



1-1-1988

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Recommended Citation

Thomas J. Welsh, *Clarifying the Peculiar Risk Doctrine: The Rule Restated*, 20 PAC. L. J. 197 (1988).

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Clarifying the Peculiar Risk Doctrine: The Rule Restated

Generally, employers¹ of independent contractors² are not held vicariously liable for the torts committed by independent contractors during the course of the work.³ This doctrine is commonly referred to as the rule of nonliability.⁴ The rationale for the rule of nonliability is that an employer who has no right to exercise control over the manner or method of the performance by an independent contractor should not be held vicariously liable for injuries that result from negligent performance by such a contractor.⁵

Over time this general rule has been severely eroded by a large number of exceptions. These exceptions have virtually swallowed the rule.⁶ California has specifically recognized that the nonliability rule is more of an exception than the general rule.⁷

1. See generally CAL. LABOR CODE § 3300 (West 1987) (definition of employer). The term "employer" is used herein to define the status of a person or entity hiring the services of an independent contractor, and is not used to denote the existence of an employer/employee relationship.

2. See generally *id.* § 3353; RESTATEMENT (SECOND) OF AGENCY § 2(3) (1959) (defining "independent contractor").

3. See generally RESTATEMENT (SECOND) OF TORTS § 409 (1965); W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 509 (5th ed. 1984) [hereinafter PROSSER]; 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 661-662 (8th ed. 1974 & Supp. 1984); 38 Cal. Jur. 3d *Independent Contractors* §§ 13-23 (1977 & Supp. 1987) (stating the general rule of nonliability for the torts of independent contractors and the various exceptions to that rule).

4. See *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 508, 595 P.2d 619, 621-22, 156 Cal. Rptr. 41, 43-44 (1979) (stating the California Supreme Court's most recent treatment of the nonliability rule and peculiar risk doctrine).

5. RESTATEMENT (SECOND) OF TORTS § 409 comment b (1965); PROSSER, *supra* note 3, § 71; 38 Cal. Jur. 3d *Independent Contractors* § 13 (1977 & Supp. 1987).

6. See RESTATEMENT (SECOND) OF TORTS §§ 410-429 (listing 24 such exceptions including, for example, negligent direction by the employer (§ 410), negligent selection of the contractor (§ 411), negligent inspection of work completed by the contractor (§ 412), work done in a public place (§ 417), statutory nondelegable duties (§ 424), and the peculiar risk doctrine (§§ 413, 416, 426, and 427)); See also PROSSER, *supra* note 3, § 71, at 509; 4 B. WITKIN, *supra* note 3, §§ 661-662; 38 Cal. Jur. 3d *Independent Contractors* § 13 (various sources recognizing the erosion of the general rule of nonliability). See generally Comment, *Responsibility for the Torts of an Independent Contractor*, 39 YALE L.J. 861 (1930) (discussing the range of exceptions to the nonliability rule).

7. *Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 252, 437 P.2d 508, 513, 66 Cal. Rptr. 20, 25 (1968). The court cites the language from *Restatement (Second) of Torts* section 409 comment b that the exceptions "are so numerous, and they have so far eroded the 'general rule,' that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." *Id.*

Among the exceptions to the rule of nonliability is the peculiar risk doctrine.⁸ The peculiar risk doctrine imposes liability on the employer of an independent contractor when a plaintiff's injury arises out of a peculiar risk inherent in the contract work, against which a reasonable employer would have taken special precautions.⁹ The doctrine consists of three prima facie elements that focus on the character of the risk of harm that caused the injury.¹⁰ First, the risk must be inherent in the work.¹¹ Second, the risk must be beyond the mere common or ordinary risks associated with the contract work.¹² Third, the risk must be foreseeable to a reasonable employer.¹³

Despite the simplicity of this statement of the peculiar risk doctrine, application of the doctrine has produced problems in California.¹⁴ Two important factors contribute to the confusion surrounding the peculiar risk doctrine. First, the California Supreme Court adopted the peculiar risk doctrine as codified in the second Restatement of Torts.¹⁵ The second Restatement of Torts has promulgated duplicative statements of the doctrine that are difficult to distinguish and apply.¹⁶ Second, the California courts have not agreed on a single analysis

8. See RESTATEMENT (SECOND) OF TORTS §§ 413, 416, and 427 (1965). See also *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 509, 595 P.2d 619, 622, 156 Cal. Rptr. 41, 44 (1979). The California Supreme Court stated in *Aceves* that the term "special risk" is perhaps a more descriptive label for the doctrine, but none of the subsequent court of appeal opinions have abandoned the peculiar risk label utilized in the restatement. *Id.* at 509 n.2, 595 P.2d at , 156 Cal. Rptr. at . See generally Comment, *A Systematic Approach to the Peculiar Risk Exception to the Independent Contractor's Rule in Iowa*, 67 IOWA L. REV. 589 (1982) (discussing the application of the peculiar risk doctrine under Iowa law).

9. RESTATEMENT (SECOND) OF TORTS §§ 413, 416, and 427 (1965). 4 B. WITKIN, *supra* note 3, §§ 661-662.

10. See RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

11. *Id.* (stating that the risk must arise out of the "character" of the work or "the place where it is to be done.").

12. *Id.* (stating that the risk must be "special" and call for the taking of special precautions).

13. *Id.* §§ 416 comment e, 427 comment b (1965) (stating that the risk must be one "which the employer should recognize as likely to arise," or one "recognizable in advance").

14. See, e.g., *Stark v. Weeks Real Estate*, 94 Cal. App. 3d 965, 970, 156 Cal. Rptr. 701, 704 (1979) (stating that the "abstract definition of the doctrine is elusive"); *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 916, 174 Cal. Rptr. 875, 881 (1981) (noting that "courts have taken varying approaches to deciding" what risks are within the peculiar risk doctrine); *LaCount v. Hensel Phelps Const. Co.*, 79 Cal. App. 3d 754, 764, 145 Cal. Rptr. 244, 249 (1978) (noting that the term "peculiar risk" is not defined well by the Restatement).

15. See, e.g., *Caudel v. East Bay Mun. Util. Dist.*, 165 Cal. App. 3d 1, 8-9 n.4, 211 Cal. Rptr. 222, 227 n.4 (1985) (indicating that some of the Restatement terminology has tended to "engender confusion"). See *infra* notes 39-83 and accompanying text (discussing the full development and acceptance of the second Restatement formulation of the peculiar risk doctrine in California).

16. See RESTATEMENT (SECOND) OF TORTS §§ 413, 416, 426 and 427 (1965); *infra* notes 47-83 and accompanying text (analyzing and construing these Restatement sections).

for applying the doctrine.¹⁷ Rather, several districts of the California Court of Appeal have applied distinguishable approaches in defining and applying the peculiar risk doctrine.¹⁸ Thus, the method of determining which risks are sufficiently peculiar to justify imposing vicarious liability on the employer is varied. The lack of a single concise definition of the peculiar risk doctrine, coupled with varying approaches to the application of the doctrine, has created substantial difficulty in litigating cases with a peculiar risk issue.¹⁹

The purpose of this comment is to clarify the peculiar risk doctrine as applied in California. Part I will focus on the general scope of the doctrine and on the policy considerations that underlie the application of the doctrine.²⁰ Part II will trace the development of the peculiar risk doctrine in California.²¹ Part III will explain and construe the Restatement formulation of the doctrine.²² Part IV of the comment will examine the recent cases that reveal the varying approaches taken in applying the doctrine.²³ Finally, part V will suggest a simplified analytical approach to the application of the peculiar risk doctrine.²⁴

I. THE SCOPE AND POLICY OF THE PECULIAR RISK DOCTRINE

The peculiar risk doctrine is essentially a rule of vicarious liability.²⁵ When the peculiar risk doctrine applies, liability for an injury re-

17. See, e.g., *Henderson Bros.*, 120 Cal. App. 3d 903, 916, 174 Cal. Rptr. 875, 881 (noting that varying approaches have been taken in applying the peculiar risk doctrine).

