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# The unique inequity of *Privette* and its progeny in wrongful-death cases

## A NEW TAKE ON CHALLENGING *PRIVETTE* AND SECURING ITS REVERSAL BY THE CALIFORNIA SUPREME COURT

Cases involving the serious injury or death of an employee of an independent contractor highlight a fundamental flaw in the rationale of the California Supreme Court's holding in *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*). The *Privette* doctrine is based on the incorrect premise that the workers' compensation system achieves the "identical purposes" that underlie recovery under the peculiar risk doctrine. It does not. As a result of this flawed rationale, the application of *Privette* and its progeny subverts fundamental public policy and impermissibly robs injured employees of independent contractors and their families of their statutory right to seek their full damages from third parties who caused them harm.

For example, the workers' compensation system limits death benefits to the heirs or dependents of the deceased worker, while a civil wrongful-death actions may be brought by adult children of the deceased whether or not they were dependents at the time of death. Thus, a person who is entitled to bring a civil wrongful-death actions may be barred by *Privette* and simultaneously precluded from receiving workers' compensation benefits. Moreover, in most cases, the workers' compensation system limits the amount of benefits available for a worker's death to a maximum of $250,000. Conversely, in a civil wrongful-death actions, the trier of fact determines what is just compensation.

As discussed in this article, from both a liability and damages perspective, *Privette*'s application in wrongful-death claims creates a unique set of inequities and serious prejudice to an employee of an independent contractor. Under stare decisis, appellate courts are bound by the higher courts of this state, and therefore lack the authority to directly overrule *Privette* and its progeny. (See, *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455-456.) However, this article offers a new take on challenging *Privette* and ideally, securing its reversal by the California Supreme Court.

### Evolution of the *Privette* doctrine

**Pre-*Privette***

At common law, a person who hired an independent contractor to perform a task generally was not liable to third parties for injuries caused by the independent contractor's negligence. One exception is the doctrine of peculiar risk, under which a person hiring an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes others' injuries. (*Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 646-648.) Thus, peculiar risk operates to limit the common-law rule and expands vicarious liability.

By imposing liability without fault on the person who hires the independent contractor, the peculiar risk doctrine attempts to ensure that (1) injuries caused by inherently dangerous work will be compensated, (2) the person who benefits from the contracted work bears responsibility for any risks of injury to others, and (3) adequate safeguards are taken to prevent such injuries. (*Privette, supra,* 5 Cal.4th at p. 691.)

Under the peculiar-risk-doctrine, an injured plaintiff may recover all damages proximately caused by the tortfeasor, whether it could have been anticipated or not (Civ. Code, § 3333), including the full array of economic damages for harms that includes earnings and profits, substitute domestic services and business opportunities, regardless of others' fault. (*Ibid*., see also, Civ. Code, § 1431.2, subd. (b)(1) (economic damages joint and several).)

**Privette *eliminates the peculiar risk-doctrine for employees of independent contractors***

In 1993, the California Supreme Court decided *Privette,* and eliminated *peculiar risk* for injured employees of independent contractors, based largely on the premise the injured employee would be compensated through the workers' compensation system. (*Privette*, *supra*, 5 Cal.4th at p. 701-702; *Johnson v. Raytheon Co.* (2019) 33 Cal.App.5th 617.) The *Privette* Court concluded the workers' compensation system achieved the "identical purposes," that underlie recovery under the peculiar risk-doctrine.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2021

Specifically, the Court ruled, "[I]t ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work, by including the cost of workers' compensation insurance in the price for the contracted work; and it encourages industrial safety." (*Privette*, *supra*, 5 Cal.4th at pp. 701-702.)

*Privette*'s progeny has further narrowed employees' private rights of action regarding peculiar risk for workplace injuries. Five years after *Privette*, the California Supreme Court decided *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 256-257. In *Toland*, the Court considered whether the *hirer of an independent contractor* was liable to the *contractor's employee* for failing to include special precautions to avert the risks of the work. The majority held the hirer was insulated from liability because no duty was owed to the injured employee.

