Title: Handling Injury & Death Cases Arising Out of Construction Incidents: 10 Basic Concepts
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Handling Injury & Death Cases Arising Out of Construction Incidents: 10 Basic Concepts

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This article discusses 10 basic concepts utilized in the prosecution of death and injury cases arising out of construction incidents. It is undisputable that construction sites vary tremendously – no two are the same – but the same basic concepts apply to them all.

Perhaps the most important ingredient for successfully prosecuting a construction incident case is the lawyer's passion for construction site safety and the understanding that the right to sue controls behavior. In other words, every construction case brought on behalf of one family can help chip away at unsafe working conditions, thereby protecting all construction workers and their families. Underlying that requisite passion must be an understanding of the compelling societal interest in providing job site safety.

1. Despite the Compelling Societal Interest in Providing Safe Job Sites, the Low Bid Process Hurts Safety

New construction in California has raced ahead into the new millennium at unprecedented levels as the economy continues to surge. Unfortunately, the stress on contractors to remain competitive too often results in the failure to engineer safety into construction projects before they start.

Even the Association of General Contractors Safety Manual states that safety starts at the top:

THE SUPERINTENDENT will be responsible for the safety of the job. He/She will make sure that a safety survey is done before work is begun. (Emphasis added.)

Review of the safety literature reveals that there is fundamental agreement on several safety principles:

1. Safety begins during set up, not after the work has started.

2. Safety begins at the top.

3. A proactive approach is best.

4. Injury-producing incidents are predictable.

5. Effective controls can be anticipated and implemented before hazard exposure occurs.

6. Planning is essential.

7. A hazard should not be allowed to evolve with the expectation that inspection will discover it before injury results.

8. Defining and assigning responsibility and accountability for safety is key to successful management.

9. Unsafe acts and unsafe conditions are symptoms not causes.

10. Safety pays.

Irrespective of these common – and indisputable – principles, safety at construction sites is, too often, an afterthought. That, of course, allows conditions to exist that lead to serious injuries. Added to that is the fact that there is always political pressure to lessen OSHA rules for job site safety.

Interestingly, since 1990, statistics show that lost time incidents are on the decline. Unfortunately, the main reason for this phenomenon is that it has become socially unacceptable for workers to fill out incident reports after they are injured because the employer's workers' compensation premium rating will increase. After what, in the past, would have been a lost time incident, it is now commonplace for employers to simply pay the injured worker directly to sit around – sometimes for months – rather than report the injury to the workers' compensation carrier. Employers even have workers go to doctors that the employer pays for with cash – thus avoiding a lost time incident on the records.

This reluctance by the employers to report lost time incidents is the result of the workers' compensation carriers' propaganda machine in which they have engineered a system with such stiff penalties for lost time incidents that employers are incentivized to convince their loyal employees not to report incidents. Unfortunately, this creates a "catch-22" for the worker: if the employee

does not heal after several months and is forced to bring an action against the employer, the employer then typically asserts that it knows nothing of the incident because no incident report was made.

It is important to keep these basic philosophical principles in mind when handling injury and death cases arising out of construction incidents. You must have a passion for job safety, because if the job sites were kept safe, your clients and their families would not have the huge economic problems and loss of physical and emotional well being that result from job site injuries.

2. Numerous Viable Legal Theories of Liability Exist for Third Party Cases in the Construction Setting

The workers' compensation system provides a low level of subsistence benefits to the employee while shielding the employer from tort liability. The only advantage to the employee is that the employee obtains those minimal benefits without having to prove fault on the part of the employer.

The employer and employee are the directly interested parties. A third party is any viable tortfeasor outside of that employer/employee relationship. The "Third Party Case" is often times the only realistic method of obtaining fair compensation for the injured worker.

The law pertaining to construction incidents has been in the state of flux since the Supreme Court's decisions in Privette v. Superior Court (1993) 5 Cal.4th 689 (Restatement of Torts § 416) and Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253 (Restatement of Torts § 413), which eliminated the peculiar risk doctrine from California law for employees of subcontractors.1

But many other theories of liability remain alive and well for injured employees seeking compensation against general contractors, subcontractors and others on job sites:

1. Common law negligence (Civil Code § 1714)

2. Negligence per se for OSHA violations (Labor Code § 6304.5)

3. The hiring of a negligent contractor (Rest. 2d § 411)

4. Negligent undertaking (Rest. 2d § 324A)

5. The negligent retention of control (Rest. 2d § 414)

6. Dangerous condition of premises (Rest. 2d § 343)

You must have total familiarity with each of these doctrines before embarking on discovery. And you must have complete knowledge of all the California OSHA rules pertaining to construction in order to properly apply the negligence per se doctrine.

3. A Timely Initial Investigation Is Crucial

Hopefully the client will make early contact with you about the incident. This will ensure that photographs of the scene are taken before the conditions change. Obviously, construction sites change dramatically on a daily basis. Letters of preservation must be sent immediately even though the recent cases of Temple Community Hospital v. Superior Court (1999) 20 Cal.4th 464 and Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, drastically limit the viability of spoliation claims against a person not a party to a lawsuit (Temple) and against the actual parties to a lawsuit (Cedars-Sinai).

