



57th ANNUAL WORKSHOP ON TRANSPORTATION LAW



RETAINED CONTROL: AGENCY LIABILITY CONTRACTOR EMPLOYEE INJURIES

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PURPOSE

- To provide a “lessons learned” to assist DOTs and other transportation agencies to make informed business decisions regarding language contained in guidance manuals that may extend obligations and liability beyond the terms of the contract.

BACKGROUND

- “Smith” is an employee of Contractor working on a project to resurface travelway
- Smith was assigned to traffic control.
- Cones had been placed to close lanes 1 and 2 and traffic was confined to lane 3.
- Smith was told by her supervisor to move the cones outside of the lane line by a few inches in order to accommodate the grinder as it milled the number 2 lane.

Smith walked on foot northward in the number 2 lane adjusting the cones outward, gradually adjusting her distance from the equipment involved in the grinding operation.

Smith had a flashlight and was dressed in reflective clothing.

Shortly before the accident, one of the three DOT Resident Engineers on the Project came upon Smith walking in the number 2 lane. They waved at each other and he drove on.

An errant driver was observed by employees driving in and out of the closed lanes at a speed of 60 mph.

Smith was hit by the errant driver who fled the scene and was not apprehended until the next day.

The driver was under the influence of alcohol and pled guilty to a charge of gross vehicular manslaughter while intoxicated and several other related charges. This was not a first offense, the driver had been previously convicted of driving under the influence.

LAWSUIT AGAINST DOT

A complaint was filed alleging causes of action for:

- Negligent exercise of retained control
- Breach of mandatory non-delegable duty
- Dangerous condition of public property
- Ultrahazardous activity

DOT's Motion for Summary Judgment knocked out following causes of action:

- Breach of mandatory non-delegable duty
- Dangerous condition of public property
- Ultrahazardous activity

It did not knock out:

- Negligent exercise of retained control

UNDERLYING FACTS ALLEGED

- The DOT Resident Engineer who saw Smith knew or should have known she was in a dangerous situation and should not have left her to continue doing what she was doing

OUTCOME OF LAWSUIT

- Settled by the Contractor's insurance company on the basis that DOT had a duty to provide a safe workplace both for its own employees and for the employees of any contractor it hired to the extent DOT retained control over the work

LEGAL ANALYSIS OF LIABILITY

- RETAINED CONTROL

- A hirer (DOT) may be found liable to the Contractor's injured employee only if the hirer (DOT) both retained control and affirmatively contributed to the employee's injuries.

- Cases have addressed Retained Control, one pivotal California Supreme Court case involving Caltrans is:
- *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198.
- Which provides the support for California Jury Instruction, CACI 1009B, Liability to Employees of Independent Contractors

- Facts of Hooker:
- Because of the contractor's failure to block traffic, cranes had to retract their outriggers to allow traffic to pass.
- An employee of contractor was killed when he tried to swing the crane boom while the outriggers were retracted, causing the crane to fall over.
- Caltrans was sued for wrongful death.

In Hooker, Plaintiff relied on the safety chapter of the Caltrans Construction Manual.

The Manual provided, “[C]altrans is responsible for obtaining the Contractor’s compliance with all safety laws and regulations...The construction safety coordinator must be familiar with highway construction procedures and equipment, construction zone traffic management and be able to recognize and anticipate unsafe conditions created by a Contractor’s operation...The Construction Safety Coordinator shall visit contracts periodically to observe the Contractor’s operation and traffic conditions affected by the construction.”

- Hooker held that:
- Caltrans did not require or order the crane operator to retract the outriggers to allow vehicles to pass but only permitted as much.
- Caltrans did not affirmatively participate in the unsafe practice as “There was, at most, evidence that Caltrans’ safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it.”

Hooker held that:

There is a “presumptive delegation of responsibility for workplace safety from the hirer to the independent contractor.” Nonetheless, when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee’s injury, the hirer may be liable in tort to the employee.

Hooker found in favor of Caltrans because it did not find an act that affirmatively contributed to the injury

BUT contractual language and/or construction guidance can give rise to liability for THE FAILURE TO ACT as well. In other words, a DOT can be liable for omissions.

LEGAL ANALYSIS OF LIABILITY

- FAILURE TO PROVIDE SAFE WORKPLACE
- Plaintiffs allege DOTs have a duty to provide a safe workplace both for its own employees and for the employees of any contractor it hired to the extent the DOT retained control over the work.
- Plaintiffs refer to Traffic Manuals, the code of Safe Practices, Safety Manuals, Cal/OSHA requirements and Standard Specifications.