18. See *infra* notes 90-141 and accompanying text (discussing the several approaches to the application of the doctrine). The first approach discussed in this comment is the attempt by a court to define the scope of the peculiar risk doctrine by citing numerous factual examples from previous decisions in which the doctrine was held to apply. The second approach was a multifactor analysis that was articulated in *Henderson Bros.* The last distinguishable approach discussed herein is a two-pronged analysis that was described in *Jimenez v. Pacific Western Construction Co.* 185 Cal. App. 3d 102, 229 Cal. Rptr. 575 (1986).

19. See, e.g., *Henderson Bros.*, 120 Cal. App. 3d at 912, 174 Cal. Rptr. at 879 (noting that the trial judge misapprehended the scope of the doctrine).

20. See *infra* notes 25-36 and accompanying text.

21. See *infra* notes 37-50 and accompanying text.

22. See *infra* notes 51-84 and accompanying text.

23. See *infra* notes 85-149 and accompanying text.

24. See *infra* notes 150-62 and accompanying text.

25. See generally PROSSER, *supra* note 3, 69, (5th ed. 1984) (providing general definition of vicarious liability); RESTATEMENT (SECOND) OF TORTS §§ 416-429 (1965). The introductory note to sections 416-429 describes these sections as "rules of vicarious liability." Section 416, for example, imposes liability on the employer despite the lack of any active negligence on the part of the employer. The employer's liability is based on the negligent acts of the

sulting from the negligence of an independent contractor is imputed to the employer.²⁶ In this sense, the peculiar risk doctrine functions as an exception to the rule of nonliability.²⁷

The rationale for imposing vicarious liability is primarily based on concerns of fundamental fairness and efficient loss allocation.²⁸ The operation of the peculiar risk doctrine prevents employers from insulating themselves from liability for harm resulting from risks they have helped to create.²⁹ The doctrine is triggered when an employer retains an independent contractor to perform work that involves some foreseeable peculiar or special risk.³⁰ When such peculiar or special risks are present in contract work, public policy prevents employers from shielding themselves from liability by delegating the work to independent contractors. To allow employers this insulation would be fundamentally unfair.³¹ This unfairness arises first from the fact that the employer is exercising full control over the choice of an independent contractor.³² In exercising this choice, the employer is in a position to choose a contractor who is both skilled and financially responsible.³³ Further, the employer generally has sufficient bargaining power to extract express contractual indemnity from the contractor.³⁴ The employer is also in the best position to ensure

independent contractor. *Id.*

The peculiar risk doctrine is virtually indistinguishable in form and result from a nondelegable duty. *See Maloney v. Rath*, 69 Cal. 2d 442, 447, 445 P.2d 513, 516, 71 Cal. Rptr. 897, 900 (1968) (listing the peculiar risk doctrine as one of a variety of nondelegable duties).

26. RESTATEMENT (SECOND) OF TORTS § 416 comment a, comment c (1965) (stating that the employer cannot shift to the contractor the responsibility for peculiar risks arising in the work, and is liable irrespective of having made express provisions in the contract for special precautions).

27. *See, e.g., Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 508, 595 P.2d 619, 621, 156 Cal. Rptr. 41, 43-44 (1979) (stating that the peculiar risk doctrine is a "well-recognized exception" to the rule of nonliability).

28. *Id.* at 508, 595 P.2d at 622, 156 Cal. Rptr. at 44 (*citing Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 253, 437 P.2d 508, 513, 66 Cal. Rptr. 20, 25 (1968) and *Widman v. Rossmoor Sanitation, Inc.*, 19 Cal. App. 3d 734, 747, 97 Cal. Rptr. 52, 59 (1971)).

29. *See Schmidlin v. Alta Planning Mill Co.*, 170 Cal. 589, 592, 150 P. 983, 984 (1915) (stating that when there is inherent danger in the work "it is not in consonance with justice that responsibility for injury" be passed to the contractor); RESTATEMENT (SECOND) OF TORTS § 416 comment a (1965) (stating that employers cannot shift to contractors the responsibilities for peculiar risks); *See also id.* § 427A comment b (noting a similar policy in the context of independent contractors hired to perform abnormally dangerous activities; in such cases the employers may not escape liability for dangers they have "set in motion").

30. *See* RESTATEMENT (SECOND) OF TORTS § 416 comment d (1965) (stating that work must involve some "special hazard").

31. *See supra* note 24 (discussing the policy considerations that underlie the peculiar risk doctrine).

32. PROSSER, *supra* note 3, § 71, at 509.

33. *Id.*

34. *Id.*

that adequate precautions are taken to protect against any special risks.³⁵ Finally, the employer can efficiently distribute any resulting loss through the cost of doing business.³⁶

II. DEVELOPMENT OF THE DOCTRINE IN CALIFORNIA.

The California Supreme Court first recognized a form of the peculiar risk doctrine in the case of *Schmidlin v. Alta Planning Mill Company*.³⁷ In *Schmidlin*, a bucket of paint, which had been placed unsecured on a platform that was being lifted up the side of a building, fell and struck the plaintiff.³⁸ The painters were hired as independent contractors to paint a large sign on the side of the employer's building.³⁹ The plaintiff argued that the building owner should be held vicariously liable for the negligence of the painters. The court recognized an exception to the nonliability rule when an injury results from a risk inherent in the work being performed by the independent contractor.⁴⁰ The application of the exception by the court, however, was quite narrow. According to the court, the remote

35. *Id.*

36. *Id.* See also *Acèves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 508, 595 P.2d 619, 621, 156 Cal. Rptr. 41, 43-44 (1979) (citing the same considerations as underlying the peculiar risk doctrine).

When the referenced policy considerations are not applicable, the doctrine simply does not apply. See, e.g., *Addison v. Susanville Lumber, Inc.*, 47 Cal. App. 3d 394, 120 Cal. Rptr. 737 (1975). In *Addison* the court found that the risk that an independent contractor would require an inexperienced employee to fall a large tree was not a risk against which the employer would reasonably be expected to take special precautions. *Id.* at 402, 120 Cal. Rptr. at 742. The court noted that imposing liability based on an unforeseeable risk would place too severe a burden on the employer of the independent contractor. *Id.* See *infra* notes 122-28 and accompanying text (discussing *Addison*). See also *Elder v. Pacific Tel. & Tel. Co.*, 66 Cal. App. 3d 650, 136 Cal. Rptr. 203 (1977). In *Elder* the plaintiff worked for an independent contractor who had been hired to perform demolition work on the employer's building. The court held that the risk created by the plaintiff's unforeseeable deviation from the planned method of performing the work was not a risk inherent in the work, and thus the peculiar risk doctrine was held inapplicable. *Id.* at 660, 136 Cal. Rptr. at 208. The court noted that when the risk is not inherent in the work, the policy consideration behind the peculiar risk doctrine make it inappropriate to shift the blame to the employer. *Id.*

37. 170 Cal. 589, 150 P. 983 (1915). In recognizing a peculiar risk type of exception to the nonliability rule, the *Schmidlin* court relied upon cases which had found related reasons to depart from the nonliability rule. See, e.g., *Williams v. Fresno Coral & Irrigation Co.*, 96 Cal. 14, 30 P. 961 (1892) (the work delegated to the independent contractor expressly required and intended damage to the plaintiff's property); *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 591, 108 P. 509 (1910) (wherein the employer delegated the duty to restore a public sidewalk that he had been licensed by the city to excavate).

38. *Schmidlin*, 170 Cal. at 590, 150 P. at 984.

39. *Id.*

40. *Id.* at 592, 150 P. at 984. See generally RESTATEMENT (SECOND) OF TORTS § 427 (1965) (using language of "inherent" risk in defining the peculiar risk doctrine).

possibility that an unsecured bucket of paint on the platform might fall was not a risk inherent in the work.⁴¹ Rather, the court viewed the risk of gross negligence by the contractor as collateral to the risks inherent in the work being performed, and thus the employer was not held vicariously liable.⁴²

Prior to the promulgation of the first Restatement of Torts, the exception to the nonliability rule announced in the *Schmidlin* decision was not altered or expanded. The first Restatement of Torts devoted an entire chapter to codifying the primary exceptions to the nonliability rule,⁴³ one exception being the peculiar risk doctrine.⁴⁴ Several California courts referred in dicta to this Restatement chapter as a correct statement of the primary common law exceptions to the nonliability rule.⁴⁵ Shortly thereafter, in *Courtell v. McEachen*,⁴⁶ the California Supreme Court cited sections 413 and 416 of the first Restatement as correct statements of the peculiar risk doctrine.⁴⁷ The holding in *Courtell* was later relied upon in *Van Arsdale v. Hollinger*⁴⁸ when the court adopted the second Restatement formulation of the peculiar risk doctrine.⁴⁹ Thereafter, California courts utilized the second Restatement definitions⁵⁰ as correct statements of the peculiar risk doctrine.

