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Recommended Citation
Linda S. Calvert Hanson, *Employers Beware! Negligence in the Selection of An Independent Contractor Can Subject You To Legal Liability*, 5 U. Miami Bus. L. Rev. 129 (1995)
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EMPLOYERS BEWARE! NEGLIGENCE IN THE SELECTION OF AN INDEPENDENT CONTRACTOR CAN SUBJECT YOU TO LEGAL LIABILITY

Linda S. Calvert Hanson*

BACKGROUND AND PURPOSE

The long established doctrine of respondeat superior or imputed negligence provides that employers can be held vicariously liable in tort law for the negligence of their employees under various circumstances. It is premised on the notion that one who is in a position to exercise control over the performance of a service must exercise it or bear the loss.[1] An employee is usually regarded as a member of the employer's staff and subject to the control of the employer.[2] The employee's tortious acts committed within the scope of his employment, resulting in liability are therefore, imputed to the employer due to the working relationship that exists between the parties.[3]

Generally, the employer of an independent contractor is immune from vicarious liability for damages to a third party for the negligent acts of the contractor, committed during the performance of the agreement.[4] An independent contractor is commonly defined as one who contracts to perform a certain task or duty independently according to their own means and methods without being subject to the control of the hiring party except as to the ultimate

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The author expresses her gratitude for insightful comments provided by Dr. Thomas E. Durkin, Assistant Professor of Criminology and Law at the University of Florida and J. Michael Davis, Visiting Assistant Professor of Criminology and Law at the University of Florida.

1 W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON TORTS, § 71, at 500 (5th ed. 1984 & Supp. 1988) [hereinafter PROSSER ON TORTS].

2 RESTATEMENT (SECOND) OF AGENCY, § 2(1)-(2) (1958).

3 *Id.*

4 RESTATEMENT (SECOND) OF TORTS, § 409, (1965); RESTATEMENT (SECOND) OF AGENCY, § 219, (1958); PROSSER ON TORTS, *supra*, note 2 at 501-516. Many commentators have noted that this general rule is almost at the point where the exceptions have swallowed the rule. For example, in Henderson Brothers Stores, Inc. v. Smiley, 120 Cal. App. 3d 903, 174 Cal. Rptr. 875 at 878 (Ct. App. Cal. 1981) the district court of appeals discussed this phenomena by citing to many authorities before concluding that " . . . it seems proper to say that nonliability is now the exception: i.e., the so-called general rule is followed only where no good reason is found for departing from it." *See also,* "Note, Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule," 40 U. CHIC. L. REV. 661 at 675 (1973).

goal or result.[5] Historically, in circumstances where this level of independence existed, the imposition of liability on the hiring entity who only exercised limited control over the method in which the contracted work was performed resulted in inequity. As Dean Prosser explained, the work is to be "regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing against it."[6] The distinction between an "employee" and an "independent contractor" therefore, can become a critical liability issue to the hiring entity.[7]

Three significant exceptions to the nonliability doctrine for independent contractors exist.[8] The first exception is premised on the supposition that certain of the employer's responsibilities are so important to the community that they are deemed to be non-delegable duties, even when that task is done by an independent contractor.[9] This doctrine holds the employer vicariously liable for the negligence of the independent contractor even given a showing that the employing party exercised due care. Examples of this exception based on non-delegability include: the duty of the government to maintain highways and roads, a railroad's duty to maintain safe tracks and crossings, the duty to provide safe working environments for employees, and the duty to provide a reasonably safe premises for business visitors.[10]

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5 *Eg.*, 41 AM. JUR. 2d, *Independent Contractors* § 1 (1968); Washington Pattern Jury Instr. 3d Civil §50.11 (1989).

6 PROSSER ON TORTS, *supra* note 2 at 509.

7 This statement is not meant to infer that this is the only possible relationship. The principal-agent relationship permeates case law and can impact on such important issues as whether or not the agent acting on behalf of the principal can subject the principal to liability for the agents acts or omissions to act. This aspect of agency law, however, is beyond the scope of this article. For example, hospitals as one class of employer in particular, continue to struggle to discriminate between whether its staff physicians are agents (for whose acts they can be held liable) or whether they are independent contractors (for whose acts they will not normally be liable) in the medical malpractice context. *See eg.*, Jack W. Shaw, Jr., Annotation, *Hospital Liability for Negligence in Selection or Appointment of Staff Physician or Surgeon*, 51 A.L.R. 3d 981 (1973); "Albain v Flower Hospital: Halting the Expansion of Hospital Liability for Negligence of Physicians in Ohio," 19 N. KY. L. REV. 393 (Winter, 1992); Dr. Malcolm A. Meyn, Jr., "The Liability of Physicians Who Examine for Third Parties," 19 N. KY. L. REV. 333 (Winter, 1992); Comment, "Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency Doctrine," 56 U. CIN. L. REV. 711 (1987); and John Dwight Ingram, "Liability of Medical Institute for the Negligence of Independent Contractors Practicing on their Premises," 10 J. CONTEMP. HEALTH L. & POL'Y 221 (1994).

8 41 AM. JUR. 2d, *Independent Contractors* §24 (1968).

9 RESTATEMENT (SECOND) OF TORTS, § 416 et seq. and Topic 2 Introductory Note, at 394 (1965); PROSSER ON TORTS, *supra* note 2, at § 71, 511-12. Prosser explains that the non-delegable duty can be imposed by statutes or ordinances, contracts, and by common law.

10 *Id.*

A second exception involves situations where the independent contractor performs work likely to be a peculiar risk[11] or an inherently dangerous function.[12] The essence of these phrases is that given the nature of the task a high degree of danger to others can result absent special precautions.[13] Circumstances demonstrating this hazardous situation exclusion include: a case wherein the Department of Defense contracted with an independent contractor for the disposal of oil contaminated with toxic chemicals from a Florida military installation,[14] a case involving the construction of a dam,[15] and a case in which a private company produced antitank explosives for the government.[16] The justification advanced for these two exceptions, non-delegable duty and inherently dangerous work, is that it would be unconscionable if the employer escaped liability for burdensome obligations merely by contracting out or shifting their responsibility to the independent contractor.[17]

The hiring party's personal negligence triggers the third exemption. That is, after engaging an independent contractor, the employer may still face exposure to independent liability as opposed to vicarious liability, should the employer personally conduct himself in a negligent manner.[18] The thrust of this

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[11] *See* Russell L. Wald, "Liability of Employer of Independent Contractor under 'Peculiar Risk' Doctrine, 7 AM. JUR. PROOF OF FACTS 3d 477 (1990).

[12] *See* 41 AM. JUR. 2d, *Independent Contractors* §41 (1968) and Jonathan M. Purver, "Inherently Dangerous Nature of Work Performed by Independent Contractor, 34 AM. JUR. PROOF OF FACTS 2d 483 (1983).

[13] RESTATEMENT (SECOND) OF TORTS, § 427 (1965); PROSSER ON TORTS, *supra* note 2, at § 71, 512; Francis M. Dougherty, Annotation, *Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor*, 34 A.L.R. 4th 914 (1984); "Liability to Employees of Independent Contractor Engaged in Inherently Dangerous Work: A Workable Workers Compensation Proposal," 48 FORDHAM L. REV. 1165 (1980); Jonathan M. Purver, "Inherently Dangerous Nature of Work Performed by Independent Contractor," 34 AM. JUR. PROOF OF FACTS 2d 483 (1983).

[14] Dickerson, Inc. v. United States, 875 F.2d 1577 (11th Cir. 1989).

[15] Lipka v. United States, 249 F. Supp. 213 (N.D. N.Y. 1965).

[16] Toole v. United States, 443 F. Supp. 1204 (E.D. Pa. 1977).

[17] Alan O. Sykes, "The Economics of Vicarious Liability," 93 YALE L.J. 1231 at n.122 (June 1984).