LESSONS LEARNED

- There is an increased risk of tort liability when language is not contained in the Contract but is contained in guidance. Guidance should not contain language that extends obligations and therefore liability beyond the terms of the Contract.
- There is an increased risk of liability if employees take actions independently to not enforce the terms of the Contract.

ENTERPRISE RISK MANAGEMENT

- *Enterprise risk management* (ERM) is a plan-based business strategy that aims to identify, assess and prepare for any dangers, hazards and other potentials for disaster.

ENTERPRISE RISK MANAGEMENT

- Old school: let the client do what it wants and when it gets itself in trouble Legal will handle the litigation
- Enterprise risk management is proactive and identifies opportunities for improvement... by making risk based decisions

ENTERPRISE RISK MANAGEMENT

- It helps if Legal and Construction already have a professional relationship based on integrity, commitment, innovation and teamwork

ENTERPRISE RISK MANAGEMENT

- Face the Future with Confidence. Learn How Legal Helps Construction Succeed in the ever changing legal liability environment

ENTERPRISE RISK MANAGEMENT

- Legal does not provide mandates.
- Legal provides options
- Options are risk based

ENTERPRISE RISK MANAGEMENT

- The dialog between Legal and Construciton begins

EXAMPLES OF CALTRANS GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *DOT does not intend that the Resident Engineer and the project safety coordinator carry the total load of monitoring the contractor's construction safety activities. All construction personnel must consider the safety of the operations in conjunction with their normal inspections.*

EXAMPLES OF GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *DOT Resident Engineer (RE) is responsible for ensuring that the COSP provides the required safety practices for all activities on the current project.*
- *This language negates the finding in Hooker and allows a finding of liability for merely NOT ACTING.*

EXAMPLES OF GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *DOT to ensure that their work environment is safe. employees must follow the safety rules, laws and procedures.*
- *This language negates the finding in Hooker and allows a finding of liability for merely NOT ACTING.*



EXAMPLES OF GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *DOT employees must not work or allow contractors to work by vehicle headlight or streetlight. If the contractor attempts to work without sufficient lighting, stop the operation until appropriate lighting is provided.*
- *This language negates the finding in Hooker and allows a finding of liability for merely NOT ACTING.*

EXAMPLES OF CALTRANS GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *The key issue facing you at night will be ensuring that the contractor provides sufficient light for the work areas.*
- *One of the biggest challenges facing any inspector in the field is what tools does he/she have to ensure night work is done safely.*
- *DOT staff has the responsibility to enforce the contract requirements to ensure their own safety, the safety of the traveling public, and the safety of the contractor personnel.*

EXAMPLES OF CALTRANS GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *When performing your duties, you need to consider your own safety and the safety of the contractor's personnel. Are the contractors complying with the contract safety requirements, Cal/OSHA, Title 8, the prime contractor's Injury Illness Prevention Program (IIPP)...*

EXAMPLES OF CALTRANS GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *Imminent Hazards: Imminent hazards are dangerous conditions that, if not corrected, would likely result in an accident causing severe injury or permanent disability injury, or causing death.*

EXAMPLES OF CALTRANS GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- *Work includes protecting traffic and workers by using impact attenuator vehicle as a shadow vehicle when placing and removing components of a traffic control system and when performing a moving lane closure.*
- *Use impact attenuator vehicle to follow behind equipment and workers placing and removing components of a traffic control system for a lane closure or a ramp closure.*
- *After placing components of a traffic control system for a lane closure or a ramp closure you may use impact attenuator vehicles in a closed lane and in advance of a work area to protect traffic and workers.*

EXAMPLES OF CALTRANS GUIDANCE THAT MAY RESULT IN LIABILITY BASED ON RETAINED CONTROL

- The contractor asked to not place three cones across a closed lane per Standard Plan T-11. The contractor felt the cones were slowing down the trucks entering and exiting the lane closure which impacted traffic.
- The inspector's actions would be seen as DIRECTING the contractor to not comply. DOT personnel should be trained to NEVER AGREE that a contractor does not have to comply with the Contract documents.

ENTERPRISE RISK MANAGEMENT

- Legal points out the problematic language to Construction
- The point is not to just point out a problem but to suggest possible solutions

ENTERPRISE RISK MANAGEMENT

- Legal's suggested solutions should be based on the goals and objectives of Construction
- Each suggestion is assessed a legal risk from Legal and a construction risk assessed by Construction
- The dialog is a partnership

ENTERPRISE RISK MANAGEMENT

Both Legal and Construciton must:

Listen to once another

Be open minded

Be innovative

In the end both Legal and Construction acknowledge that:

Guidance should specifically state that the DOT takes NO responsibility for the contractor's employees.

The Resident Engineer and Construction Inspectors should be educated to tell the contractors that their employees are their responsibility.

Questions?