41. *Schmidlin*, 170 Cal. at 592, 150 P. at 984. In applying the exception the court required that there be a close nexus between the particular negligent act and the existence of the inherent risk that justifies departing from the nonliability rule. *Id.*

42. *Id.* Under a modern application of the peculiar risk doctrine, the outcome of *Schmidlin* would have been different. See RESTATEMENT (SECOND) OF TORTS § 427 comment c (1965). Comment c contains an example that uses the facts of the *Schmidlin* case to illustrate a risk that is squarely within the scope of the doctrine. *Id.*

Prior to the adoption by California of the first Restatement of Torts the doctrine was generally referred to as the "inherently dangerous work" exception. See, e.g., *Snyder v. Southern Cal. Edison Co.*, 44 Cal. 2d 793, 797, 285 P.2d 912, 916 (1955). One section of the second Restatement formulation has retained this language. See RESTATEMENT (SECOND) OF TORTS § 427 (1965). See *infra* notes 67-71 and accompanying text (discussing § 427 in detail).

43. See RESTATEMENT OF TORTS §§ 409-429 (1934). These sections make up a chapter entitled "Employer Liability." Section 409 states the general rule of nonliability for the torts of independent contractors. The remaining sections codify the primary common law exceptions to the nonliability rule. See *id.* §§ 410-429.

44. See *id.* §§ 413, 416, 426 and 427. See also *infra* notes 52-69 and accompanying text (discussing the Restatement formulation of the peculiar risk doctrine in full).

45. See, e.g., *Potter v. Empress Theatre Co.*, 91 Cal. App. 2d 4, 10-11, 204 P.2d 120, 124 (1949) (citing Restatement §§ 413 and 416 as potential grounds for imposing liability on the employer); *Knell v. Morris*, 39 Cal. 2d 450, 456, 247 P.2d 352, 355 (1952) (citing Restatement §§ 410-429 as codifying the numerous exceptions to the nonliability rule).

46. 51 Cal. 2d 448, 334 P.2d 870 (1959).

47. *Courtell*, 51 Cal. 2d at 456-57, 334 P.2d at 874.

48. 68 Cal. 2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968).

49. *Van Arsdale*, 68 Cal. 2d at 253-54, 437 P.2d at 513-14, 66 Cal. Rptr. at 25-26 (noting that only minor, inconsequential changes were made in the second Restatement sections stating the peculiar risk doctrine).

50. See notes 51-84 and accompanying text (discussing *Restatement (Second) of Torts* sections 413, 416, 426 and 427).

III. THE RESTATEMENT FORMULATION

Four independent sections of the second Restatement of Torts are relevant to the peculiar risk doctrine, specifically sections 413, 416, 426, and 427.⁵¹ These sections can be divided into two classes based upon their approach to the peculiar risk doctrine. The first class includes sections 413, 416, and 427.⁵² These sections provide affirmative statements of the elements and parameters of the peculiar risk doctrine. The second class consists of section 426.⁵³ Section 426 is labelled the collateral risk doctrine. The collateral risk doctrine defines risks that fall outside the scope of the peculiar risk doctrine.⁵⁴

A. *The Peculiar Risk Doctrine*

California courts most often use section 416 as an affirmative definition of the peculiar risk doctrine.⁵⁵ Section 416 imposes liability on the employer when harm results from the failure of the independent contractor to take special precautions against a foreseeable peculiar risk.⁵⁶ Liability is imposed even though the employer has provided for special precautions against the risk.⁵⁷

51. RESTATEMENT (SECOND) OF TORTS §§ 413, 416, 426 and 427 (1965). These sections are included in Restatement Chapter 15 entitled, "Liability of an Employer of an Independent Contractor."

52. *Id.* § 413, 416, 427 (1965). While these are generally treated as a class, section 416 is utilized more frequently by the California courts to state the definition of the peculiar risk doctrine in California.

53. *Id.* § 426 (1965).

54. See *infra* notes 70-79 and accompanying text (fully construing RESTATEMENT (SECOND) OF TORTS § 426). The collateral risk doctrine is essentially a negative statement of the peculiar risk doctrine. See RESTATEMENT (SECOND) OF TORTS § 426 comment a. Compare *id.* §§ 413, 416, 427 (stating the peculiar risk doctrine) with *id.* § 426 (stating the collateral risk doctrine).

55. RESTATEMENT (SECOND) OF TORTS § 416 (1965) provides:

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Id.

56. *Id.*

57. *Id.* The fact that liability is imposed regardless of whether the employer made provisions for special precautions reveals that the drafters of the Restatement were using the language of "special precaution" in order to limit the doctrine to special or peculiar risks. That is, the doctrine does not include risks against which a reasonable person would only take ordinary precautions. The "special precautions" language embodies the prima facie requirement that the risk be beyond the common or ordinary risks inherent in the work. *Id.*

Section 413 is another statement of the same basic doctrine.⁵⁸ Both sections 413 and 416 contain the prima facie requirements of the peculiar risk doctrine.⁵⁹ Section 413, however, is designed to apply only when the employer has completely failed to make provisions, either in the contract or otherwise, for the taking of special precautions against a peculiar risk.⁶⁰ In such circumstances, the employer is held directly liable for physical harm caused by the absence of special precautions.⁶¹ The California courts have recognized that liability under section 416 is vicarious,⁶² while, in contrast, section 413 imposes direct liability against the employer.⁶³ Section 416 is designed to apply only when the employer has expressly provided for special precautions against the peculiar risk.⁶⁴ If no such provisions have been made, section 413 should be applied, and the employer is held directly liable for harm resulting from the peculiar risk.⁶⁵ According to comment c to section 416, however, applying either section

58. *Id.* § 413 provides:

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar *unreasonable* risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the *absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of special precautions.*

Id. (emphasis added to highlight language in § 413 which differs from § 416).

59. See *supra* notes 10-13 and accompanying text. The three prima facie elements of the peculiar risk doctrine are: (1) The risk must arise from or be inherent in the work, (2) the risk must be beyond the mere common or ordinary risks involved in the work, and (3) the risk must be one which is foreseeable to a reasonable person in the employer's position. *Id.*

60. See RESTATEMENT (SECOND) OF TORTS § 413 comments a, b (1965); *id.* § 416 comment b (1965) (stating that when provisions for special precautions have been made by the employer, the employer may nonetheless be held liable under section 416).

61. *Id.* § 413.

62. BLACK'S LAW DICTIONARY 1404 (5th ed. 1979) (defining vicarious liability as "indirect legal responsibility").

63. *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 509, 595 P.2d 619, 622, 156 Cal. Rptr. 41, 44 (1979). While the *Aceves* court expressly distinguished between direct liability under § 413 and vicarious liability under § 416, a number of lower courts have not made the distinction. *Id.* The courts apparently choose to rely upon the more inclusive statement contained in § 416. See, e.g., *Caudel v. East Bay Mun. Util. Dist.*, 165 Cal. App. 3d 1, 6, 211 Cal. Rptr. 222, 224 (1985) (noting the distinction between these sections in footnote 2, but proceeding to apply section 416 without citing any facts indicating that the employer had made any provision for taking special precautions).

The distinction clearly suggests a required threshold question of whether the employer made provisions for special precautions in order to determine which section should be applied. No reported cases have entered into such an analysis, however.