[18] The Restatement identifies a number of categories which fall within the exception that the status of employing an independent contractor does not absolve the hiring entity from its own personal negligence. Examples of situations in which the employer of an independent contractor can be liable for its own acts include when the employer fails to exercise reasonable care in: 1) giving instructions to the independent contractor as to how the work is to be accomplished [RESTATEMENT (SECOND) OF TORTS, § 410, (1965)]; 2) engaging only independent contractors competent to safely perform the work [(RESTATEMENT (SECOND) OF TORTS, § 411, (1965)]; 3) inspecting the work while or after it is performed, to ensure that the work is done so as to secure the safety of others [RESTATEMENT (SECOND) OF TORTS, § 412, (1965)]; 4) providing for necessary precautions, by either the employer or the contractor to enable the work entrusted to the contractor to be safely done when a peculiar unreasonable risk of physical harm could create dangers, absent language in the contract [RESTATEMENT (SECOND) OF TORTS, § 413, (1965)]; 5) over areas in which the employer

analysis will be to consider one aspect of the employer's independent liability that can result from the negligent selection of an independent contractor.[19] The status of employing an independent contractor does not absolve the hiring party from its personal negligence when the employer fails to exercise reasonable care in engaging only independent contractors competent to safely perform the work.[20]

This analysis will begin by defining the status of an independent contractor before analyzing the negligent selection doctrine. It will discuss the class of potential plaintiffs before scrutinizing a sampling of cases that have alleged this

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retains control [RESTATEMENT (SECOND) OF TORTS, § 414, (1965)]; 6) supervising the equipment and methods of persons working upon his land when the land is held open to the public [RESTATEMENT (SECOND) OF TORTS, § 414A and 415, (1965)]. *See also,* — Annotation, *Independent Contractors: Liability of Employer as Predicated on the Ground of His Personal Fault,* 30 A.L.R. 1502 (1924).

[19] Policy considerations cited by Dean Prosser for imposing liability on the hiring party include that "the enterprise is still the employer's, since he remains the person primarily to be benefitted by it; that he selects the contractor and is free to insist upon one who is financially responsible, and to demand indemnity from him, and that the insurance necessary to distribute the risk is properly a cost of his business." PROSSER ON TORTS, *supra,* note 2 at 509. *See also,* Reuben I. Friedman, Annotation, *When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor,* 78 A.L.R. 3d 910 (1973); *see also,* Jack W. Shaw, Annotation, *Hospital's Liability for Negligence in Selection or Appointment of Staff Physician or Surgeon,* 51 A.L.R. 3d 981 (1973); Frederick E. Felder, *Lack Of Care In Selecting Independent Contractor,* 11 AM. JUR. PROOF OF FACTS 2d 499 (1976).

[20] RESTATEMENT (SECOND) OF TORTS, §411, (1965). Note also that the negligent selection of an employee by an employer can provide the basis for liability independent of vicarious liability. Should an employee lack the appropriate skills and subsequently perform his work incompetently which results in injury to another, the employer can be deemed negligent in the selection of the employee for that particular task. *See,* Western Stock Center, Inc. v Sevit, Inc., 195 Colo. 372, 578 P2d 1045 at 376, 1048 n.1 (1978); David P. Chapus, Annotation, *Liability of School Authorities for Hiring or Retaining Incompetent or Otherwise Unsuitable Teacher,* 60 A.L.R. 4th 260 (1988). The negligent selection theory whether applied to the hirer of an employee or an independent contractor still can result in the direct imposition of liability on the hiring entity. Negligent selection, however, must be set apart from the somewhat akin, more newly recognized tort of negligent hiring. Negligent hiring, predicated on a respondeat superior basis alleges that an employer negligently hired an employee who (in most circumstances) commits an intentional tort against an innocent party while on the job, but outside of the scope of employment. The injured party claims that the employer failed to make a proper inquiry into the employees background which would have revealed dangerous propensities of the employee. Negligent hiring invokes the vicarious liability doctrine whereas negligent selection of an incompetent independent contractor or employee utilizes the direct liability concept. *See e.g.,* Note, "Negligent Hiring—Holding Employers Liable When Their Employees' Intentional Torts Occur Outside of the Scope of Employment," 37 WAYNE L. REV. 237 (Fall, 1990); Note, Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees, 13 DEL J. CORP. L. 501 (1988); Thomas R. Malia, Annotation, *Security Guard Company's Liability for Negligent Hiring, Supervision, Retention or Assignment of Guard,* 44 A.L.R. 4th 620 (1986); John H. Derrick, Annotation, *Landlord's Tort Liability to Tenant for Personal Injury or Property Damage Resulting From Criminal Conduct of Employee,* 38 A.L.R. 4th 240 (1985); Note, Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory, 68 MINN L. REV. 1303 (1984).

negligent selection cause of action to ascertain the level and type of inquiry necessary to determine the competency of a contractor. Circumstances under which courts are willing to impose liability for this malfeasance will be examined to assess the potential legal exposure to the hiring party. Special attention will be given to the unique situation that can arise when government entities engage the services of independent contractors and assert the immunity defense to challenges of an incompetent contractor. The article will conclude with an assessment of mechanisms to avoid legal liability for this cause of action and a prediction regarding the future expansion of this tort to include recoveries from economic damages.

INDICIA OF THE INDEPENDENT CONTRACTOR RELATIONSHIP

Independent contractors perform a variety of beneficial labor to others. Part of the need fulfilled by the hiring of an independent contractor is to provide services that the employers themselves cannot provide whether due to lack of knowledge or expertise, a lack of specialized equipment or a lack of trained personnel to perform the needed services. Another inducement for contracting for services is that the hiring entity is not required to pay social security taxes, or benefits such as unemployment compensation,[21] worker's compensation,[22] retirement, or medical insurance. Instead, compensation is usually in a flat fee, which can have distinct tax consequences for the hiring party.[23] An additional

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21 *See* Donald A. Brenner, "The Employer's Fruitless Quest for Independent Contractor Status," 21 COLO. LAW. 459 (Mar. 1992) for a discussion of the Colorado Employment Security Act which provides that employers must pay into unemployment benefit fund, however, the hirer of an independent contractor is not required to pay the same tax. *See also,* Christopher J. Cotnoir, "Employees or Independent Contractors: A Call For Revision of Maine's Unemployment Compensation 'ABC' Test," 46 MAINE L. REV. 325 (1994).

22 This was true under the traditional view, however, some jurisdictions have altered this rule statutorily. For discussions of this modification *see eg.,* Note, "Workmen's Compensation Coverage on an Independent Contractor - Determinative of Employee Status under the Alabama Workmen's Compensation Act," 22 CUMB. L. REV. 787 (Spring 1992); Barbara P. Kozelka, "Independent Contractor's and Colorado's Workers' Compensation Act, 22 COLO. L. 545 (Mar. 1993).

23 *See eg.,* Robert K. Johnson and Stephen D. Rose, "Classification of Workers As Employees or Independent Contractors: A Proposed Legislative Solution," 10 AM. J. TAX POL'Y 1 (Spring 1992) for a discussion of the tax liability differences for employees as opposed to independent contractors. *See also,* Steven M. Burke, "Implications of IRS Recharacterization of Independent Contractors as Employees," 33 N.H. B.J. 307 (Mar. 1992); Thomas J. Dwyer, "That Control Thing: Employment Status of Worker Defines Tax Obligation," 79 A.B.A. J. 90 (June 1993); Avery A. Neumark, "Employee vs. Independent Contractor Status," 51 INSTIT. FED. TAX 7 (Jan. 1993); Myron Hulen, "Independent Contractors: Compliance and Classification Issues," 11 AM J. TAX POL'Y 13 (1994); James L. Rigelhaupt, Annotation, 51 A.l.r. FED. 59,

benefit is that employing an independent contractor may reduce the employers susceptibility to legal liability.[24] Contract provisions routinely maintain that the independent contractor will provide appropriate levels of insurance and that the contractor will assume liability for tort actions.[25]

The types of situations in which employers rely upon the assistance of an independent contractor vary. Services provided by contractors range from the more traditional timber removal to building contractors and subcontractors[26] such as plumbers and electricians[27] to independent truck and transport drivers,[28] to repair technicians[29] to landscapers and tree trimmers[30] to painters to salespersons.[31] More contemporary cases reveal an expansion in the use of independent contractors into such areas as food service,[32] pizza delivery drivers,[33] collection agencies, repossession services,[34] private security guards,[35]

Income Tax Withholding, What Constitutes Employer-Employee Relationship for Purpose of Federal Income Tax Withholding, (1981).

[24] *See* Rick A. Pacynski, "Legal Challenges in Using Independent Contractors," 72 MICH. B.J. 671 (Summer 1993).

[25] The general rule is that employers cannot be vicariously liable for the intentional torts committed by its employee. Note however, that there appear to be situations which can give rise to an imposition of liability on the hiring party for the commission of intentional torts by an independent contractor. *See eg.*, Robert A. Brazener, Annotation, *Liability of One Contracting for Private Police or Security for Acts of Personnel Supplied*, 38 A.L.R. 3d 1332 (1971); 41 AM. JUR. 2d, *Independent Contractors* §21 (1968).

[26] Western Stock Ctr., Inc. v Sevit, Inc., 95 Colo. 372, 578 P2d 1045 (1978)(regarding pipe salvage).

[27] Page v. Sloan, 12 N.C. App. 433, 183 SE 2d 813 (Ct. App. N.C. 1971).