It is also necessary to hire an investigator to take key witness statements as soon as possible. Witnesses want to help and they have a tendency to aid the first person who contacts them. (See Wellman, "Art of Cross Examination," Collier Books, 4th ed. 1998.) If you do not have full time investigators, you should have an independent contractor on tap who knows what is needed in a construction case.

It is also crucial to get appropriate expert witnesses to the scene as soon as possible so that they can get the information necessary for them to form reliable opinions. One of the most powerful trial tools is to have experts who viewed the scene before it changed – as opposed to the defense's experts having a difficult time reconstructing the case from sheer speculation.

After the investigation is complete, develop the factual contentions of liability so that you can embark on discovery with a plan in place.

4. Be the Aggressor in Discovery

Job sites are run in a militaristic fashion. There is a pyramid of control and authority at the top of which rests the general contractor. In order to develop information about the extent of the general contractor's control over the site, you must conduct very document-intensive discovery. Some of the documents that are necessary include:

Doctor’s First Report of Injury

Employer’s First Report of Injury

Injury and Illness Prevention Plans

Job Logs

Progress Photos

Weekly Coordination Meeting Minutes

Blueprints

Incident Reports

Critical Path Charts

All contracts and subcontracts on the job

Job descriptions

Only after the documents are obtained can you successfully embark on the depositions of the supervisory personnel on the project. It is impossible for the general contractor’s representatives to "pass the buck" when the documents spell out their responsibilities. Accordingly, the first depositions should be of the key supervisory personnel of the general contractor, construction manager and other key subcontractors.

5. Understand the Limited Potential for Plaintiff’s Negligence

Usually the injured construction worker was just doing what he or she was told. Defendants attempt to shift the blame to plaintiffs – like in all other litigation – but are less successful because jurors are loath to find a worker in this context comparatively negligent.

A particularly powerful weapon to defeat assessment of fault to the plaintiff is BAJI 3.40, which reads:

When a person’s lawful employment requires that [he] [she] work in a dangerous location or a place that involves unusual possibilities of injury, or requires that in the line of [his] [her] duty [he] [she] take risks which ordinarily a reasonably prudent person would avoid, the necessities of such a situation, insofar as they

limit the caution that [he] [she] can take for [his] [her] own safety, lessen the amount of caution required of [him] [her] by law in the exercise of ordinary care.

6. Contractual Indemnity Creates Bias

It is typically believed that the plaintiff's co-workers will side with the injured worker. Unfortunately, one of the most powerful forces shaping bias of witnesses in construction litigation is the "indemnity contract" and "additional insured" provision. Simply stated, most subcontractors enter into indemnity/additional insured agreements with the general contractor so that when the general contractor is sued, the subcontractor/employer's carrier defends the general and will pay for any verdict awarded against the general.

This creates a tremendous pressure on the injured worker's employer to do everything it can to defeat the worker's claim. As a result, the applicable indemnity agreements and even additional insured agreements can be admissible to show bias. (Hart v. Wielt (1970) 4 Cal.App.3d 224. See also Morgan C. Smith, "Admissibility of Insurance/Indemnity Agreements," Forum, Nov. 1999.)

When the jury is made aware of this bias and it sees the employer trying to scuttle its own employee, the jury realizes that this conspiracy to defeat the worker's claim must be punished with a large verdict. Jurors do not like uneven playing fields – especially when it is the injured family trying to get just compensation from a powerful corporation unfairly trying to defeat a valid claim.

7. Defendant Summary Judgment Motions Present an Opportunity to Make the Case Un-triable for the Defense

It is fashionable for defendants to make motions for summary judgment on many construction incident cases. This is so because the defendant (usually the general contractor) attempts to blame the incident completely on the plaintiff's employer. Defense attorneys who represent general contractors typically have the general contractor's supervisors sign declarations in support of the general contractor's summary judgment motion which lack credibility and exaggerate their positions. Similarly, the employer's supervisory personnel, motivated by the indemnity clause, fall on the sword as sacrificial lambs by saying "it was our fault, not the general's."

Be sure to set the depositions of all persons who file declarations in support of these defense motions. You should even consider having the plaintiff present when the "exaggerating" witnesses are deposed.

When the summary judgment is denied, the defendant general contractor and employer are locked into such ludicrous positions that a jury will penalize them for their lack of credibility and the case becomes un-triable for the defense.

Thus, you need not dread the fact that a summary judgment is filed. Look at it as an opportunity to lock defendants in to untenable positions. During jury selection when the jurors state that they do not want to sit through a frivolous case, ask them if they would be equally upset if they were forced to sit through a meritorious case with a frivolous defense.

8. Understand the Parameters of the Worker's Compensation Lien

The subrogator for the workers compensation carrier is the plaintiff's friend. There should be a mutual sharing of information with the subrogator and the plaintiff's attorney from the beginning of the case. It always benefits the workers' compensation carrier to help the worker's lawyer by providing documents and assisting with investigations. Irrespective of this, the law and facts are going to dictate what will happen to the lien in the case.