64. RESTATEMENT (SECOND) OF TORTS § 416 comment c (1965). The language in section 416 indicating that the employer will be liable "even though" provisions have been made in the contract or otherwise for taking special precautions against the peculiar risk implies that such provisions have in fact been made. *Id.*

65. *Id.* §§ 413 comment a, 416 comment c.

will have no impact on the liability of the employer.⁶⁶ Thus, when the prima facie elements of the doctrine are satisfied, the application of one section rather than the other will not change the outcome.

Section 427 is the final affirmative statement of the peculiar risk doctrine in the second Restatement formulation.⁶⁷ While section 427 differs in form from section 416, the comments to both sections make clear that the sections are closely related and essentially duplicative statements of the peculiar risk doctrine.⁶⁸ According to the comments, courts that utilize language of “inherent or intrinsic danger” to describe the doctrine, rather than “peculiar or special risk” should apply section 427.⁶⁹ Section 427 is often mentioned in appellate court decisions as stating essentially the same rule as section 416,⁷⁰ however, the courts generally utilize sections 413 and 416 to define the peculiar risk doctrine.⁷¹ Regardless of which section is used, the resulting liability will be the same. No reported cases have articulated a rationale or justification for these redundant statements of the doctrine. Thus, it appears that while a single statement of the

66. *Id.* § 416 comment c. Comment c provides:

[T]he fact that the contract contains express stipulations for the taking of adequate precautions and that the contractor agrees to assume all liability for harm caused by his failure to do so, does not relieve his employer from the liability stated in this Section.

Id.

67. *Id.* § 427. Section 427 provides:

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

Id.

68. *Id.* § 427 comment a. Section 427 comment a provides: “The rule stated in this Section is closely related to, and to a considerable extent a duplication of, that stated in § 416, as to work likely to create a peculiar risk of harm to others unless special precautions are taken.” *Id.* See also *id.* § 416 comment a. Section 416 comment a provides:

There is a close relation between the rule stated in this Section, and that stated in § 427, as to dangers inherent in or normal to the work. The two rules represent different forms of statement of the same general rule The rules stated in the two Sections have been applied more or less interchangeably in the same types of cases, and frequently have been stated in the same opinion as the same rule

Id.

69. *Id.* § 427 comments b, c. See also *supra* note 42 (discussing the *Schmidlin* case, which employed language similar to § 427, and discussing the fact that the outcome of *Schmidlin* would apparently be different under an application of § 427).

70. See, e.g., *Caudel v. East Bay Mun. Util. Dist.*, 165 Cal. App. 3d 1, 6, 211 Cal. Rptr. 222, 225 (1985).

71. See, e.g., *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 508-09, 595 P.2d 619, 622, 156 Cal. Rptr. 41, 44 (1979) (holding that the “applicable law on the peculiar risk doctrines is stated in sections 413 and 416 of the Restatement (Second) of Torts”).

doctrine would have been sufficient, the second Restatement of Torts provided three.

B. The Collateral Risk Doctrine

Section 426 of the second Restatement outlines the collateral risk doctrine.⁷² The collateral risk doctrine is the converse of the peculiar risk doctrine.⁷³ The collateral risk doctrine defines risks that fall outside the scope of the peculiar risk doctrine and thus do not support an exception to the nonliability rule.⁷⁴ The focus of collateral risk analysis is on the specific negligent conduct of the independent contractor that causes an injury.⁷⁵ Under the collateral risk doctrine, an employer is not held vicariously liable when the negligence of the independent contractor results from performance of the contract work in an unforeseeable manner.⁷⁶ The second Restatement illustration of a collateral risk is a situation in which the employer hires a contractor to make an excavation.⁷⁷ The employer may reasonably expect the contractor to use a bulldozer, or picks and shovels. However, when the contractor instead uses explosives and causes physical harm, a collateral risk issue is raised.⁷⁸ Under the collateral risk doctrine the employer is not liable for injuries that result from the contractor's negligent use of this unusual method, so long as the employer had no reason to anticipate that the contractor might use such a method of performance.⁷⁹

72. RESTATEMENT (SECOND) OF TORTS § 426 (1965). Section 426 provides:

Except as stated in [sections] 428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if (a) the contractor's negligence consists solely in the improper manner in which he does the work, and (b) it creates a risk of such harm which is not inherent in or normal to the work, and (c) the employer had no reason to contemplate the contractor's negligence when the contract was made.

Id.

73. *Id.* § 427 comment d. Comment d provides: "The rule stated in § 426 is the converse of the rule stated here, and the two should be read together." *Id.*

74. *Id.* § 426 comment a.

75. *Id.*

76. *Id.* Using the language of comment a to § 426, a risk arising from the unforeseeable manner of performance by the independent contractor would be referred to as "abnormal or unusual" negligence that is outside the risks inherent in the work. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* See also PROSSER, *supra* note 3 § 71, at 516. Prosser defines collateral risks as those risks having a "disassociation from any inherent or contemplated special risk which may be expected to be created by the work." *Id.*

When the above hypothetical is analyzed under an affirmative statement of the peculiar risk doctrine, rather than under the collateral risk doctrine, the same result is obtained. In terms used by section 416, for example, the risk that the independent contractor would use explosives for the excavation is not the type of risk that the employer "should recognize" as arising from the contract work.⁸⁰ Consequently, the requirements of the peculiar risk doctrine would not be satisfied, and the employer would not be held liable for the negligence of the independent contractor. Thus, whether a fact situation is analyzed under an affirmative statement of the peculiar risk doctrine, or under the collateral risk doctrine, the same result is obtained.⁸¹

A thorough examination of the four sections of the second Restatement of Torts relevant to the peculiar risk doctrine reveals substantial redundancies. First, to distinguish among the affirmative definitions of the peculiar risk doctrine will not produce differing results.⁸² In addition, the inclusion of a section codifying the collateral risk doctrine serves only to require an additional layer of analysis.⁸³ As a result, courts are compelled to distinguish among the sections, and include an unnecessary discussion of the collateral risk doctrine. Admittedly, the structure of the peculiar risk doctrine in the second Restatement will not lead to incorrect results. Nevertheless, the multi-section treatment of the Restatement has added to the difficulty in defining this elusive doctrine.⁸⁴

80. Likewise, using the language of section 427, the work could not be said to "involve] a special danger to others which the employer *knows or has reason to know to be inherent in or normal to the work.*" *Id.* § 427.

81. Comment a to § 426 states that the collateral risk doctrine protects the employer from liability for negligence by the independent contractor in the "operative details" of the contract work. *Id.* § 462 comment a. This would include such items as negligence in driving a standard pickup truck on the work site. This type of risk would likewise be excluded from the scope of the peculiar risk doctrine as being a common or ordinary risk, not calling for any special precautions. Again, section 426 is redundant in covering these situations. *See id.* § 413 comment b.

In seeming recognition that the collateral risk doctrine is redundant, California BAJI does not contain an instruction on the collateral risk doctrine. *See California Book of Approved Jury Instructions*, BAJI 13.21 & 13.21.4 (7th ed. 1986).

82. *See supra* notes 52-69 and accompanying text (discussing *Restatement (Second) of Torts* sections 413, 416, and 427).

83. *See, e.g.,* *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979); *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 174 Cal. Rptr. 875 (1981). Virtually all of the reported decisions on the peculiar risk doctrine include a separate discussion and analysis on the collateral risk doctrine, after deciding on the peculiar risk doctrine issue. Several courts have, however, recognized that the collateral risk doctrine, by its own definition is inapplicable in cases which have been found to present a peculiar risk. *See White v. Uniroyal, Inc.*, 155 Cal. App. 3d 1, 31, 202 Cal. Rptr. 141, 159 (1984).

84. *See Caudel v. East Bay Mun. Util. Dist.*, 165 Cal. App. 3d 1, 8-9 n.4, 211 Cal. Rptr.