[28] *See eg.*, Foster Co. v. Humblad, 418 F.2d 727 (9th Cir. 1969); Hudgens v Cook Indust., Inc., 521 P2d 813 (Okl. 1973); Stone v Pinkerton Farms, Inc., 741 F.2d 941 (7th Cir. 1984); Donald L. Miler, II, "Motor Carrier Liability for Accidents Involving Lease Trucks and Drivers: Can You Avoid It?" 61 TRANSP. PRAC. J. 320 (Spring 1994).

[29] *See eg.*, Barnard v Trenton-New Brunswick Theaters Co., 32 NJ Super 551, 108 A2d 873 (Super. Ct. App. 1954).

[30] Gettemy v Star House Movers, Inc., 225 Cal. App. 2d 636, 37 Cal. Rptr. 411 (Dist. Ct. App. 1964).

[31] *See e.g*, Annotation, *Route Driver or Salesman as Independent Contractor of Merchandise Producer or Processor, for Purposes of Respondeat Superior Doctrine*, 53 A.L.R. 2d 183 (1957).

[32] Penman v Korper, 977 F.2d 590 (9th Cir. 1992) [Canteen, private food service vendor contracted with the Arizona Department of Corrections to provide food service at a prison].

[33] Georgia Sargeant, "Workplace Safety Group Targets Fast Food Deliveries," 29 TRIAL 95 (Sept. 1993).

[34] *But see*, Note, "Lenders and Borrowers Beware! Secured Creditors May Not Avoid Liability for Breaches of the Peace by Using an Independent Contractor to Carry Out Repossession (MBank El Paso, M.A. v Sanchez, 836 SW 2d 151, Tex. 1992)," 24 TEX. TECH. L. REV. 275 (1993).

[35] Ross v Texas One Partnership, 796 SW 2d 206 (Ct. App. Tex. 1990), *writ denied*, 34 Tex. Sup. Ct. 293, 806 SW 2d 222 (1991).

physicians at correctional facilities,[36] rehabilitation centers or hospitals,[37] charter air pilots[38] and even privately operated correctional facilities.[39]

No conclusive rule divines whether a party is an employee or an independent contractor.[40] Indeed, part of the quandary in defining the business relationship is that no single element is controlling.[41] Instead, it is a combination of factual elements all of which are considered and guide the jury's resolution of the nature of the business relationship.[42] Commonly cited factors include: whether the party is engaged in a distinct business or independent occupation, who supplies the place, tools, supplies, and materials, the length of time the employment is to last and the method of payment (per job basis or weekly payroll) and independence over selection of projects or contracts to be

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[36] West v. Atkins, 487 U.S. 42, (1988); [independent contractor physician providing medical care to prison inmate pursuant to contract with state department of correction, however, medical care was nondelegable duty]; Rivers v State, 159 AD 2d 788, 552 NYS 2d 189, (App. Div. 1990) [Court reversed lower court decision and held that the state was not liable for the negligent treatment of an inmate because the Doctor was an independent contractor and thereby liable for his own negligence].

[37] *See eg.*, "Hospital Vicarious Liability for the Negligence of Independent Contractors and Staff Physicians: Criticisms of Ostensible Agency Doctrine in Ohio" 56 U. CIN. L. REV. 711 (1987). *See also*, DeMontiney v. Desert Manor Convalescent Ctr., 144 Ariz. 21, 695 P.2d 270 (1985).

[38] Huddleston v Union Rural Electric Assn., 821 P.2d 862 (Ct. App. Colo. 1991); Giuseppe Guerreri, "The Airport Operator: Aircarrier's Agent of Independent Contractor?" 17 AIR & SPACE L. 231 (Sept. 1992).

[39] Charles W. Thomas & Linda S. Calvert Hanson, "The Implications of 42 U.S.C. §1983 For The Privatization of Prisons," 16 FLA. ST. U. L. REV 933 at 960 (Spring 1989).

[40] *See, e.g.* Clyde Scott & Robert Culpepper, "Independent Contractors or Employees: The View From the National Labor Relations Board," 44 LAB. L.J. 395 (July 1993); Mark A. Coel, "Distinguishing Independent Contractors from Employees," 67 FL. B.J. 47 (Mar. 1993); John Bruntz, "The Employee/ Independent Contractor Dichotomy: A Rose is not Always a Rose," 8 HOFSTRA LAB. L.J. 337 (Spring 1991).

[41] *See e.g.*, Brenner, Donald A., "The Employers Fruitless Quest for Independent Contractor Status," 21 COLO. LAW. 459 (Mar. 1992); Comment, "The Definition of "Employee" under Title VII: Distinguishing Between Employees and Independent Contractors," 53 U. CIN. L. REV. 203 (1984); Richard C. Tinney, Annotation, *Trucker as Independent Contractor or Employee under §2(3) of National Labor Relations Act (29 Uscs §152(3))*, 55 A.L.R. Fed. 20 (1981); Note, Newsboys as Independent Contractors or Employees, 12 Miami L. Rev. 117 ( ); — Annotation, *House-to House Salesman or Canvasser as Independent Contractor or Employee for Purposes of Respondeat Superior*, 98 A.L.R. 2D 335 (1964); Debra T. Landis, Annotation, *Determination of "Independent Contractor" and "Employee" Status for Purposes of §3(e)(1) of the Fair Labor Standards Act (29 Uscs §203(e)(1))*, 51 A.L.R. FED. 702 (1981).

[42] This distinction between whether an injured worker is employed by an employer or an independent contractor can have serious consequences in areas beyond liability for negligence or tort actions, such as workers' compensation. To combat this, some states have attempted to statutorily define an independent contractor. *See e.g.*, TENN. CODE ANN. 50-6-102 (9) (1992); COLO. REV. STAT. §8-70-103 (10)(a) (19). Also, *see*, Stone v. Pinkerton Farms, Inc., 741 F.2d 941 (7th Cir. 1984) as an example of the number of factors in combination that the courts consider to determine whether one is an employee or independent contractor.

performed according to their own specifications and control the flow of the work except as to the result of the work.[43]

One who exerts significant control over the physical details of the work is characteristic of an employer-employee relationship. One who controls the more general process by which the assignment is accomplished is evidence of the independent contractor status.[44] The amount and level of autonomy exercised by the party performing the work is the hallmark of the distinction. The right to terminate the relationship without liability can also signal an employee relationship whereas an independent contractor could face accountability for breach of contract for wrongful termination.[45] Several courts hold that the existence of language in the contract alone is insufficient.[46] The fact that the agreement purports to create a specified relationship by designating the roles that the parties will play will not be determinative unless viewed together with the conduct manifested by the parties. However, lacking "extrinsic evidence indicating that the contract was a subterfuge" or the conduct of the parties suggests otherwise, the contract will be dispositive.[47] Generating a list of factors is elementary. The challenge begins when attempting to apply the singular elements to the facts of a specific case to detect whether an independent contractor relationship is demonstrated.[48]

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[43] RESTATEMENT (SECOND) OF TORTS, section , (19).

[44] This feature was demonstrated in the oft cited case of Majestic Realty Associates, Inc. v Toti Contracting Co., 30 NJ 425, 153 A2d 321 (1959). The Supreme Court of New Jersey explained this distinction when interpreting a contract provision reserving to the hiring party a right of supervision "for the purpose of seeing that the work is done in accordance with the contract and specifications. The supervisory interest relates to the result to be accomplished, not to the means of accomplishing it." at 431, at 324.

[45] *See* 41 AM. JUR. 2D, *Independent Contractors* § 19 (1968). This characteristic was emphasized as determinative in a Colorado case, Dana's Housekeeping v Butterfield, 807 P.2d 1218 (Ct. App. Colo. 1990) (citing to Industrial Commission of Colorado v Hammond, 236 P 1006 [Colo. 1925]).

[46] Locke v Longacre, 772 P2d 685 (Ct. App. Colo. 1989); Ross v. Texas One Partnership, 796 S.W.2d 206 (Ct. App. Tex. 1990).

[47] Ross at 209.

[48] For example, in Wasson v Stracener, 786 SW2d 414, 419-20 (DCA Tex. 1990) the appellate court delineated that evidence presented to establish the independent contractor relationship which included that the welder furnished his own tools and equipment, and the lack of supervision over the welder's work even though the construction company had a right of inspection. In evaluating the evidence to support the welder being classified as an employee, the court noted the welder was paid on an hourly basis, the welder's starting time, lunch time and quitting time were all dictated by the hirer, and that the hirer permitted the welder to have a helper, who also was paid on an hourly basis by the hirer. On this basis, the court reversed the summary judgment for the construction company finding that material facts were in dispute over whether the welder was an employee or an independent contractor.