In 2001, the Supreme Court also barred claims by injured employees for negligently hiring an independent contractor. (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1238.) These decisions rest on the premise that the workers' compensation system is available and adequate to the task.

## Workers' comp and Privette's assumptions

Contrary to *Privette*'s assumption, workers' compensation does not achieve the identical purposes that underlie the peculiar risk doctrine. *Privette* identified a number of policy considerations as the basis for its decision, all of which arose from the assumption employees of a contractor are covered by the workers' compensation system. However, this is fundamentally unsound and warrants reconsideration. The substantial disparity in benefits available through workers' compensation and recoverable damages in (peculiar risk) tort cases, makes this obvious.

*Privette* and its progeny have failed to recognize or deal with the chasm between the nature of recoverable "compensation" attainable under the peculiar risk doctrine and an "award" from the WCAB. The compensation afforded by tort damages substantially exceeds anything available through workers' compensation – even serious and willful violations.

"The Workers' Compensation Law is intended to provide compensation for disability incurred by employment. The purpose of the award is *not* to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. [citation] *The purpose of workmen's compensation is to rehabilitate, not to indemnify,* and its intent is limited to assuring the injured workman subsistence while he is unable to work and to effectuate his speedy rehabilitation and reentry into the labor market. [citation]." (*Internal quotations Omitted*) (*emp. supp.*) (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1300.) Obviously, this purpose is not served or achieved in wrongful-death cases.

The difference in workers' compensation benefits and tort damages, "stems from the *fundamentally different nature* of the workers' compensation system and the tort law system." (emp. supp.) (*Scalice v. Performance Cleaning Systems,* (1996) 50 Cal.App.4th 221, 231 (and cases cited).) "Workers' compensation benefits, even when they superficially resemble economic damages, are the product of a rough statutory approximation of what the average injury of a particular type should yield, rather than a precise computation of actual monetary losses." (*Id.* at p. 230; see also, Lab. Code, § 4702.) Only the legislature determines what worker's compensation benefits are (see, *Bautista v. State of California* (2011) 201 Cal.App.4th 716, 729), and it depends entirely on whether the deceased employee has "total" or "partial dependents." The maximum death benefit, if there are three or more total dependents, is $320,000. (Lab. Code, § 4702, subd. (a).) These benefits are paid in the same manner as temporary total disability indemnity – weekly. (*Ibid.* at subd., (b).)

## Workers' comp lacks general damages

Workers' compensation does *not* include general damages for non-economic harms and neither does it empower spouses to sue for loss of consortium. The workers' compensation scheme does not offer *any* equivalent for a civil loss-of-consortium claim including the loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, enjoyment of sexual relations, ability to have children. (Civ. Code, § 3333; *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408, and *Ledger v. Tippitt* (1985) 164 Cal.App.3d 625.) Both rights and remedies were available to workers before *Privette,* and neither have been adequately substituted for fair and adequate recoveries in a *Privette*-limited wrongful-death actions.

In a lengthy discussion of *Privette* and its progeny, the Court of Appeal in *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334 (*Browne*) recognized the inequities resulting from *Privette*. (*Id.* at p. 1340.) There, plaintiff was an employee of a subcontractor who was injured in a fall. He claimed that the property owner and the general contractor acted negligently in removing safety devices from the work area.

The Court of Appeal observed, "[i]f the [peculiar risk] doctrine were still available, it would clearly apply here, because the work in which plaintiff was engaged inherently involved a clear and distinct risk of falling, against which defendants might have been under a duty to require that precautions be taken." (*Browne*, *supra*, 127 Cal.App.4th at p.1340.) The *Browne* court continued, "There is no reason to exempt the hirer from liability under circumstances where a *complete stranger* would be liable. Nothing in these cases suggests that with respect to its own action (as distinct from imputed or constructive) negligence, the hirer should enjoy any more freedom from liability to workers on its site than

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2021

would an invitee or passerby. A hirer must be liable on general tort principles if, for example, he causes foreseeable harm by heedlessly shouting at a contractor's employee, distracting him from some hazardous task in which he is obviously engaged. These [*Privette*] cases only excuse the hirer from a *duty* to protect employees from the *negligence of their own employer*. Where the hirer breaches a duty arising under general tort principles, nothing in these cases suggest that it may not be liable." (*Id*. at p. 1346; see also, *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 595 (*SeaBright*).)

