care is one of great public importance." *Id.*

[123] Though landowners/developers and general contractors play vastly different roles in a construction project, no California court has recognized any legal difference between the two classes of defendants in a peculiar risk situation. *See infra* note 138. For a brief discussion on the differences between landowners and developers versus general contractors, see CUSHMAN & SILVERMAN, *supra* note 5, at 7. The authors state: "The *owner* is primarily a purchaser of materials and services: it pays for the construction and derives the benefit of the product. . . . [A] contractor adjusts its construction administration methods depending upon the nature of the owner." *Id.* (emphasis in original).

[124] *See supra* notes 21-24 and accompanying text.

[125] *See supra* notes 5 & 9-13 and accompanying text.

[126] *See, e.g.*, Jimenez v. Pacific W. Constr. Co., 185 Cal. App. 3d 102, 229 Cal. Rptr. 575 (1986); Mackey v. Campbell Constr. Co., 101 Cal. App. 3d 774, 162 Cal. Rptr. 64 (1980) (lawsuits brought against general contractors under the peculiar risk doctrine).

[127] As one justification for broadly applying the peculiar risk doctrine, California courts have stated that the third party employer primarily benefits from the subcontractor's work. *See supra* note 118. However, California courts have never articulated how third party employers are primary beneficiaries in the construction industry. Neverthe-

In addition, California courts unrealistically assume that imposing peculiar risk liability on third party employers will force employers to carefully select competent and well-financed subcontractors.[128] The construction industry's highly competitive environment and impersonal methods of selecting subcontractors[129] for construction projects does not allow for the courts' suggested handpicking of competent subcontractors.[130] California courts further suggest that third party employers should select well-financed subcontractors for indemnification purposes.[131] However, if third party employers can successfully seek indemnity against subcontractors, why should the third party employer be liable for the subcontractor's negligence in the first place? In effect, California courts seem to acknowledge that a third party employer liable under the peculiar risk doctrine should not be held liable for causing an accident.[132]

Courts should abide by the fundamental tort policy of imposing liability in proportion to a defendant's fault or moral culpability.[133] Thus,

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less, in other areas of the law, courts have traditionally held that landowners and developers are primary beneficiaries of land developments or construction projects. *See* City of Rancho Palos Verdes v. City Council of Rolling Hills, 59 Cal. App. 3d 869, 129 Cal. Rptr. 173 (1976) (primary benefit of city's action accrues to the developer of shopping center); *see also* State v. Reedy Creek Improvement Dist., 216 So. 2d 202 (Fla. 1968) (drainage revenue bonds benefitting large landowners and developers); Chandler v. Drainage Dist. No. 2, 187 P.2d 971 (Idaho 1947) (landowners primarily benefitting from formation of drainage district); Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) (public utilities district ordinances primarily benefitting developers).

[128] *See supra* note 119 and accompanying text.

[129] *See* CUSHMAN & SILVERMAN, *supra* note 5, at 3-5, 33-34. A construction project is more complex and competitive than most other ventures. *See id.* Unlike many businesses characterized by two-party transactions, a construction project will likely involve an owner, one or more prime contractors, several different subcontractors and suppliers, an architect, one or more engineers, several sureties and insurance carriers, a construction lender, and perhaps a construction manager or various other consultants. *Id.* Furthermore, because construction profit margin is very small relative to the risk exposure, good business and money managers analyze investments in terms of a natural tradeoff between risk and return. *Id.*

[130] *See id.* at 34-36. The general contractor is under a statutory duty to award a job to the lowest responsive bidder. *Id.* The term "responsive" refers to the subcontractor's trustworthiness, quality, fitness, and capacity to perform the work. *Id.*

[131] *See supra* notes 119-20 and accompanying text.

[132] *See* PROSSER & KEETON, *supra* note 2, § 51, at 341-42. "Indemnity" is an order requiring another to reimburse in full one who has discharged a common liability. *Id.* Thus, indemnity is in favor of one who is "held responsible solely by imputation of law because of a relation to the *actual wrongdoer*, or an independent contractor." *Id.* (emphasis added).

[133] Molien v. Kaiser Found. Hosp., 27 Cal. 3d 916, 936, 616 P.2d 813, 825, 167

when a third party employer negligently hires an incompetent subcontractor, California courts should impose third party employer liability under a negligent selection theory,[134] not under the peculiar risk doctrine. Furthermore, general contractors can face liability to subcontractors' employees under a breach of the common law duties to reasonably direct[135] and supervise subcontractors.[136] By imposing liability on general contractors under these common law theories, California courts can decrease the probability of a jury decision based solely on arbitrariness[137] or sympathy.[138]

Cal. Rptr. 831, 843 (1980) (Clark, J., dissenting) (quoting Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958)).

[134] *See* RESTATEMENT (SECOND) OF TORTS § 411 (1965); *see also* Holman v. State, 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (1975) (holding that injured employee brought cause of action against third party employer for negligently selecting subcontractor).