POTENTIAL PLAINTIFFS

Proper plaintiffs in an action for negligent selection of an independent contractor include the injured third persons, bystanders or members of the public.[49] Indeed, the plain language of the Restatement is specific in this regard and courts have approved claims by this class of plaintiffs. There is no consensus, however, about whether an injured employee of the independent contractor has standing to sue the hirer for negligent selection.[50] Section 411 of the Second Restatement of Torts regarding negligent selection of an independent contractor specifically states that the hiring party can be liable for "physical harm to *third persons* . . . " (emphasis added). The notes and comments in the Second Restatement make no mention of whether an employee of the independent contractor was within the class of persons protected by this provision. For guidance on this issue, commentators have referred back to an Introductory Note contained within the chapter on liability for those engaging independent contractors in a Tentative Draft of the Second Restatement. This provision explained that, at that point, the reference to "third persons" was not intended to include employees of the independent contractor.[51] The employees of the contractors were intentionally excluded according to Dean Prosser, because of the drafters inability to formulate a ubiquitous rule due to vast inconsistencies among state workers' compensation statutes.[52] In many jurisdictions, worker's compensation covers employees of an independent contractor and it is usually intended to be the exclusive remedy. The controversy arises, of course, when the independent contractor lacks the appropriate workers compensation coverage and is insolvent, depriving the injured employees of essential benefits or remedies from their employer.[53] Thus begins the search for deeper pockets and a shift in focus to the conduct of the

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[49] RESTATEMENT (SECOND) OF TORTS, §411, (1965).

[50] *See* 41 AM. JUR. 2d, *Independent Contractors* § 42 (1968).

[51] RESTATEMENT (SECOND) OF TORTS, Special Note to Ch. 15, (Tent. Draft. No. 7, 1962) 17-18.

[52] He concluded his explanation of the exclusion with the statement, "it appears undesirable, if not impossible, to state anything at all about what the liability is to the employees of an independent contractor." 39 A.L.I. Proceedings 256 (1963). *See also,* 41 AM JUR 2D, *Independent Contractors* §26 (1968); PROSSER ON TORTS, *supra,* note 2 at 514 n.63; Reuben I. Friedman, Annotation, When is Employer Chargeable with Negligence in Hiring Careless, Reckless, or Incompetent Independent Contractor, 78 ALR 3d 910 (1973); Thompson, Donna "Berry v. Holston Well Service, Inc.,: Statutory Employer Status—Tort Liability of Principal to Employee of Independent Contractor—Louisiana Revised Statute 23:1061," 61 Tul. L. Rev. 693 (February, 1987).

[53] Becker v. Interstate Properties, 569 F.2d 1203 (3d Cir. 1977), *cert. denied,* 436 U.S. 906 (1988).

hiring party.[54] Even today there remains a split in the jurisdictions across the nation on whether an independent contractor's employees are covered by this provision.[55]

FACTORS USED TO DETERMINE NEGLIGENT SELECTION

For guidance in understanding the elements of the tort of negligent selection we turn to the Restatement of the Law Second on Torts, which states that

> (A)n employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.[56]

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54 *Id.*

55 States which have adopted the view that employees are protected include: [Arkansas] Jackson v. Petit Jean Elec. Co-op, 270 Ark. 506, 606 SW 2d 66 (1980); [California] Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 156 Cal. Rptr. 41, 595 P.2d 619 (1979); [District of Columbia] Linder v. District of Columbia, 502 F.2d 495 (D.C. Cir. 1974); [Hawaii] Makaneole v. Gampon, 70 Haw. 501, 777 P.2d 1183 (1989): [Iowa] Clausen v. R.W. Gilbert Constr. Co. Inc., 309 NW 2d 462 (Iowa 1981); [Maryland] Chesapeake & Potomac Tele. Co. of Maryland v. Chesapeake Util. Corp., 436 A.2d 314 (Del. 1981) applying Md law; [Michigan] Warren v. McLough Steel Corp., 111 Mich App. 496, 314 NW2d 666, (Ct. App. Mich. 1981); [Mississippi] Whatley v. Delta Brokerage & Warehouse Co., 248 Miss. 416, 159 So. 2d 634 (1964); [New Hampshire] Elliot v. Public Serv. Co. of New Hampshire, 128 N.H. 676, 517 A.2d 1185 (1986); [New York] Parsan v. New York Breweries Co., 208 NY 337, 101 NE 879 (Ct. App. N.Y. 1913); [Pennsylvania] LeFlur v. Gulf Creek Indust. Park #2, 511 Pa 574, 515 A.2d 875 (1986); [Texas] EDCO Product., Inc. v. Hernandez, 794 SW 2d 69 (Dist. Ct. App. Tex. 1990) error den; [West Virginia] Pasquale v. Ohio Power Co., 187 W. Va 292, 418 SE 2d 738 (1992). States which have adopted the view that employees are not protected include: [Arizona] Cordova v. Parrett, 146 Ariz 79, 703 P.2d 1228 (Ct. App. Ariz. 1985); [Connecticut] Ray v. Schneider, 16 Conn App. 660, 548 A.2d 461 (Ct. App. Conn. 1988) *cert. denied*, 209 Conn 822, 551 A.2d 756; [Florida] Florida Power & Light v. Price, 170 So.2d 293 (Fla. 1964); [Idaho] Peone v. Regulus Stud Mills, Inc., 113 Idaho 374, 744 P.2d 102 (1987); [Indiana] Johns v. New York Blower Co., 442 N.E.2d 382 (Ct. App. Ind. 1982); [Kentucky] King v. Shelby Rural Electric Co-op Corp., 502 SW 2d 659 (Ky. 1973) *reh'g denied*, U.S. *cert. denied*, 417 US 932 (1974); [Massachusetts] Vertentes v. Barletta Co. Inc., 392 Mass. 165, 466 NE 2d 500 (1984); [Minnesota] Conover v. Northern States Power Co., 313 NW 2d 397 (Minn. 1981); [Nevada] Sierra Pacific Power Co. v. Rinehart, 665 P.2d 270 (1983); [New Mexico] Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 723 P.2d 1258 (1987); [South Dakota] Hagberg v. City of Sioux Falls, 281 F.Supp. 460 (D. S.D. 1968); [Tennessee] Cooper v. Metro Gov't. of Nashville, 628 SW2d 30 (Ct. App. Tenn. 1981); [Washington] Tauscher v. Puget Sound Power and Light Co., 96 Wash 2d 274, 635 P.2d 426 (1981); [Wisconsin] Wagner v. Continental Gas Co., 143 Wisc. 2d 379, 421 NW 2d 835 (1988); [Wyoming] Jones v. Chevron U.S.C. Inc., 718 P.2d 890 (Wyo. 1986).

56 RESTATEMENT (SECOND) OF TORTS §411 (1965).

As will be shown through analysis of the cases to follow, there are multiple factors that the courts' contemplate before ruling whether a hiring entity negligently selected a particular independent contractor who was incompetent. The Restatement explains that the "words 'competent and careful contractor' denote a contractor who possesses the knowledge, skill, experience, and available equipment which a reasonable man would realize that a contractor must have in order to do the work which he is employed to do without creating unreasonable risk of injury to others, and who also possesses the personal characteristics which are equally necessary."[57] The selection of an independent contractor requires the exercise of that amount of care that a reasonable person would exercise under the same or similar circumstances.[58] Of course, the level and type of knowledge, skill, experience and available equipment necessary for a competent independent contractor will be fact specific. That is, the measure of competence will depend upon the type of service to be provided by the independent contractor. The Restatement of Torts identifies three elements for examination: (1) the danger to which others will be exposed if the contractor's work is not properly done; (2) the character of the work to be done—whether the work lies within the competence of the average person or is work that can be properly done only by persons possessing special skill and training; and (3) the existence of a relation between the parties that imposes upon the one a peculiar duty of protecting the other.[59]

Assume for example that you are contracting for the protective services of a security guard. Relevant inquiries to detect the guard's competency would include: the guard's formal training in the use of force and firearms, whether the guard was licensed as a security guard and licensed to carry a weapon, the level of expertise in the use of firearms coupled with an inquiry into whether the guard maintains his/her level of expertise by routine practice. So too would an inquiry into whether the guard has previously been involved in a confrontational situation during the discharge of his duties along with the results of the encounter.[60] In *Ross v. Texas One Partnership*[61] this level of inquiry constituted

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[57] *Id.*

[58] RESTATEMENT (SECOND) OF TORTS, §411 (1965).

[59] *Id.*

[60] *See,* 11 P.O.F. 2d 499 at 522, Lack of Care in Selecting an Independent Contractor, Robert A. Brazener, Annotation, *Liability of One Contracting for Private Police or Security Service for Acts of Personnel Supplied,* 38 A.L.R. 3d 1332 (1971). *See also,* Del Signore v. Pyramid Security Services, Inc., 147 A.D.2d 759, 537 N.Y.S. 2d 640 (App. Div. N.Y. 1989).