IV. APPLICATION OF THE PECULIAR RISK DOCTRINE IN CALIFORNIA.

After the promulgation of the second Restatement of Torts, the California courts tacitly accepted the Restatement version of the peculiar risk doctrine without critical interpretation.⁸⁵ The most recent supreme court case to analyze the doctrine is *Aceves v. Regal Pale Brewing Co.*⁸⁶ In *Aceves*, the court cited and applied sections 413, 416, and 426 of the second Restatement.⁸⁷ The *Aceves* court did not attempt to distinguish among the Restatement sections beyond noting that Section 413 imposes direct liability, while section 416 imposes vicarious liability.⁸⁸ In discussing section 426, the court cited Professor Prosser's definition of collateral risks as those risks that are "foreign" to the normal, inherent risks which trigger the peculiar risk doctrine.⁸⁹ The *Aceves* court, however, failed to articulate a broadly applicable analytical approach to determine when the peculiar risk doctrine should apply. Consequently, the lower courts have no clear guidance on how the doctrine should be applied. The absence of clear guidance from the California Supreme Court has led to the development of at least three distinguishable approaches to the application of the peculiar risk doctrine in the appellate courts.⁹⁰

The first approach originated in the case of *Griesel v. Dart Industries, Inc.*⁹¹ In *Griesel*, an employee of the independent con-

222, 227 n.4 (1985) (indicating that some of the Restatement terminology has tended to "engender confusion").

85. See *supra* notes 33-46 and accompanying text (discussing development of the peculiar risk doctrine in California, and the eventual acceptance of the Restatement formulation of the doctrine). See, e.g., *Courtell v. McEachen*, 51 Cal. 2d 448, 456-57, 334 P.2d 870, 874 (1959) (adopting the first Restatement formulation); *Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 253-54, 437 P.2d 508, 513-14, 66 Cal. Rptr. 20, 25-26 (1968) (adopting the *Second Restatement* formulation).

86. 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979).

87. *Aceves*, 24 Cal. 3d at 508-510, 595 P.2d at 622-23, 156 Cal. Rptr. at 44-45 (citing Sections 413, 416, and 426 of *Restatement (Second) of Torts*).

88. *Id.* at 509, 595 P.2d at 622, 156 Cal. Rptr. at 44. See also *supra* notes 59-66 and accompanying text (discussing the distinction between *Second Restatement* Sections 413 and 416).

89. *Aceves*, 24 Cal. 3d at 510, 595 P.2d at 623, 156 Cal. Rptr. at 45 (1979) (citing W. Prosser, *Law of Torts* § 71, at 474-75 (4th ed. 1971)). See *supra* note 79 (providing Prosser's definition of collateral risk doctrine).

90. See *infra* notes 85-149 and accompanying text (discussing the varying approaches taken in applying the peculiar risk doctrine). See also *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 916, 174 Cal. Rptr. 875, 881 (1981) (expressly recognizing that courts have taken varying approaches to the doctrine).

91. 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979).

tractor was injured when the unsloped and unsupported walls of a pipeline excavation caved in on top of him.⁹² The defendant, Dart Industries, had hired the independent contractor to perform the excavation and pipeline work.⁹³ The issue before the court was whether the trenching work involved a peculiar risk of physical harm to the workers of the independent contractor.⁹⁴ In attempting to define the scope and parameters of the peculiar risk doctrine, the court reviewed the facts of previous peculiar risk cases.⁹⁵ Based primarily upon this listing of cases, the court held that the risk of a cave-in would be a peculiar risk if the jury found that the employer could have foreseen the danger.⁹⁶ Since the court did not provide clear guidance on the application of the doctrine, lower courts have applied the case review method to define and illustrate the scope of the peculiar risk doctrine.⁹⁷

The most notable application of the *Griesel* case review method was in *Stark v. Weeks Real Estate*.⁹⁸ In *Stark*, an employee of an independent contractor was injured by an electric hand saw that the contractor had allowed to be modified so that the shield covering the blade was inoperative.⁹⁹ The injured worker apparently argued that the presence of an improperly modified hand saw on the work site created a risk that was within the scope of the peculiar risk doctrine. As a result, the employer of the independent contractor

92. *Griesel*, 23 Cal. 3d at 582, 591 P.2d at 504-505, 153 Cal. Rptr. at 214-15.

93. *Id.* at 581, 591 P.2d at 504, 153 Cal. Rptr. at 214.

94. *Id.* at 585-86, 591 P.2d at 507, 153 Cal. Rptr. at 215-16. On appeal the plaintiff successfully challenged the trial court's binding instruction to the jury that the peculiar risk doctrine was not applicable. The trial judge specifically instructed the jury that the risks involved in trenching work are "ordinary and customary," and accordingly, no peculiar risk was present in the work. *Id.*

95. *Id.* at 586, 591 P.2d at 507-8, 153 Cal. Rptr. at 217. The final case reviewed by the court was factually similar to the *Griesel* case. See *Widman v. Rossmoor Sanitation, Inc.*, 19 Cal. App. 3d 734, 97 Cal. Rptr. 52 (1971) (holding that the risk of a cave-in while working in a 14-foot deep trench was a peculiar risk).

96. *Griesel*, 23 Cal. 3d at 586, 591 P.2d at 508, 153 Cal. Rptr. at 217.

97. See *infra* note 149 (citing cases which have used the approach of the *Griesel* court to analyze the application of the peculiar risk doctrine). The method of defining the scope of the doctrine through examples from previous decisions is utilized to a degree in virtually every reported decision on the peculiar risk doctrine. In most instances, the court will first note that the definition of the doctrine is "elusive." The court then cites a string of cases, providing a parenthetical summary of the facts. In this manner, the outer parameters of the doctrine are said to be "defined." See, e.g., *Stark v. Weeks Real Estate*, 94 Cal. App. 3d 965, 970-71, 156 Cal. Rptr. 701, 704 (1979); *Hughes v. Atlantic Pac. Const. Co.*, 194 Cal. App. 3d 987, 998 n.4, 240 Cal. Rptr. 200, 206 n.4 (1987).

98. 94 Cal. App. 3d 965, 156 Cal. Rptr. 701 (1979).

99. *Stark*, 94 Cal. App. 3d at 968, 156 Cal. Rptr. at 703.

should be vicariously liable.¹⁰⁰ In addressing this argument, the court noted that the "abstract definition" of the peculiar risk doctrine was "elusive" and that the parameters of the doctrine could best be determined by example.¹⁰¹ The opinion then proceeded to review cases that had found risks within the scope of the doctrine.¹⁰² The court was unable to find a sufficiently analogous case.¹⁰³ Thus, the court held the risk to be outside the scope of the peculiar risk doctrine.¹⁰⁴ The vague attempt at defining and applying the peculiar risk doctrine illustrated by both *Griesel* and *Stark* is utilized to some degree by virtually all the courts in considering the application of the peculiar risk doctrine.¹⁰⁵

The second approach taken by the courts of appeal in applying the peculiar risk doctrine is found in the case of *Henderson Brothers Stores, Inc. v. Smiley*.¹⁰⁶ In *Henderson Brothers*, a tar kettle being used by an independent contractor hired to reroof Smiley's building overheated and exploded. The explosion set fire to the adjacent Henderson Brothers' building and caused substantial damage.¹⁰⁷ Henderson Brothers argued that the use of a tar kettle heated to temperatures over 450 degrees created a peculiar risk of harm that necessitated special precautions. As a result, the employer should be liable through the application of the peculiar risk doctrine.¹⁰⁸ In considering this argument, the court expressly acknowledged that other courts had taken varied approaches to the peculiar risk issue.¹⁰⁹ The court then listed four factors drawn from previous decisions to determine whether the risk was within the scope of the doctrine.¹¹⁰

100. *Id.* The case is an appeal from the granting of a motion for summary judgment in favor of the employer. The only issue considered on appeal was the applicability of the peculiar risk doctrine. *Id.*

101. *Id.* at 970-71, 156 Cal. Rptr. at 704.

102. *Id.*

103. *Id.* at 972, 156 Cal. Rptr. at 705.

104. *Id.* at 972-73, 156 Cal. Rptr. at 705-06. This holding was based partially on the fact that the risk was not one which the employer could reasonably anticipate. In addition, the court concluded that the risk was within the definition of collateral risk. *Id.*

105. See *supra* notes 97-104 and accompanying text (discussing the impact of the *Griesel* decision).

106. 120 Cal. App. 3d 903, 174 Cal. Rptr. 875 (1981).