## Wrongful-death cases

Wrongful-death cases, in particular, present a prime example of where *Privette*'s application subverts fundamental public policy. Code of Civil Procedure section 377.60 provides a tort cause of action for the death of a person caused by the wrongful act or neglect of another. It follows intestate succession: The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession. (*Ibid*.) Before *Privette*, a decedent's family enjoyed rights of action that were unimpeded or unbounded by a bureaucratic system of benefits.

However, under California's workers' compensation scheme, benefits are only payable to heirs at law and only partial or total dependents are eligible for death benefits. (*Matthews v. Liberty Assignment Corp*. (2016) 247 Cal.App.4th 71, 80, *Williams v. Workers' Comp. Appeals Bd.* (1993) 17 Cal.App.4th 582, 589.)

In addition, tort damages for wrongful-death heirs include non-economic damages like the pecuniary value of the lost love, affection, society and solace from the decedent, and can be recovered for past and future losses by each heir individually (and collectively for the claim). (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 799-800.)

In stark contrast to tort damages, workers' compensation specifically excludes general damages in all cases. In serious injury and wrongful-death cases, such damages constitute a significant portion of the plaintiff's recovery. *Privette*'s holding denies this compensation for injured and deceased employees of independent contractors. The *best* that workers' compensation offers a spouse for the death of the other is $250,000. (Lab. Code, § 4702.) It pales in comparison to the compensation a trier of fact may award an injured spouse or heirs of the decedent.

By depriving a deceased worker's heirs of their full tort damages based on the rationale that they will be compensated by the workers' compensation system, *Privette* penalizes those who expect monetary compensation the most.

## A multifaceted challenge of *Privette* and its progeny

***Privette undermines statutory law to fully compensate victims for all the detriment proximately caused by a wrong***

*Privette* should be overturned because it is a judicial usurpation of *bona fide* negligence claims that is neither mandated by a legislative exception (see, Civ. Code, § 1714) nor justified by oft-cited tenets of sound public policy. Although the *Privette* Court reasoned public policy justified eliminating the peculiar risk-doctrine for injured employees of independent contractors, its assumption underlying that public policy was a false equivalency of tort recoveries for damages and workers' compensation benefits.

A negligence claim in California is a statutory right of action against third parties that must not be judicially abrogated. It is a fundamental principle of our system of jurisprudence that for every legal wrong there is a remedy (Civ. Code, § 3523), and that an injured party should be compensated for *all* damage proximately caused by the wrongdoer unless a departure from the basic principle is mandated by a legislative exception or by strong public policy. (*Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 433; *Barbara A. v. John G*. (1983) 145 Cal.App.3d 369, 376.)

Civil Code section 3333 explicitly states, "the measure of damages...is the amount which will compensate for *all the detriment proximately caused*," by the breach of an obligation (other than contract), to wit, a *duty of care* to employees of independent contractors. (emphasis added.)

***Labor Code section 3852 expressly preserves the statutory right to recover all damages for workers who are injured or killed on the job and receive workers' compensation benefits***

Labor Code section 3852 entitles the injured (or family of killed) employee to receive full compensation from a liable third party. "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..." (*Ibid*.)

Thus, by enacting Labor Code section 3852, the Legislature expressly protected the right of employees to recover all damages available under Civil Code section 3333 in cases where a worker was injured or died on the job, and workers' compensation benefits had been paid.

**Privette *violates the California constitution by improperly nullifying statutory law***

*Privette*'s elimination of the peculiar risk doctrine and cases against the hirer cannot be reconciled with Labor Code section 3852, and therefore violates the separation of powers between the legislature and judiciary. (Cal. Const., art., III, § 3.)