[135] *See* RESTATEMENT (SECOND) OF TORTS § 410 (1965). Section 410 states: "The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself." *Id.*

[136] *See id.* § 412. Section 412 states:

> One who is under a duty to exercise reasonable care to maintain land or chattels in such conditions as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise . . . .

Id.

[137] *See* Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 404, 403 P.2d 330, 339 (1965). The *Welker* court expressed a concern over a fair adjudication of peculiar risk claims by stating:

> In a job of this magnitude — fifteen to sixteen millions dollars worth of construction — it would be inconceivable that there would not be injury to workmen were there not an extensive safety program having many facets. It is probably inconceivable in any event that work of this magnitude could be performed without some personal injury to the employees. Every excavation presents some danger and every construction job has certain inherent dangers. A multistory building has inherent dangers associated with the law of gravity and certain precautions must be taken to cope with these dangers or injury to employees is probable. The same can be said of most hammering, cutting, digging, welding and/or transporting equipment. And every major construction job has its own peculiar dangers arising from special jobsite factors, or the combinations of work that must be performed.

Id.

[138] *See* Widman v. Rossmoor Sanitation, Inc., 19 Cal. App. 3d 734, 747, 97 Cal.

Another justification used by California courts to allow injured subcontractor's employees to recover from third party employers under the peculiar risk doctrine relates to a third party employer's ability to procure insurance and to distribute these costs.[139] When applied to a modern construction project this reasoning does not justify the imposition of liability on a general contractor. Developers and landowners, *not* the general contractors, are the ultimate beneficiaries of a construction project.[140] Furthermore, the general contractor has already borne her insurance costs through indirect worker's compensation payments.[141]

Finally, California courts argue that imposing peculiar risk liability on third party employers furthers an important public concern.[142] No California court deciding a peculiar risk issue has commented on the

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Rptr. 52, 59 (1971). The *Widman* court inferred a possible reason for broadly applying the peculiar risk doctrine to include injured employees. *See id.* The court stated: "It is common knowledge that workmen injured or killed in construction work do not receive full compensation under the Workmen's Compensation Act for damages that they sustain, notwithstanding the commendable purpose of such legislation." *Id.*

Most peculiar risk liability cases in California involve severely or fatally injured construction workers. *See, e.g.*, Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979) (jury awarded over $22,000 to severely injured worker struck by wall knocked down on demolition job); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979) (collapsing nine-foot trench severely injured construction worker); Van Arsdale v. Hollinger, 68 Cal. 2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968) (speeding car struck and threw street line worker 40 feet); Woolen v. Areojet Gen. Corp., 57 Cal. 2d 407, 369 P.2d 708, 20 Cal. Rptr. 12 (1962) (exploding tank fatally injured worker); Forseca v. County of Orange, 28 Cal. App. 3d 361, 104 Cal. Rptr. 566 (1972) (worker permanently injured from falling off bridge); Stilson v. Moulton-Niguel Water Dist., 21 Cal. App. 3d 928, 98 Cal. Rptr. 914 (1971) (severely injured plaintiff recovered against defendant after falling without safety equipment off cross-girdering 30-foot steel column on water tower); Morehouse v. Taubman Co., 5 Cal. App. 3d 548, 85 Cal. Rptr. 308 (1970) (worker who fell off unguarded wall recovered against defendant for severe injuries); Anderson v. L.C. Smith Constr. Co., 276 Cal. App. 2d 436, 81 Cal. Rptr. 73 (1969) (worker fatally run down by moving truck without warning device).

[139] *See supra* note 121 and accompanying text.

[140] *See* Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 709 (1986). Courts have traditionally imposed liability on landowners who are commercial enterprises that solicit customers. *See id.* Society has accepted a view that landowners cannot be blameless for injuries occurring on their land. *Id.* By inviting customers in order to secure financial gain, a landowner fosters potential accidents. *See id.* Furthermore, a landowner is in a position to take advance measures to avoid any potential dangers on her land. *See id.*; *see also* Comment, *A Landowner's Duty to Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule*, 48 OHIO ST. L.J. 247 (1987). Landowners are in the best position to distribute costs to subsequent purchasers. *Id.* at 265.

[141] *See supra* note 94 and accompanying text.

[142] *See supra* note 122 and accompanying text.

nature of this "public concern."[143] If the public concern is for safer work sites, then holding a general contractor liable under the peculiar risk doctrine may create safer work sites if general contractors can successfully seek indemnity suits against their subcontractors.[144] However, courts will achieve this goal at the expense of circumventing the worker's compensation system.[145] Furthermore, in light of all other arguments against applying the peculiar risk doctrine to general contractors,[146] this Comment finds a lack of compelling reasons for California courts to continue holding general contractors liable under this doctrine.[147]

PROPOSAL

The reasoning under which California courts allow injured workers to recover against third party employers under the doctrine falters when applied to the construction industry.[148] Thus, this Comment proposes that California courts should not allow injured subcontractor's employees to recover damages against general contractors under the peculiar risk doctrine.