[61] 796 SW 2d 206 (Ct. App. Tex 1990).

due diligence. In this case, the hiring entity, an apartment complex, received documentation showing that the security company was licensed by the state. Further, two of the references were verified by the hiring party who received favorable reports from the previous users of the security company's services.[62] The court indicated that this level of scrutiny was sufficient to fulfill the apartment complex's duty to its residents.

Another case examining the level of inquiry into the competence of an independent contractor by a hiring entity is *Philip Morris, Inc. v. Emerson.*[63] In this case the Virginia Supreme Court stated that "Philip Morris engaged A-Line [the independent contractor] without any investigation of its competence to perform an admittedly dangerous task" of disposing of toxic chemicals from pressurized tanks.[64] The court then discussed the impropriety involved in the hiring entity's reliance upon the independent contractor's "self serving brochure describing [the independent contractors] activities and personnel" which was later discovered to be erroneous[65] "A perusal of a contractor's self-serving brochure is not sufficient to discharge an employer's duty of reasonable care to employ a contractor who is competent to perform a dangerous task."[66] Further, the court noted that no references were checked nor were any inquiries made to learn whether the contractor had previous experience dealing with pressurized cylinders containing toxic chemicals. Clearly, the level and type of care to be exercised by the hiring entity will vary as the circumstances vary. After acknowledging these qualifiers regarding variations in the requisite level and types of investigation, we can turn to the factors weighed by the courts in determining whether due care was exercised in the selection of an independent contractor.

Reputation and Experience

The next area of inquiry concerns the reputation and past experience of the independent contractor. An employer can justifiably rely upon a previous successful pattern of work performed by an independent contractor.[67] Evidence

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62 *Id.* at 216.

63 235 Va 380, 368 SE 2d 268 (1988).

64 *Id.* at 278.

65 *Id.*

66 *Id.*

67 *See* Cooper v. Metro. Gov't. of Nashville, 628 SW2d 30 (CA Tenn. 1981) in which the independent contractor had been performing the same or similar work "for . . . 20 years, apparently without incident." at 31.

that the contractor's past performance with the employer was satisfactory and incident free coupled with proof that the contractor engaged a competent and seasoned supervisor present at the work site precluded liability on the theory of negligent selection of an independent contractor.[68]

Presenting a contrast is a case in which a couple was injured when their car was rear-ended by a truck transporting forty-thousand pounds of steel after the tractor-trailer's brakes failed. *In L.B. Foster Company v. Hurnblad,*[69] a negligent selection case, the court discussed numerous general factors to evaluate the competence of the independent contractor.[70] These factors included the transporter's "lack of experience, poor financial condition, failure to respect federal [transportation] certificate requirements, and willingness to do business at cut-rates."[71] The 9th Circuit Court of Appeals recounted that substantial proof had been offered to the jury, enough to justify the conclusion that it was "a fly-by-night operation."[72] This evidence included: that the independent contractor had only been in business for six months before the accident, it had only a telephone number and post office box, others in the trucking business in the area had never heard of the company, and the contractor offered to transport without the required federal certificates at illegal cut-rate prices.[73] The court continued, however, to evaluate whether the hiring entity "knew, or in the exercise of reasonable care, should have known, of [the independent contractor's] incompetence."[74] The court opined that even though there was no evidence of actual knowledge of incompetence by the hiring party, the shipper's experience with the weight and bulk of the goods being shipped compelled a suitable inquiry into the competence of the independent contractor, which was clearly lacking.[75] The court also stated that evidence solely of a single act of previous

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[68] *See* Henderson Bros. Stores, Inc. v Smiley, 120 Cal. App.3d 903, 174 Cal. Rptr. 875 (C.A. Cal. 1981) in which the hiring of a licensed roofing contractor who had been in business for many years, and who had been previously employed by that employer three to four times per year for the past four years, presented no evidence of negligent selection. *See also,* Western Arkansas Telephone Company v Cotton, 259 Ark. 216, 532 SW 2d 424 (1976).

[69] 418 F. 2d 727 (9th Cir. 1969).

[70] L.B. Foster Co. v Hurnblad, 418 F.2d 727 (9th Cir. 1969).

[71] *Id.* at 730.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* For a different perspective, *see,* Stone v. Pinkerton Farms, Inc., 741 F.2d 941 (7th Cir. 1984) wherein evidence was presented that the soy bean hauler had been hauling periodically for the hiring farmer for approximately six months, the hauler had six speeding tickets, lacked insurance coverage and an ICC permit but did possess a valid chauffeur's license. Further, the hiring party had checked his reference and received a good recommendation about the hauler. The appellate court ruled that receiving the favorable

negligence by the independent contractor would be insufficient to presume incompetence. Proof of multiple acts, however, could produce an inference of carelessness.[76]

An Illinois court ruled that proof of an independent contractor's sobriety was material evidence for the jury to consider as it related to the welder's general reputation. In *Woodward v. Mettille*,[77] a fire that started following the welding of scrap metal in a dilapidated wooden warehouse, burned down the employing party's building and a third party's business. Allegations included: that the warehouse owner had sufficient knowledge of the incompetence of the independent contractor in that the welder was operating his torches dangerously, that he had a reputation for being careless and that on several occasions he had seen the welder inside the building under the influence of alcohol. The welder testified that he had three beers at lunch that day and a witness testified that when the welder left the building before the fire broke out, there was a half-pint of whiskey was visible in the welder's back pocket. Despite contrary evidence as to the qualifications of the welder who was portrayed as a "careful and experienced welder" who had a good reputation in the community by another witness, the jury entered a verdict against the defendants. *Hurnblad* and *Woodward* contained several distinct components that courts use to evaluate the experience and reputation of an independent contractor such as length of time in business, their standing among the tradespersons, their skills, their work practices and the number of previous dealings with a particular client. Additionally the use of alcohol on the job site can be an element of reputation factored in by some jurisdictions in deciding the competence of an independent contractor.

Licensing

Another indicium of the independent contractor's proficiency is whether the contractor possesses the appropriate license. In *Watsontown Brick Co. v. Hercules Powder Co.*[78] a hiring party's reliance upon knowledge that an independent contractor was licensed to conduct blasting was deemed to be an

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recommendation was "sufficient to satisfy the duty to exercise ordinary care" and that the hiring farmer "breached no duty by failing to inquire as to any traffic tickets . . . [or] to ascertain whether [the hauler] had any permits" at 946.

[76] *Id.* at 730. *See also*, Bagley v Insight Communications Co., 623 N.E.2d 440 (Dist. Ct. App. Ind. 1994).

[77] 81 Ill. App.3d 168, 400 N.E.2d 934, 36 Ill. Dec. 354 (C.A. 1980).

[78] 265 F. Supp. 268 (M.D. Pa. 1967)

insufficient indicator of competence. Evidence was introduced that the independent contractor had received his blasting license under a grandfather clause. The fact that the contractor took no examination and had no previous experience in blasting under these unique circumstances weighed more heavily in the opinion of the court.[79]

In another case, the owner of a motel engaged the services of a licensed plumber to repair a faulty hot water heater which subsequently exploded killing a guest.[80] The plaintiffs alleged that the motel owner negligently selected the licensed plumber who was not properly qualified to make the repair in that the hot water heater repair should have been done by a licensed electrician. The defendants contended that they reasonably relied upon the plumber, an independent contractor, to make the repair and they had no reason to know that the malfunction was in the electric thermostat in the hot water heater that would require the services of a licensed electrician. The North Carolina Appellate Court held that "the evidence of the repairs and maintenance performed on the electrical system of defendants' electric hot water heater by [the independent contractor] tends to affirm the incompetence of defendants' independent contractor as an electrician" and to show negligence "in failing to secure the services of a competent independent contractor . . . ."[81] One disturbing facet of this case is that the motel owner justifiably relied upon a licensed plumber which is arguably, reasonable conduct under these facts.[82] The average person would have no reason to realize that the repairs called for a skilled electrician. Therefore, it seems that the party who should have perceived that he was incompetent to perform the required repairs was the plumber. He would be in the best position to recognize that the steps necessary to correct the problem with the electric thermostat were beyond his qualifications as a licensed plumber. This case places a high burden on the hiring party who is not in all likelihood called upon to contract out for these specific services routinely.[83]

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79 *Id.* at 271.

80 Page v. Sloan, 12 N.C. App. 433, 183 S.E. 2d 813 (Ct. App. N.C. 1971).

81 *Id.* at 817.