107. *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 908, 174 Cal. Rptr. 875, 877 (1981).

108. *Id.* at 909, 174 Cal. Rptr. at 877.

109. *Id.* at 916, 174 Cal. Rptr. at 881. The *Henderson Bros.* court included a list of cases in the opinion that found peculiar risks in the contract work. *Id.* at 911 n.3, 174 Cal. Rptr. at 878 n.3 (citing *Stark v. Weeks Real Estate*, 94 Cal. App. 3d 965, 970-71, 156 Cal. Rptr. 701, 704 (1987)). This list, however, was relegated to a footnote and was not considered in the final analysis. *Id.*

110. *Id.* at 916-17, 174 Cal. Rptr. at 881-82. These factors include the foreseeability of the

This multi-factor approach appears to include prima facie elements that significantly narrow the application of the peculiar risk doctrine.

The first two factors listed by the court contain the three prima facie elements of the peculiar risk doctrine recognized in the second Restatement definitions.¹¹¹ The first factor requires that the risk that caused the injury be foreseeable to the employer.¹¹² The second factor requires the risk to be inherent in, or arise out of, the work.¹¹³ In addition, any such inherent risk must not arise solely in the performance of operative details of the work.¹¹⁴

The third factor articulated by the *Henderson Brothers* court represents a substantial departure from the language in the Restatement. The third factor requires that the court consider the degree of the risk that caused the injury. The court cited *West v. Guy F. Atkinson Const. Co.* as authority for the degree-of-risk factor.¹¹⁵ In *West*, the court relied upon a treatise by Prosser which argued that the peculiar risk doctrine seems to be limited either to cases of high risk work or cases in which the work has a specific recognizable risk.¹¹⁶ This is contrary to the second Restatement. Both comment b to second Restatement section 413 and comment c to section 427 expressly state that application of the peculiar risk doctrine is not limited to work that involves a high degree of risk.¹¹⁷

The California Supreme Court has refused to limit the peculiar risk doctrine to work involving a high degree of risk.¹¹⁸ Under *Aceves*,

risk, whether the risk is inherent in the work or merely an accident in the operative details of the work, the degree of the risk, and the availability of definite precautions that could have averted the danger. *Id.*

111. *Id.* The first two factors listed by the court are (1) the foreseeability of the risk, and (2) whether the risk is intimately connected with the work, or is accidental. *Id.* The three prima facie elements of the peculiar risk doctrine are that the risk be (1) inherent in the work which the independent contractor was hired to perform, (2) beyond the common and ordinary risks involved in that work, and (3) foreseeable by the employer. *See supra* notes 10-13 and accompanying text (discussing the prima facie elements of the peculiar risk doctrine).

112. *Henderson Bros.*, 120 Cal. App. 3d at 916-17, 174 Cal. Rptr. at 881-82.

113. *Id.*

114. *Id.* This requirement distinguishes between special or peculiar risks, and mere common or ordinary risks not intended to fall within the scope of the peculiar risk doctrine. For policy reasons the peculiar risk doctrine does not impose liability when the risk that gives rise to the injury is so common or ordinary that it is reasonable to allow the employer to assume that the independent contractor will take ordinary precautions to protect against the risk. *See* RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

115. *Henderson Bros.*, 120 Cal. App. 3d at 917, 174 Cal. Rptr. at 882 (*citing* *West v. Guy F. Atkinson Const. Co.*, 251 Cal. App. 2d 296, 59 Cal. Rptr. 286 (1967)).

116. *West*, 251 Cal. App. 2d at 299, 59 Cal. Rptr. at 288 (*quoting* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 486 (3d ed. 1964)). *See also* PROSSER, *supra* note 3 § 71, at 514 (5th ed. 1984).

117. RESTATEMENT (SECOND) OF TORTS §§ 413 comment b, 427 comment c (1965).

118. *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 509, 595 P.2d 619, 622, 156 Cal.

if the requisite elements of the doctrine are satisfied, the doctrine is applied regardless of the degree of risk involved.¹¹⁹ The potential impact of a degree of risk factor would be to narrow the scope of the doctrine substantially. In addition to reducing the scope of the doctrine, the inclusion of a degree-of-risk factor would add an additional layer of analysis. The courts and juries would be required to answer the added question of what risks are sufficiently great to justify imposing liability. The inclusion of a degree-of-risk factor by the *Henderson Brothers* court thus is inconsistent with California's statement of the peculiar risk doctrine.¹²⁰

The final factor cited by the *Henderson Brothers* court concerns the availability of definite special precautions to avert the danger.¹²¹ In support of this factor, the court cited *Addison v. Susanville Lumber, Inc.*¹²² In *Addison*, an independent contractor was retained to clear a logging road through a rural forest.¹²³ An employee of the independent contractor¹²⁴ was injured by a tree which was cut down incorrectly.¹²⁵ The *Addison* court concluded that the risk of an independent contractor hiring an incompetent employee was too common to trigger the peculiar risk doctrine.¹²⁶ According to the court, an employer need not anticipate the need for special precautions against such common risks.¹²⁷ After announcing this decision, the court added that they found it "hard to conceive of any special precautions one could take in a rural forest to eliminate such a common risk."¹²⁸ The *Henderson Brothers* court relied upon this specific language in articulating a factor which requires the availability of special precautions which could have prevented the harm.¹²⁹

Rptr. 41, 44 (citing RESTATEMENT (SECOND) OF TORTS § 413 comment b, as indicating that the degree of risk is not relevant to the application of the peculiar risk doctrine).

119. *Id.*

120. RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

121. *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 917, 174 Cal. Rptr. 875, 882 (1981).

122. *Id.* (citing *Addison v. Susanville Lumber*, 47 Cal. App. 3d 394, 402, 120 Cal. Rptr. 737, 742 (1975)).

123. *Addison v. Susanville Lumber*, 47 Cal. App. 3d 394, 397, 120 Cal. Rptr. 737, 738-39 (1975).

124. The peculiar risk doctrine also applies when plaintiff is an employee of the independent contractor. *See generally* *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 509 n.1, 595 P.2d 619, 622 n.1, 156 Cal. Rptr. 41, 44 n.1 (1979); *Van Arsdale v. Hollinger*, 68 Cal. 2d 245, 254, 437 P.2d 508, 514, 66 Cal. Rptr. 20, 26 (1968).

125. *Addison*, 47 Cal. App. 3d at 397, 120 Cal. Rptr. at 738-39.

126. *Id.* at 401-2, 120 Cal. Rptr. at 741.

127. *Id.* at 402, 120 Cal. Rptr. at 742.

128. *Id.*

129. *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 917, 174 Cal. Rptr. 875, 882 (1982).

By including factors concerning the degree of risk created by the activity and the availability of special precautions to prevent harm, the *Henderson Brothers* court adds several substantive prerequisites to the application of the peculiar risk doctrine. Thus, the burden on a plaintiff who is attempting to impose liability on an employer of a negligent independent contractor is increased. No other court of appeal has yet adopted the approach articulated by the *Henderson Brothers* court.¹³⁰

The final approach taken by the California courts in applying the peculiar risk doctrine was articulated in *Jimenez v. Pacific Western Construction Company, Inc.*¹³¹ The facts of *Jimenez* are indistinguishable from the facts of *Griesel v. Dart Industries*.¹³² In *Jimenez*, two employees of the independent contractor were working in an unsupported and unsloped nine foot deep trench when the walls collapsed on top of them.¹³³ One worker was killed, the other was seriously injured.¹³⁴ The *Jimenez* court divided the peculiar risk analysis into two prongs. Under the first prong the court considers whether the contract work was likely to create a peculiar risk of harm absent special precautions.¹³⁵ The second prong limits the doctrine to peculiar risks that the employer should have foreseen.¹³⁶

The *Jimenez* decision did not analyze the first prong of this approach. Rather, the court was bound by the prior holding of *Griesel* that contract work involving the excavation of a deep trench presents a peculiar risk of harm absent special precaution.¹³⁷

130. See generally *Caudel v. East Bay Mun. Util. Dist.*, 165 Cal. App. 3d 1, 9 n.5, 211 Cal. Rptr. 222, 227 n.5 (1985) (discussing) to *Henderson Brothers* as an example of a fact situation in which no collateral negligence was found).