However, this proposal does not suggest that California courts should retreat to the majority of jurisdictions' restriction of this doctrine to a subcontractor's employees. The majority view fails to recognize that its application of the doctrine imposes too little liability on the landowner or developer, especially in light of undercompensating worker's compensation systems.[149] Therefore, California courts' reasoning for broadly applying the doctrine is more equitable than the major-

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[143] *See supra* notes 122-23 and accompanying text.

[144] *See* Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 330, 146 Cal. Rptr. 550, 554, 579 P.2d 441, 445 (1978). The *Nest-Kart* court discussed the application of equitable indemnity principles in the product liability context. *Id.* Apportionment of liability depends on several factors, such as deterrence of dangerous conduct or encouragement of accident-reducing behavior. *Id.*

In a construction accident context, if a court holds a general contractor liable under the peculiar risk doctrine, the general contractor may file an indemnity suit against a subcontractor. *See, e.g.*, Jimenez v. Pacific W. Constr. Co., 185 Cal. App. 3d 102, 229 Cal. Rptr. 575 (1986).

[145] *See* Comment, *supra* note 13, at 1495.

[146] *See supra* notes 123-42 and accompanying text.

[147] *See infra* text accompanying notes 148-57.

[148] *See supra* notes 123-41 and accompanying text.

[149] *See supra* notes 2-3 and accompanying text.

ity view when the defendant is a landowner or developer.[150]

Indeed, difficulties arise in distinguishing between peculiar risk and abnormally great risk situations.[151] However, courts need to impose some nondelegable duty on landowners and developers to protect bystanders and neighbors, in addition to construction workers. California courts should still apply the peculiar risk doctrine against landowners and developers. Landowners and developers are the primary beneficiaries of a construction project.[152] They are also in the best position to distribute the costs associated with work site risks.[153] Thus, this Comment's proposal is consistent with California courts' justifications in applying the doctrine.[154]

This proposal does not close an avenue of circumventing the usually inadequate worker's compensation system — it merely identifies the proper defendants and the bases for their liability.[155] Injured workers may still recover against general contractors if these third party employers retain control over construction sites.[156] Furthermore, under this Comment's proposal, general contractors would remain liable to *all* employees if these contractors negligently selected, directed, or supervised their subcontractors.[157]

CONCLUSION

The peculiar risk doctrine originated as one of numerous exceptions to the general rule which protected third party employers from liability for their subcontractors' acts. The peculiar risk exception originally im-

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[150] *See* Comment, *A Systematic Approach to the Peculiar Risk Exception to the Independent Contractor's Rule in Iowa*, 67 IOWA L. REV. 589, 600-05 (1982) (proposing new procedural approach to peculiar risk exception, but nevertheless approving Iowa's minority position applying peculiar risk doctrine).

[151] *See supra* note 44 and accompanying text.

[152] *See supra* note 140 and accompanying text.

[153] *See supra* note 120 and accompanying text.

[154] *See supra* notes 119-22 and accompanying text.

[155] *See supra* notes 134-36 & 148-54 and accompanying text.

[156] A general contractor who retains control of the work site has a common-law duty of providing reasonable care to protect subcontractors' employees against physical injuries. *See* RESTATEMENT (SECOND) OF TORTS § 414 (1965). Section 414 states:

> One who entrusts work to an independent contractors, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Id.

[157] *See supra* notes 134-36 and accompanying text.

posed a nondelegable duty of care on landowners to compensate injured neighbors and innocent bystanders, but not to compensate the subcontractor's employees. Likewise, courts in the majority of jurisdictions prohibit injured subcontractor's employees to recover under the peculiar risk doctrine.[158] In contrast, California courts broadly construe the class of injured parties who may recover under the doctrine.[159]

Although California and the majority of jurisdictions differ in their application of this doctrine, neither approach is ideal. The majority of jurisdictions have placed an unrealistic faith on the worker's compensation system to fully compensate accident victims. California courts have failed to distinguish landowners and developers from general contractors when applying the peculiar risk doctrine. In failing to make this distinction, California courts have imposed liability on general contractors without creating safer work sites. Thus, landowners and developers, but *not* general contractors, should remain liable to subcontractors' employees under the doctrine. This approach will further the goals of work site safety and accident victim compensation without unfairly burdening innocent defendants.

B. Tilden Kim

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[158] The majority of jurisdictions' limited application of the peculiar risk doctrine reflects the rationale underlying the "entrepreneur theory." For a broad discussion of the entrepreneur theory of liability, see Douglas, *Vicarious Liability and Administration of Risk I*, 38 YALE L.J. 584 (1929); Comment, *Liability of Landowners Resultant From Their Employment of Independent Contractors*, 13 HASTINGS L.J. 147 (1961).

[159] *See* Snyder v. Southern Cal. Edison Co., 44 Cal. 2d 793, 795-97, 285 P.2d 912, 913-14 (1955) (discussing reasons behind favoring "enterprise theory" of liability over "entrepreneur theory" of liability). For a broad discussion of the enterprise theory of liability, see PROSSER & KEETON, *supra* note 2, § 72, at 516-20; Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934).