82 Indeed, as is discussed in the comment c of §411 of the Restatement, a person employing "a carpenter to repair the ceilings of his shop or to install plumbing in his hotel is entitled to assume that a carpenter or plumber of good reputation is competent to do such work safely. In such case, there is no duty to make an elaborate investigation as to the competence of the carpenter or plumber."

83 Comment c of §411 of the Restatement also differentiates between the types of persons contracting out for the services of an independent contractor. A contrast is demonstrated between an "inexperienced widow" engaging a building contractor who "is not to be expected to have the same information concerning the competence and carefulness of building contractors in the community, or to exercise the same judgment, as would a bank seeking to" engage a building contractor.

The absence of a commercial pilot's license as required by law to crop dust coupled with the lack of a special permit to spray chemicals were factors cited in an Arkansas case alleging selection of an incompetent independent contractor by a farmer.[84] The farmer alleged that it was not the custom or practice among farmers engaging crop dusters to ask about the adequacy of their licensure. The Supreme Court upheld the trial court's ruling that this evidence was inadmissible. Other facts established in this case included that the 22-year old pilot possessed only a student-pilot's license, he had limited experience in this type of plane, and he had dusted crops for only one other farmer once, all of which were sufficient to allow the issue to be submitted to the jury. A corollary aspect of licensing relevant to an independent contractor's competency in certain circumstances is the possession of a driver's license and solid driving record if driving is required as part of one's job.[85]

Equipment

The Restatement explains that one facet of a competent or a careful contractor presumes the contractor will have or use adequate equipment of the type that a reasonable person would realize was required to perform the contract work without creating an unreasonable risk to others.[86] Deciding the suitability of a contractor's equipment is usually a factual issue for the jury. In *Hudgens v. Cook Industries, Inc.* [87]a wheat hauler caused an accident resulting in injuries to a passenger in another vehicle. The plaintiff maintained that the independent

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[84] Riddell v. Little, 253 Ark. 686, 488 S.S.2d 34 (1972). The court did note the connexity problem in that bare evidence of non-compliance with the statutory requirement did not by itself establish the causation of the accident which killed a spotter on the ground. *See also,* Annotation, Jonathan M. Purver, *Crop Dusting, Liability for Injuries Caused by Spraying or Dusting of Crops,* 37 A.L.R.3d 833 §§3-5 (1971).

[85] Wasson v. Stracener, 786 SW2d 414 (Ct. App. Tex. 1990) a case which involved a welder's helper who was a passenger in a car enroute to a pipeline construction site. The welder's helper was severely injured when the car was involved in an accident. The plaintiff contended negligent selection of an independent contractor alleging that the hiring party failed to investigate the driving record of the contractor (the driver of the car) which would have revealed multiple speeding tickets and prior accidents. The court responded by pointing out that an employer is required to determine an employee's driving ability "only if performance of the contract includes driving a vehicle" at 421. The court continued its analysis by concluding that because the independent contractor was required to get his truck and tools to the construction site to perform his work, "his driving record would be pertinent to his employment." Id. *See also,* Gomien v. Wear-Ever Aluminum, Inc. 50 Ill.2d 19, 276 NE 2d 336 (1971) a case wherein the court stated that a hiring company may be liable for the negligent selection of an independent contractor by not determining that a salesman who was required to drive to make his sales calls had a bad driving record.

[86] RESTATEMENT (SECOND) OF TORTS §411 (1965).

[87] 521 P.2d 813 (Okla. 1974).

contractor was an incompetent, unfit driver operating defective and unsafe equipment.[88] It was said that the truck was "grossly defective and unsafe for operation."[89] Testimony revealed that the tires were threadbare, the axles had been re-welded, the speedometer was defective and the brakes malfunctioned because they were worn completely through. Besides the poor condition of the truck when it was empty, at the time of the accident it was 13,000 pounds overweight and the driver was speeding on a wet road. Testimony demonstrated that the wheat owners who contracted for the hauling services made no effort to screen or determine the qualifications of the drivers or their equipment. Instead, they just "assumed" everything was in order.[90] The Supreme Court of Oklahoma recognized that because the employing party regularly hired truckers in a commercial enterprise, they had a duty to discover the competence of the driver and the driver's equipment.

Financial Responsibility

A more troublesome component of evaluating the competency of an independent contractor concerns their financial state. Back in 1965 the author's of the Restatement dodged this issue by stating that they held no opinion about whether the employing party had an obligation to investigate the financial affairs of a potential contractor. Their justification was that "cases are lacking in sufficient number to deal with the question of whether the employer may ever be responsible to any third person for his failure to exercise care to employ a contractor who is financially responsible, and therefore able to respond, by liability insurance or otherwise, for any damages which he may inflict by his tortious conduct."[91] The primary case commenting on the financial responsibility aspect up to that time was *Majestic Realty Associates, Inc. v. Toti Contracting Co., Inc.*[92] In *Majestic*, the city hired an independent contractor, Toti Contracting, to raze a building that during demolition, collapsed onto an adjacent third party's business [Majestic] causing substantial property damage.

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[88] The evidence presented regarding the incompetency of the driver included that he "was a reckless driver with a lengthy history of prior arrests and accidents; he consistently and repeatedly hauled loads in excess of the legal weight limits . . . ; he was a person with a lengthy history of drinking intoxicating beverages while operating motor vehicles [he had been drinking before the accident]; he had no permit to haul grain within the State . . . " and so on.

[89] *Id.* at 814.

[90] *Id.*

[91] RESTATEMENT (SECOND) OF TORTS, § , (1965)

[92] 30 N.J. 425, 153 A.2d 321 (1959).

Majestic brought an action against the city alleging multiple counts including hiring an incompetent independent contractor. In a discussion of the policy issues involved in assessing responsibility against the hiring party, the New Jersey Supreme Court emphasized the fact that these cases balance the interest of an innocently harmed third party against the party contracting for the work, who can choose the contractor. Therefore, "in the application of concepts of distributive justice perhaps much can be said for the view that a loss arising out of the tortious conduct of a financially irresponsible contractor should fall on the contractee."[93] The supreme court declined to expressly rule on the financial incompetency issue as it was not raised in the lower court.

Only a few cases decided after this time, however, have dealt with the issue of a contractor's financial responsibility.[94] The most oft cited and somewhat controversial case is *Becker v. Interstate Properties.*[95] This New Jersey case was filed after the independent contractor, driving a heavy truck, drove over a construction worker. The seriously injured worker alleged that the hiring party, a shopping center developer, was negligent for allowing a "financially-irresponsible" contractor to be hired.[96] Evidence established that the contractor was "only minimally capitalized" and had inadequate insurance coverage.[97] The Third Circuit Court of Appeals, sitting in diversity, noted the absence of a case directly on point but looked to *Majestic* for guidance and attempted to construe the New Jersey Supreme Court's dicta and apply it to the case at hand. The Third Circuit noted that although no subsequent cases were evaluated under liability for a financially impaired contractor similar to *Majestic*, the case generated numerous articles and commentary.[98] In a discussion of the allocation of risks and resources, the Third Circuit declared that the developer was a "substantial entrepreneur and a member of an industry that carries large liability insurance policies as a matter of course" who therefore, was in a stronger

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[93] *Id.* at 325.

[94] *See,* Lakeview Terrace Homeowners Assoc., v. Le Rivage, Inc., 498 N.W.2d 68 at 71 (Ct. App. Minn. 1993) wherein the appellate court refused to assess liability on the hiring party after recognizing that "the weight of authority supports not imposing liability on an employer . . . for hiring an apparently competent contractor, . . . that turns out to be judgment proof." *See also,* Holland v. Dolese Company, 643 P.2d 317 at 321 (Okla. 1982) wherein the Oklahoma Supreme Court stated that it was error to submit the issue of an incompetent contractor to the jury on the allegation that the contractor was in "poor financial condition" and willing to "do business on a low margin of profit" without a showing of how those elements constituted an incompetent contractor.

[95] 569 F.2d 1203 (3d Cir. 1977), *cert. denied,* 436 U.S. 906 (1988).

[96] *Id.* at 1205.