131. 185 Cal. App. 3d 102, 229 Cal. Rptr. 575 (1986).

132. *Jimenez*, 185 Cal. App. 3d at 110, 229 Cal. Rptr. at 578-79 (1986). See *Griesel v. Dart Industries, Inc.*, 23 Cal. 3d 578, 582, 591 P.2d 503, 504-05, 15 Cal. Rptr. 213, 214 (1979) (holding that working in an unsloped and unsupported nine foot deep trench presents a peculiar risk of harm absent special precautions). See *supra* notes 91-96 and accompanying text (discussing *Griesel*).

133. *Jimenez*, 185 Cal. App. 3d at 107-08, 229 Cal. Rptr. at 577.

134. *Id.*

135. *Id.* at 110, 229 Cal. Rptr. at 578.

136. *Id.*

137. *Id.* at 110, 229 Cal. Rptr. at 578-9.

The *Jimenez* approach was recently followed in *Hughes v. Atlantic Pacific Const. Co.*, 194 Cal. App. 3d 987, 998, 240 Cal. Rptr. 200, 206 (1987). *Hughes* arose when an employee of an independent contractor, hired to pour concrete during construction of a high-rise building, fell into a gap in the floor of the fifth story. *Id.* at 992-93, 240 Cal. Rptr. at 202. The two-foot "seismic joint" was placed in the floor to allow the separate towers of the building to sway independently in the event of an earthquake. The plaintiff's fall occurred when a bridge over the gap collapsed. *Id.* In affirming the trial court's granting of a motion for nonsuit in

The second prong of the *Jimenez* approach focuses on whether the employer should foresee that the work is likely to create the peculiar risk.¹³⁸ The employer in *Jimenez* argued that this foreseeability analysis requires consideration of the knowledge and experience of the employer in the type of work being performed by the independent contractor.¹³⁹ The court agreed that this analysis was correct in cases containing no evidence that the employer had actually anticipated the risk.¹⁴⁰ In this case, however, the evidence indicated that the employer had in fact anticipated the risk.¹⁴¹ The court ruled that when the employer has actually foreseen the peculiar risk, the knowledge and experience of the employer in the type of work being performed by the independent contractor becomes irrelevant.¹⁴²

The approach taken by the court in *Jimenez* provides a clear presentation of the three prima facie elements of the peculiar risk doctrine which are reflected in the second Restatement definition.¹⁴³ The first prong requires both that the risk be inherent in the work, and that the risk be peculiar, or beyond the common or ordinary risks of the work.¹⁴⁴ The second prong requires that the risk be foreseeable to a reasonable person in the position of the employer.¹⁴⁵ The *Jimenez* decision, however, was unable to provide a full analysis of the first prong of this approach.

favor of the general contractor, the *Hughes* court entered into a detailed factual analysis of the first prong of the analysis articulated in *Jimenez*. The court noted that the evidence at trial showed that the cause of the collapse of the bridge was the use of a piece of plywood that was too small. *Id.* at 993, 240 Cal. Rptr. at 203. The court held as a matter of law that the risk of an independent contractor using an improperly sized piece of wood was not a peculiar risk inherent in the work of building a high-rise. *Id.* at 999, 240 Cal. Rptr. at 207. The court did not expressly divide the analysis of the first prong of the *Jimenez* approach into two factors. Nevertheless, the conclusion that the risk must be both inherent in the work, and peculiar or special is implicit in the language of the court's holding. *Id.* The only criticism that might be made of the *Hughes* decision is that the holding appears to withdraw somewhat from the rule that peculiar risk issues are ordinarily left to the trier of fact.

138. *Jimenez*, 185 Cal. App. 3d at 110, 229 Cal. Rptr. at 579. The second prong of the *Jimenez* approach is simply an analysis of the foreseeability of the risk.

139. *Id.*

140. *Id.* at 110-11, 229 Cal. Rptr. at 579.

141. *Id.* In ruling that the employer had actually foreseen the presence of a peculiar risk, the court noted the testimony of the president of the defendant construction company. The president testified that he was aware that a permit was needed to perform the trenching work, and that he requested that the independent contractor obtain one. *Id.* In addition, both the president and the construction company's project foreman knew of the applicable safety standards concerning trenching. *Id.*

142. *Id.*

143. See *supra* notes 10-13 and accompanying text (discussing the prima facie elements of the peculiar risk doctrine).

144. *Jimenez*, 185 Cal. App. 3d at 110, 229 Cal. Rptr. at 579.

145. *Id.*

The approaches the California appellate courts have taken to the peculiar risk doctrine represent distinct and differing attempts to provide a workable definition and application of the doctrine. For example, the approach taken by the *Jimenez* court differs noticeably from the *Henderson Brothers* multi-factor analysis. The *Henderson Brothers* court required that the plaintiff prove there were available special precautions, and the risk of harm was significant.¹⁴⁶ The *Jimenez* court did not require such proof.¹⁴⁷ In addition to these two approaches, the case analysis method stated in *Griesel v. Dart Industries, Inc.*¹⁴⁸ continues to be utilized by courts attempting to articulate a workable definition of the doctrine.¹⁴⁹ The presence of these three divergent approaches to the application of the peculiar risk doctrine strongly suggests a need for clarification of both the definition and correct application of the rule.

V. PROPOSAL FOR THE CLARIFICATION OF THE PECULIAR RISK DOCTRINE IN CALIFORNIA

The confusion surrounding the peculiar risk doctrine is clearly evidenced by the varying approaches taken in applying the doctrine in California.¹⁵⁰ In addition, the second Restatement of Torts does not provide a clear definition to dispel this confusion. Rather, the second Restatement promulgated four redundant sections of the peculiar risk doctrine, all of which have been utilized to some degree by the California courts. Thus, there is a need for clarification. Ideally, clarification of the peculiar risk doctrine should incorporate

146. See *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903, 916-17, 174 Cal. Rptr. 875, 881-82 (1981). See *supra* notes 106-130 and accompanying text (discussing *Henderson Brothers v. Smiley*).

147. See *Jimenez v. Pacific W. Const. Co.*, 185 Cal. App. 3d 102, 229 Cal. Rptr. 575 (1986). No reported cases have followed the *Henderson Brothers* approach. Thus it cannot be determined whether the additional requirements articulated in that approach might produce results that would differ from an analysis under *Jimenez*.

148. 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979). See *supra* notes 91-97 and accompanying text (discussing *Griesel*).

The *Griesel* decision gave rise to an analysis that attempts to illuminate the contours and application of the doctrine by providing numerous examples of how the doctrine has previously been applied.

149. See, e.g., *Stark v. Weeks Real Estate*, 94 Cal. App. 3d 965, 156 Cal. Rptr. 701 (1979); *Hughes v. Atlantic Pac. Const. Co.*, 194 Cal. App. 3d 987, 240 Cal. Rptr. 200 (1987).

150. See *supra* text accompanying notes 85-149 (discussing the varying approaches taken to the application and definition of the peculiar risk doctrine).

the prima facie elements of the doctrine¹⁵¹ into a statement of the rule that also suggests the appropriate application. The structure of the approach taken by the *Jimenez* court satisfies this objective. The definition of the doctrine in *Jimenez* provides for a two-pronged approach. Under the first prong the court determines whether the work presents a peculiar risk of harm absent special precautions. The second prong requires analysis of whether the risk identified under the first prong is one that the employer could have reasonably foreseen. The approach taken by the *Jimenez* court encompasses the core of the doctrine, but further analysis is needed to fully develop the approach.