Labor Code section 3852 authorizes an employee to pursue his right of action for *all damages* proximately resulting from the injury or death against any person *other than the employer*. As detailed above, in cases where *Privette* is applied, it restricts the scope of general contractors and owners who may be held liable and the nature and amount of damages available to injured workers and their heirs. *Privette*'s limitations on these rights

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2021

violates section 3852 for a specific subset of employees in construction cases. Considering section 3852 was passed by the Legislature, it is presumed constitutional (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086) and cannot be reconciled with *Privette*.

*Privette* ignored the importance of separation of powers. While disagreeing with Labor Code section 3852's application to construction cases, *Privette* never addressed – let alone found – any constitutional violation. Rather, the Court blurred the line between judicial *interpretation* and legislating out peculiar risk. If the elected Legislature had been moved to carve out an exception to section 3852, it could have done so. *Privette* is the elephant in the room and those in the construction trades and their heirs are in a *peculiar* place because of it.

Simply, workers' compensation does *not* achieve the identical purposes that underlie the peculiar risk doctrine – it undercuts them. And *Privette* cannot withstand constitutional scrutiny, as it lacked authority to overturn Labor Code section 3852's codification of the peculiar risk doctrine.

## Small successes create some exceptions to *Privette*

The State Supreme Court has acknowledged that *Privette* cannot abrogate Labor Code section 3852 but has failed to restore its mandate. Nine years and multiple related opinions after *Privette*, including Supreme Court decisions in *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, and *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, the California Supreme Court decided *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), and held an employee or heirs could sue the hirer if the latter retained control over the safety conditions at the worksite and affirmatively contributed to the injury or death. (*Id*. at p. 202.)

"If an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then *permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an unwarranted windfall*. The tort liability of the hirer is warranted by the hirer's own affirmative conduct. The rule of workers' compensation exclusivity 'does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury.'" (*Hooker*, at p. 214, citing, *Privette*, at p. 697, *emphasis added*.) "[W]hen affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer." (*Privette,* at p. 214.)

In a companion decision to *Hooker*, the Supreme Court decided *McKown v. Wal-Mart Stores* (2002) 27 Cal.4th 219, and adopted the dissenting views in *Toland* and *Hooker* that comparative fault applied in cases against the hirer of an independent contractor. In *McKown*, an independent contractor's employee sued the hirer for negligent provision of unsafe equipment. The Court held that if a hirer's employees negligently and affirmatively contributed to the injury, the hirer was liable for its own negligence, and plaintiff's recovery was subject to offset based on comparative fault. (*Id.* at p. 226.)

The Court has also scaled back *Privette*'s reach through the so-called "*Kinsman*" exception. (See, *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659.) "[A] landowner that hires an independent contractor may be liable to the contractor's employee if the following conditions are present: the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition." (*Id.* at p. 664, & fn. 36.)

These small successes in creating "exceptions" to the *Privette* doctrine have done little to limit the expansive view of *Privette*'s reach by trial and appellate courts in this state. In consequence, employees' heirs are treated disparately and undercompensated.

## Hope on the horizon

The California Supreme Court has recently granted review in a few post-*Privette* cases, indicating that the Court may be interested in revisiting this unfortunate doctrine. For instance, the Court granted a petition for review in *Sandoval v. Qualcomm Inc.*, case number S252796, after the Court of Appeal, in an unpublished opinion, affirmed a judgment in a civil action. The issue upon which the Court granted review is, "Can a company that hires an independent contractor be liable in tort for injuries sustained by the contractor's employee based solely on the company's negligent failure to undertake safety measures or is more affirmative action required to implicate *Hooker*?"

Similarly, the Court granted review in *Gonzalez v. Mathis*, case number S247677, on the issue, "Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor?" As of February 2021, the Court had not issued a decision in either case.

Although a few published opinions have narrowed the *Privette* doctrine, wrongful-death cases highlight the inequities and injustices of applying the doctrine and it cannot be reconciled with Labor Code section 3852. The time has come for the California Supreme Court to revisit and abolish *Privette*.

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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
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