[97] *Id.*

[98] *Id.* at 1208 n.18.

position to accept the loss and pass the cost on to the project users than was the injured worker.[99] After an examination of policy reasons underlying tort law in New Jersey, the Third Circuit indicated their belief that the New Jersey court would rule that "the failure to engage a properly solvent or adequately insured subcontractor is a violation of the duty to obtain a competent independent contractor."[100] This decision provoked a sharp dissent by Circuit Judge Hunter who stated his view that the majority had succeeded in conceiving a new duty in tort law not previously reflected in any jurisdiction across the nation.[101]

The *Becker* decision did not pass unregarded. Subsequent criticism from the New Jersey courts chided the Third Circuit for taking undue liberties trying to predict the future course of New Jersey law.[102] As the United States District Court for the District of New Jersey stated in 1990, "Becker illustrates the vicissitudes of predicting state high court decisions . . . . Although Becker's holding may ultimately be adopted by the New Jersey Supreme Court, the history of Becker shows that when a federal court divines state common law, it is merely writing in the sand."[103]

Casting the Becker decision as writing in the sand proved accurate. The Third Circuit revisited the issue in 1993 and reversed its findings. In *Robinson v. Jiffy Executive Limousine Co.*,[104] the Third Circuit deliberated the issue of the pecuniary status of an independent contractor and retreated from its previous decision in *Becker*. The court painstakingly set out the basis for their ability to disregard their previous decision on the same issue. After noting the criticism

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99 *Id.* at 1210.

100 *Id.* at 1209.

101 *Id.* at 1215.

102 Indeed, in Cassano v. Aschoff, 226 N.J. Super 110, 543 A.2d 973 (Super. Ct. N.J. 1988) when called upon the decide the issue of the financial instability of an independent contractor as indicative of incompetence, the court tersely declared, "[a]lthough no court in this state, either before Majestic, or in the intervening nineteen years had chosen to apply that concept, the majority in Becker nevertheless predicted that future New Jersey courts would do so. No court has since chosen to follow that lead. In these circumstances, nor do we." at 116. *See also,* Miltz v. Borroughs-Shelving, Div. of Lear Siegler, Inc., 203 N.J. Super. 451, 497 A.2d 516 (1985).

103 Gutman v. Howard Savings Bank, 748 F.Supp. 254 (D. N.J. 1990). The Seventh Circuit was also called upon to assess the relevance of a lack of insurance and a subsequent filing of bankruptcy by a independent contractor in Stone v. Pinkerton Farms, Inc., 741 F.2d 941 (7th Cir. 1984). The court noted the lack of Indiana cases on the issue and surveyed opinions from other jurisdictions on this issue including *Becker*. The Seventh Circuit Court found no indication that the Indiana courts were moving toward an expansion of their state tort doctrine to recognize financial responsibility as a basis for negligent selection of an incompetent contractor and consequently deferred to the legislature or the Indiana courts to adopt any changes as they saw fit. Id. at 947.

104 4 F.3d 237 (3d Cir. 1993).

that grew out of their previous decision coupled with the fact that the New Jersey court flatly refused to adhere to "their" rule, the Third Circuit adopted a more "conservative approach."[105] The court recognized the precarious position that would be imposed on contractors seeking to be competitive in the marketplace while lacking start-up capital which was an original concern of the dissent in *Becker*. Further, it also acknowledged the burden imposed on the hiring parties who "would be obliged to make a diligent and continuing inquiry into the financial qualifications of the contractor before calling upon him to perform the . . . service, . . . " to preclude exposure to liability for hiring an incompetent contractor.[106] The Third Circuit conceded that not only would the imposition of that duty be unprecedented but, it "would indeed impose prohibitive obligations" on the hiring party "beyond what we are prepared to predict the New Jersey Supreme Court will adopt."[107] Although the element of proof of financial responsibility appeared to be a viable consideration in evaluating the competence of an independent contractor, its significance appears to be marginal at this time.

CAUSATION

Proof of a contractor's negligence creates no presumption that the employer was negligent in the selection of the contractor.[108] Nor does proof of the individual elements of negligent selection absent a legal connection to the injury provide an adequate basis upon which to impose liability on the hiring party. As explained in the comments in the Restatement, to subject the employer to liability, it must be shown that injury resulted

> from some quality in the contractor which made it negligent for the employer to entrust the work to him. Thus, if the incompetence of the contractor consists in his lack of skill and experience or of adequate equipment but not in any previous lack of attention or diligence in applying such experience and skill or using such equipment as he possesses, the employer is subject to liability for any harm caused by

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105 *Id.* at 242.

106 *Id.* at 242.

107 *Id.*

108 57 C.J.S.2d Master and Servant, §592 at 369.

the contractor's lack of skill, experience, or equipment, but not for any harm caused solely by the contractor's inattention or negligence.[109]

This connection between the inexperience of the contractor and the harm which occurred was demonstrated in a case previously mentioned. *Phillip Morris* concerned an inexperienced independent contractor hired to dispose of pressurized cylinders containing hazardous chemicals.[110] The Virginia Supreme Court concluded that there was "no conflict in the evidence of [the hiring party's] failure to investigate and that "there can be no doubt that [the independent contractor's] incompetence was the ultimate cause of the losses claimed in this case."[111] In this case, the failure to thoroughly investigate the contractor coupled with the hiring of the untrained contractor was the cause of the harm, thus providing the requisite linkage.

A case failing to substantiate the proximate cause connection is *Wilson v. Good Humor Corp.*[112] In this case a wrongful death action was initiated for the death of a three-year-old girl who was struck by a car while crossing a street to reach a Good Humor ice cream truck which was operated by an independent contractor. Allegations lodged against Good Humor included selection of an incompetent independent contractor. Evidence was presented that Good Humor did not use reasonable care in the selection of their independent contractors premised on the fact that no background inquiries were conducted and that they testified that "Good Humor would have 'no reason' to turn down any applicant."[113] While acknowledging that "this aggressive indifference to the fitness of its vendor might well subject Good Humor to liability under a negligent selection theory," the court noted that the plaintiff's failed to produce evidence that the ice cream driver was in fact incompetent and that this incompetence was the proximate cause of the death of the child.[114]

Another case demonstrating the proximate cause requirement is *Hixon v. Sherwin-Williams Company.*[115] This case involved a linoleum contractor who was called upon to glue sheets of plywood to a floor prior to the application of the linoleum, a task he had never specifically performed before although he had been a reputable flooring contractor for many years. The flooring contractor

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[109] *Id.*

[110] *Infra*, note 57.

[111] *Id.* at 278.

[112] 757 F.2d 1293 (D.C. Cir. 1985).

[113] *Id.*

[114] *Id.* at 1309.

[115] 671 F.2d 1005 (7th Cir. 1982).

neglected to read the instructions on the glue can warning to use the glue only in a well-ventilated areas. The glue was applied in a confined area, exploded and a fire broke out. The Seventh Circuit declared that even if the hiring party was negligent for hiring a contractor who had no experience with this particular project, that act was not the proximate cause of the accident. The flooring contractor's failure to read and heed the warnings printed on the glue can caused the fire, not his inexperience in laying this type of floor.[116] The court continued to say that the accident was not more likely to occur because of his inexperience. If anything, one would expect a contractor performing a new task to be more careful than one would who had experience.[117] The court thus concluded that the hiring of an inexperienced contractor was not the proximate cause of the mishap in this case.[118] For a claim of negligent selection to succeed, therefore, it must be established that some unsuitable feature or characteristic of the contractor that the engaging party knew of or reasonably should have discovered proximately caused the harm sustained.

DAMAGES

Embedded in the negligent selection provision of the Restatement is the criteria that damages result from physical harm. "An employer is subject to liability for *physical harm* to third persons" caused by his negligent selection of a competent contractor to perform "work which will involve a risk of physical harm" unless it is done carefully or "to perform any duty which the employer owes to third persons."[119] As made evident from the cases discussed, the physical harm component is not rigidly followed. For example, in *Henderson Brothers Stores, Inc.*,[120] in *Western Stock Center, Inc.*,[121] in *Woodward*,[122] and in *Hixon*[123] the damages requested were for compensation for losses to physical property (buildings and a home) due to fires. In *Oregon Portland Cement Co.*,[124] the damages were for the additional monetary

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116 *Id.* at 1010.

117 *Id.* This certainly presents a different twist on the experience requirement as discussed *infra* note 68-78.

118 *Id.*

119 RESTATEMENT (SECOND) OF TORTS, § 411, (1965) (emphasis provided).

120 *Supra*, note 65.

121 *Supra*, note 26.

122 *Supra*, note 74.

123 *Supra*, note 112.

124 *Supra*, note 124.

expenses involved in continuing the quarry operations following unsuccessful blasting. In *Majestic Realty Associates, Inc.*[125] and *Watsontown Brick Co.*,[126] the losses sustained were to physical property (buildings) due to blasting and demolition work. None of these cases made mention of the occurrence of physical harm nor was relief in the form of damages for physical harm, as indicated in the black-letter rule of the Restatement's definition of the tort of negligent selection, requested. How did these courts deal with this enlargement of damages beyond the scope of the Restatement? Most did not. Indeed, the only reference in any of these seven cases is contained in *Watsontown Brick Co.*, wherein the federal court sitting in diversity opined, "(a)lthough the case at bar did not involve physical injuries to people, but injuries to personalty of Watsontown, the reasoning behind the rule . . . is applicable here."[127] In a number of jurisdictions then, it appears that by judicial extension property damages will also be compensated.