The first prong of the *Jimenez* approach defines whether the risk is in fact a peculiar risk. The focus of this prong is on the nature of the risk that precipitated the injury to the plaintiff. To define the nature of the risk two factors should be evaluated. First, the risk must be inherent in the work. Second, the risk must be special or peculiar, or beyond the common and ordinary risks associated with the work.¹⁵²

In order to satisfy the first factor, that the risk be inherent in the work, the risk must arise either out of the character of the work or the location in which the work is to be performed.¹⁵³ The key to this analysis is whether the risk is one that can be severed from the work site. If the negligence that caused the plaintiff's injury could have occurred outside the context of the job, then the risk is not inherent in the work. As a result, the peculiar risk doctrine will not apply.¹⁵⁴

151. The prima facie elements of the peculiar risk doctrine, that preexisted the Restatement formulation, are relatively simple. The doctrine is triggered by the presence of a risk which meets three criteria. First, the risk must be inherent in the contract work. Second, the risk must be sufficiently peculiar to require the taking of special precautions. That is, the risk must be beyond the common and ordinary risks that require merely routine precautions. Finally, the risk must be one that the employer did foresee or should have foreseen. See *supra* notes 10-50 and accompanying text (introducing the peculiar risk doctrine and its origins).

152. See generally PROSSER, *supra* note 3 § 71, at 509; RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

153. RESTATEMENT (SECOND) OF TORTS § 413 comment b (1965).

154. Compare *Stark v. Weeks Real Estate*, 94 Cal. App. 3d 965, 156 Cal. Rptr. 701 (1979) (the dangerous element/risk in *Stark* was the presence of a power saw that had a disabled safety guard. Removal of the saw from the work site severs the risk from the work, thus it becomes clear that the risk is not inherent in the work, and the peculiar risk doctrine does not apply) with *Griesel v. Dart Indus., Inc.*, 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979) (the work required the presence of a deep trench in which people would be working. The risk/danger is that the walls of the trench might collapse on the workers. This risk cannot be removed from the nature of the work. Thus, special precautions are required [shoring or sloping the walls] and the peculiar risk doctrine is applicable).

The second factor in defining the nature of the risk requires that the risk present a special, peculiar or unusual danger. This factor excludes risks that are common or ordinary. Distinguishing between peculiar and common risks is the central consideration in applying the peculiar risk doctrine.¹⁵⁵ This determination is based on a factual analysis of the circumstances surrounding the work that is being performed by the independent contractor.¹⁵⁶ This question ordinarily must be resolved by the trier of fact.¹⁵⁷ If analysis of the first prong of the proposed approach reveals a peculiar risk inherent in the contract work, the second prong must then be analyzed.

The second prong of the *Jimenez* approach focuses on whether the risk was foreseeable to the employer.¹⁵⁸ The peculiar risk identified under the first prong must be one that the employer could have foreseen. If the employer actually recognized the risk, the second inquiry is satisfied and the employer is held liable.¹⁵⁹ Absent actual recognition of the risk, the employer may nonetheless be held liable if the employer was in a position to have constructive knowledge of the risk. In such situations the employer's knowledge and experience in the area of work being contracted becomes relevant.¹⁶⁰ The greater the employer's knowledge and experience, the more likely the employer will be held to have constructive knowledge of the peculiar risks arising out of the work.¹⁶¹

155. Consequently, making this distinction has led courts to differing approaches to the doctrine. Sections 413 and 416 of the second Restatement of Torts have framed this concept by reference to "special precautions." See RESTATEMENT (SECOND) OF TORTS §§ 413, 416 (1965). When the risk presented would cause a reasonable person to believe that special precautions are warranted, the risk will be deemed peculiar. *Id.* Section 427, on the other hand, defines peculiar risks as "special dangers" of physical harm recognizable in advance. *Id.* § 427. Thus, the central concern of the doctrine can be stated in several ways.

156. See *id.* § 413 comment b (1965). An example that is commonly used to distinguish between common risks and peculiar risks is the risk that a contractor will be negligent in operating a vehicle while performing the contract work. This form of risk is considered common and ordinary, and requiring only routine precautions. Thus, this form of risk is excluded from the scope of the doctrine. *Id.*

157. *Mackey v. Campbell Const. Co.*, 101 Cal. App. 3d 774, 785, 162 Cal. Rptr. 64, 69 (1980).

158. *Jimenez v. Pacific W. Const. Co., Inc.*, 185 Cal. App. 3d 102, 110, 229 Cal. Rptr. 575, 578 (1986).

159. See, e.g., *Jimenez v. Pacific W. Const. Co.*, 185 Cal. App. 3d 102, 229 Cal. Rptr. 575 (1986). The court in *Jimenez* found evidence that the employer actually foresaw the peculiar risk. Thus there was no inquiry into the employers constructive knowledge. *Id.* at 111, 229 Cal. Rptr. at 579.

160. See RESTATEMENT (SECOND) OF TORTS § 413 comment f (1965). The comment provides the example of a widow who has hired a building contractor to construct a home. The widow will be held to a lesser standard of foreseeability than will a real estate developer who hires the same contractor to build the same home. *Id.*

161. *Jimenez*, 185 Cal. App. 3d at 111, 229 Cal. Rptr. at 579.

In summary, the following analytical approach is proposed:

- I. Does the work present a peculiar risk of harm absent special precautions?
 - (1) Is the risk inherent in the work, or is the risk severable from the context of the work; and
 - (2) Is the risk special, peculiar or unusual, or is the risk so common that a reasonable person in the employer's position would not consider special precautions warranted?
- II. Was the risk one that was or should have been foreseen by the employer as arising out of the work?

This proposed analytical approach adopts and modifies the tests stated in the *Jimenez* decision. This approach to the peculiar risk doctrine will provide structure both for practitioners concerned with pleading and proof, and for courts faced with issues under the peculiar risk doctrine.

VI. CONCLUSION

The peculiar risk doctrine is an exception to the general rule of nonliability for the torts of independent contractors. The doctrine is frequently relied upon to impose liability on employers who have, through their work, created identifiable risks of harm to others. The peculiar risk doctrine is based on sound policy demanding that liability for torts rest with those parties who are responsible for creating the risks.

To implement the peculiar risk doctrine, California has relied upon the definition of the doctrine in the second Restatement of Torts. Unfortunately, the second Restatement has promulgated several redundant definitions that have obscured the relatively simple contours of the doctrine.¹⁶² If the courts are to provide the needed clarification

162. The Restatement has codified three affirmative statements of the doctrine. See RESTATEMENT (SECOND) OF TORTS §§ 413, 416, and 427 (1965). California has expressly adopted two of these sections, 413 and 416. See *Aceves v. Regal Pale Brewing Co.*, 24 Cal. 3d 502, 508, 595 P.2d 619, 621, 156 Cal. Rptr. 41, 43-44 (1979). The third section, 427, has been referred to as an additional correct statement of the doctrine. See *Caudel v. East Bay Mun. Util. Dist.*, 165 Cal. App. 3d 1, 6, 211 Cal. Rptr. 222, 224-25 (1985). While the courts have made distinctions between these sections, the sections have been applied interchangeably. In addition, California has recognized a fourth section in the Restatement, section 426, that codifies the collateral risk doctrine. See *Aceves*, 24 Cal. 3d at 510, 595 P.2d at 623, 156 Cal. Rptr. at 45. The collateral risk doctrine merely defines risks that are not included within the scope of the peculiar risk doctrine. In this sense, § 426 is redundant. See *supra* notes 51-84 and accompanying text (discussing the above Restatement sections).

of the peculiar risk doctrine, the Restatement will either need to be abandoned or reduced to a single statement of the doctrine.

In addition to consolidating the definition of the peculiar risk doctrine, the courts must clearly articulate the manner in which the doctrine is to be applied. Thus far, the California courts have articulated three different approaches to the application of the doctrine. While none of these approaches appear to produce clearly improper results, the presence of differing approaches strongly indicates a need for clarification.

The analytical approach articulated in this comment attempts to provide needed clarification, while remaining consistent with the policies that underlie the doctrine. The suggested approach follows the decision in *Jimenez v. Pacific Western Construction Co.* by dividing the analysis into two prongs. The first prong requires that the work present a peculiar risk of harm, absent special precautions. This prong is further divided to ensure that the risk is inherent in the work and is beyond mere common and ordinary risks. If the first prong is satisfied, analysis under the second prong limits the liability of the employer to situations in which the risk could have been foreseen. If the analytical approach suggested in this comment is adopted, the courts will provide the clarity and accessibility to the peculiar risk doctrine which has been consistently lacking in California.

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