When a workers' compensation lien exists, you not only calculate set-off (see below) but also the amount of repayment that the workers' compensation carrier gets back, if any. The formula to determine the "Threshold Level" is set forth in Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 829, 843 as follows:

When the issue of an employer's concurrent negligence arises in a judicial forum, application of comparative negligence principles is relatively straightforward. The third party tortfeasor should be allowed to plead the employer's negligence as a partial defense, in the manner of Witt. Once this issue is injected into the trial, the trier of fact should determine the employer's degree of fault according to the principles of American Motorcycle. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liability – up to the amount of the workers' compensation benefits assessed against the employer…. Correspondingly, the employer should be denied any claim of reimbursement – or any lien under section 3856, subdivision (b) – to the extent that his contribution would then fall short of his percentage share of responsibility for the employee's total recovery.

Thus, the formula for determining the "Threshold Number" is calculated by multiplying the percentage of the employer's negligence assessed by the jury by the total damage award:

FORMULA FOR THRESHOLD NUMBER

(Total economic and non-economic

verdict before any deductions)

X (% of employer's negligence)

Threshold Number

As an illustrative example, assume there is a $100,000 worker's compensation lien, a total net verdict of $1,000,000 and a determination of 40% employer's negligence. To determine the threshold number, the $1,000,000 verdict is multiplied by the 40% employer fault, which equals $400,000. This is the threshold number below which the employer is not entitled to any recovery from the third party defendant. In the given hypothetical, the employer is entitled to no repayment of the $100,000 lien because its threshold level of fault is much higher ($400,000).

The calculation of the workers' compensation "threshold number" is not to be confused with the set-off of the lien, which occurs regardless of the right of the employer to receive funds or not. Set-off prevents plaintiff from being paid twice for the same damages. The threshold number prevents a negligent employer from benefitting from his or her own negligence.

Torres v. Xomox Corp. (1996) 49 Cal.App.4th 1, 7, is the lead case in determining the amount of the worker's compensation lien setoff from the verdict:

We conclude that the proper method of allocating workers' compensation benefits under Proposition 51 is the same one that has been adopted for pre-verdict settlements in a line of cases beginning with Espinoza v. Machonga (1992) 9 Cal.App.4th 268. Under this "Espinoza" approach, workers' compensation benefits are to be allocated between economic and non-economic damages in the same proportions as those damages are awarded by the trier of fact." (See also Scalice v. Performance Cleaning Systems (1996) 50 Cal.App.4th 1632.)

Therefore, to calculate lien set-off, assuming the $1,000,000 verdict is 70% economic, the same percentage is applied to the workers' compensation lien. In the hypothetical the $100,000 compensation lien is multiplied by 70%, which would equal a $70,000 deduction.

Worker's compensation subrogators should be dealt with fairly and rewarded for helping make plaintiff's case one of higher value. However, the complexities of the law must be understood and applied to the facts of the case which may result in lien waiver and a payment of new money.

9. Understand the Factors That Come into Play in Determining a Final Judgment

In order to determine the value of a construction incident case, you need to determine all of the factors that come into play. These factors include: 1) the effect of the workers' compensation lien discussed in point 8, above; 2) percentages of negligence of the third party, employer and plaintiff and the effect on economic and non-economic damages; 3) the effect of pre-trial settlements on a verdict; 4) the effect of collectible costs; and 5) the effect of cost and prejudgment interest penalties per CCP § 998 and trial de novo penalties per CCP § 1141.21(a).

It is necessary to show the effect of these issues to illustrate probable net judgment scenarios to a client before trial, to help convince the defense of the value of the case in settlement negotiations and to be able to swiftly calculate a net judgment on a jury verdict after a trial.2

Anyone interested in a pre-formatted template for Microsoft Excel, that will automatically calculate each of the foregoing factors with an explanation of the steps taken, can send a self-addressed stamped (75 cent) 8 x11 inch envelope to: The Arns Law Firm, Judgment Spreadsheet Request, 101 Spear Street, San Francisco, CA, 94105 and a disk with hard copy instructions will be mailed.

10. Using Mock Trials to Best Understand the Case

Construction cases are particularly suited to a full-blown mock trial with jurors who are hired from the geographic area of the expected jury pool. Perhaps the most interesting aspect of the mock trial in a construction case is that even conservative jurors want to help a person who has been injured on the job. Jurors are appalled when defendants and employers take untenable positions in an effort to defeat a deserving family of just compensation. This knowledge gives the plaintiff's lawyer greater power and confidence at time of trial.

Conclusion

No plaintiff’s lawyer has ever represented a client who was glad they were seriously injured. Injured workers want to get back to work and support their families. Most construction cases present workers who make great witnesses and who have been injured by lack of proper safety precautions engineered into the job. Thus the properly worked-up construction case helps make the family whole again.

1 See, Robert A. Arns, "Another View of the Peculiar Risk Doctrine" Vol. 12, No. 3, 1999 California Litigation, which addresses the Supreme Court’s obliteration of this doctrine through the specious argument that workers’ compensation benefits should be enough.

2 See, Robert A. Arns, "Calculating the Judgment on Jury Verdict: Where Art Meets the Math Nightmare," Forum, April 1999.