DEFENSES

Defenses that can be raised by the hiring party to counter a claim of negligent selection include evidence of an indemnity agreement or release and sovereign immunities. An early case involving blasting in a shale quarry dealt with the issue of a signed release. In *Oregon Portland Cement Co., v E.I. DuPont De Nemours & Co.*,[128] the party who engaged the independent contractor, DuPont, raised the defense of an express release and produced the signed contract that sought to indemnify and hold DuPont harmless from negligence. On the issue of whether the contract language relieved the hiring party from liability for negligence in choosing an incompetent and inexperienced contractor, the court expressed the opinion that the release did not preclude liability on that basis.[129] Another federal trial level court reached a similar conclusion regarding the impact of an indemnification agreement in a more recent blasting case by stating that the contract provision did not relieve the hiring entity from liability for selecting an incompetent or inexperienced person.[130] A more complex defense is presented when examining the sovereign immunity doctrines. Government entities routinely contract out for services

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125 *Supra*, note 89.

126 *Supra*, note 75.

127 265 F.Supp. 268 at 271 (M.D. Pa. 1967).

128 118 F.Supp. 603 (D. Ore. 1953).

129 *Id.*

130 Watsontown Brick Company v. Hercules Powder Co., 265 F. Supp. 268 (M.D. Pa. 1967).

utilizing independent contractors. In predicaments in which injuries or damages occur because of action by the independent contractor, the federal government can hide behind its shield of immunity. In 1946 Congress enacted the Federal Tort Claims Act, 28 U.S.C. 1346 thereby waiving governmental immunity from suit under enumerated circumstances. The Act seeks to hold government accountable in a manner similar to that which would confront a private person. One area still protected from suit under the Act is for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved was abused."[131] Subsequent cases have applied this provision to the award of government contracts to independent contractors and have concluded that the awarding function is exempt from liability because it involves a "discretionary function or duty."[132] In essence, cases alleging the negligent selection of an independent contractor by an agent of the federal government have been unsuccessful because the government asserts its immunity for the discretionary function involved in the decision to award the contract to a particular provider. For example, in *Lipka v. United States*[133] an independent contractor was engaged to modify sections of a River Lock and Dam owned by the United States. Following the collapse of a cofferdam and the death of several workers within the dam, a suit was filed. Evidence offered cast doubt on the competency of the independent contractor. These evidentiary factors included: that the contractor had performed poorly on previous government contracts, a pre-award survey recommended that the contractor not even be considered for the contract award, and that the Small Business Administration had denied the contractor a certificate of competency for the project.[134] Despite these indications of a less than desirable contractor, he received the contract award. After serious problems developed, the subsequent challenge of negligent selection of an incompetent contractor failed due to the immunity protection. The federal government was not held accountable for its decision to award the contract to an incompetent contractor.

In another case a woman was killed at her place of employment, a manufacturer of antitank explosives for the U.S. Army.[135] The independent

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131 28 U.S.C. § 2680(a).

132 Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969).

133 249 F. Supp. 213 (N.D. N.Y. 1965).

134 *Id.* at 216.

135 Toole v. United States, 443 F. Supp. 1204 (E.D. Pa. 1977).

contractor agreed to do work that was inherently dangerous and created a "peculiar risk of physical harm to others unless special precautions were taken" [136]and other multiple counts beyond just the negligent selection allegation. The peculiar risk of physical harm provision failed because the waiver of immunity contained within the FTCA did not extend to claims of vicarious liability for those not employed by the United States. The court concluded that this count alleged vicarious liability that was protected by the FTCA, not personal liability.[137] As to the negligent selection count, the court held that the decision to award the contract for the fuze rockets to this particular contractor "undoubtedly considered a number of 'policy factors' in arriving at their decision. Items such as the type and quantity of fuzes needed, the amount of each contractor's bid, the responsiveness of each bid, the fitness of each bidder, the location of each bidder, the quality of work that could be expected from each bidder, the past performance of those bidders who had previously held other government contracts, and the ability of each bidder to comply with detailed safety specifications are among the considerations that were probably weighed in reaching the decision."[138] Therefore, the discretionary role involved in selecting the independent contractor was "not reviewable under the Federal Tort Claim Act."[139] Challenges to negligent retention of an incompetent independent contractor similarly fail under the protected discretionary function exception.[140] While the law at the federal level regarding negligent selection of an independent contractor is relatively clear, the implications for state or local level contract awards depends upon the extent of the individual states waiver of sovereign immunity.[141]

CONCLUSION

Independent contractors continue to contribute a variety of indispensable services to private individuals and commercial enterprises. Traditionally these

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[136] Another exception to the non-liability of the hiring entity for acts of the independent contractor previously discussed *infra*, notes 12-14.

[137] *Id.* at 1217.

[138] *Id.* at 1222.

[139] *Id.*

[140] *Id.* at 1223.

[141] *See, e.g.*, Jane Marshall Gagne, "New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm From Dangerous Work, but Bestows Immunity on a Government Employer: Saiz v. Belen School District," 23 N.M. L. Rev. 399 (Spring 1993); DeMontiney v. Desert Manor Convalescent Ctr., 144 Ariz. 21, 695 P.2d 270 (1985).

contractors were used in blue collar employment settings. This gave rise to the ability to litigate on the basis of negligent selection for personal injury or property damages which was more likely to occur around those types of work environments. More recently, we have witnessed an expansion of the employment of independent contractors into white collar areas. Today it is not uncommon to encounter such service providers as contract attorney who provide legal defense representation on an "as needed" basis, or attorney's who contract out for accounting and tax services, or appraisals for their clients. Independent contractors are being engaged in other professions as real estate brokers, dealers representatives, physicians, home care nurses, and computer specialists. Most of these contractors provide services that foreseeably could result in economic harm to third persons as opposed to the more traditionally recognized losses such as physical harm or property damage. Given the ease of the court's transition from allowing damages for physical harm to allowing claims seeking awards for property losses, we may find that the courts are more willing to compensate third parties for economic harm as well. Up to this point, there is a dearth of cases arguing negligent selection of professionals, due in part, to the ability of litigants to pursue professional claims under malpractice actions. In the future, however, we should expect to see greater accountability for the negligent selections of these types of professionals for economic harms occasioned.

One other trend seems noteworthy. The cases we examined involved predominately disputes in a commercial context where the employing party was called upon to contract out for services that they themselves could not provide. As articulated by the judiciary, the level of inquiry and the factors germane to a determination of the competency of an independent contractor seems to be an elevated degree of common sense, except of course, when the government contracts for services in which case it is immune. The clear message is that some measure of exploration into the contractor's background must be undertaken, one just cannot assume that they are competent.

Although most of the cases were commercial in nature, it would be ill-advised to assume that the average person contracting for services would not be bound by these same indicators of a competent contractor and the same need to conduct a pre-hiring screening. Indeed, one concern is that the motivation for individuals to contract for the services of an independent contractor is that they recognize that they are not qualified to handle a particular job. They must rely, therefore, upon the expertise or skills of someone who holds themselves out to be a specialist. Further, at times for example, the homeowner contracts out to rectify a potentially dangerous condition on their property such as the removal

of a rotting tree ready to fall onto the property of a neighbor or for the trimming of tree limbs that are precariously close to utility wires. Most homeowners are not aware of the techniques involved in tree removal, or the appropriate type of tools and equipment that should be used, so by what process do they evaluate the competence of an independent contractor? Typically, the average person faced with needing services of this type would turn to the yellow pages of their telephone book and pick the vendor with the "best" ad or call for a price comparisons. These folks could find themselves in the position of an unwary victim in a no-win situation, liable if they do not correct the known defect and liable if they do not select a competent contractor, who they lack the ability to judge. The authors of the Restatement in their comments recognized this potential dilemma and at least raised the distinction, although not directly addressing the difference in standards that would be appropriate.

One needs to be mindful that the search for "deep pockets" can be a motivating factor in seeking to pursue the hiring party under a negligent selection theory. Therefore, the best offensive move for any employer—including private citizens who engage independent contractors—is to create a strong defense through careful preparation. Exercising due care through a pre-hiring screening is a vital course for preventing complications. At a minimum, this screening should include a thorough background inquiry into the reputation and experience of the contractor, including learning whether the contractor has complied with licensing requirements and possesses appropriate equipment. Further, the inquiry should involve a consideration of whether the contractor is bonded, possesses adequate insurance coverage and appears financially responsible. The final phase of the inquiry should be a verification of references by contacting past clients served by the contractor. A careful pre-hiring screening should help shield the employing party from liability. After all, "the best offense is a good defense."