Reducing Risk, Shifting Liability

Safety programs, insurance, and the law offer crane owners a three-pronged approach to preventing financial loss.

It’s a given that crane ownership is a high-profile, high-risk business. So the question that remains is, How can crane owners best control that risk while reducing their liability?

According to research conducted on behalf of the Crane Inspection and Certification Bureau (CICB), crane-related fatalities have continued to climb since the mid-2000s. Billy Cook, sales director for CICB, Orlando, Fla., shared some accident statistics with attendees at the Crane & Rigging Conference (CRC), held in July in Houston, Texas.

“From 1997 to 2007, annual deaths from crane-related accidents ranged between 62 and 90. In 2008, fatalities jumped to 197; in 2009 the number climbed to 217. In 2010, there were 111 deaths with 57 being from rigging accidents. As of May of this year, there were already 57 crane-related deaths in the United States.”

Cook went on to say that the National Safety Council estimates the cost of one lost-time accident could easily cover the cost of providing comprehensive and ongoing safety training programs for operators, site managers, and supervisors,” said Cook.

Likewise, company management needs to be familiar with the various responsibilities identified in OSHA and industry standards. Beyond rigger, signaler, and operator, does your staff know what’s expected of lift directors, assembly/disassembly directors, site supervisors, and the controlling entity?

Second, a close working relationship with your insurance provider is essential to preventing loss to equipment—whether it’s due to maintenance, operational errors, theft, vandalism, fire, or flood. “Insurance compensates you for your losses, but it’s a shared risk,” says Mark Monson, director of loss control specialty for The Hanover Insurance Group, Worcester, Mass. “We’re gambling on you. That’s why we need to know about your safety programs, maintenance programs, and theft prevention tactics.” Likewise, in a presentation he made during CRC, he advised owners to “make sure you know about coverage limitations and exclusions” to prevent gaps in coverage.

Beyond that, insurance companies often have resources available to help you reduce your risk. Hartford, Conn.-based Travelers Insurance, for example, offers crane safety training and test preparation programs to its customers at no cost. Courses cover crane operation, crane management, signaling, and rigging.

Finally, when an accident occurs, your legal team needs to be familiar with the construction industry and, more specifically, the crane industry. As a partner in your defense, their familiarity with legal trends in this industry is crucial. Two such trends, the Borrowed Servant and Privette doctrines, have a direct impact on construction and crane industries.

In the articles that follow, Matthew Shorr, an attorney with Gray•Duffy LLP, Encino, Calif., will address meeting accepted standards of directing furnished personnel and using or operating leased equipment in his overview on the Borrowed Servant doctrine. And Michelle MacDonald, an associate with the same law firm, discusses who is liable if an employee of a subcontractor gets injured on a job site.

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Determining whether and with whom a special employment relationship exists can be critical to limiting liability for employers, such as crane and equipment rental companies, that loan out their employees to customers. More important than the employment agreement is answering the question of who has the right to control an employee’s activities.

Under the worker’s compensation system, an employee may have two employers, a general employer and a special employer. A general employer is one that “lends” or “hires out” an employee to another entity or person for a period of time, such as when a crane or equipment rental company furnishes an operator to operate the rented equipment to work at the direction and control of the customer. The customer that borrows the employee from the crane or equipment rental company is known as the employee’s special employer.

By Matthew Shorr, Esq.

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The subcontractor (who supplies the equipment and/or “loans out” an operator to the contractor that hires him or her) may enter into a lease contract which includes an agreement concerning how the operating personnel will be treated for worker’s compensation purposes. In the event that an employee of the hiring contractor becomes injured on the job site, the injured worker would potentially be precluded from bringing suit against the “loan-out” employee and the crane or equipment rental company, under the Exclusive Remedy Rule of the worker’s compensation system.

The Exclusive Remedy Rule provides that, if the conditions for worker’s compensation are satisfied, the exclusive remedy of an injured employee against “any other employee of the employer acting within the scope of his or her employment” has the right to receive worker’s compensation, subject to certain exceptions recognized by statute or case law. As a result, co-employees are granted immunity from liability for civil damages and lawsuits brought by an injured worker, unless the alleged conduct falls within one of the recognized exceptions.

In such circumstances, an injured worker may seek to contend that the co-employee’s status and the existence of a special employment relationship barring the injured worker’s civil action is a question that must be reserved for a jury at trial. Whether a special employment relationship exists generally turns on who had the right to control the loaned out employee’s activities or to supervise the details of his work. The existence of an agreement between the general employer and an alleged special employer that intends to give the special employer the right to control and direct an employee’s work has been determined
In California, property owners and general contractors can shift liability away from themselves for injuries to subcontractor employees through a legal doctrine known as Privette after the landmark 1993 case of the same name. Essentially what the California Supreme Court found in that case was that, in the absence of affirmative negligence by the owners and/or general contractors which actually caused the injury, the subcontractors are in the best position to protect the welfare of their own employees through the workers compensation system.

Over the years, exceptions have been carved out of the original holding including for the supplying of defective equipment and for failing to warn of hidden dangerous conditions. One exception which has been legally controversial may be decided by the California Supreme Court shortly in the case of Seabright Insurance v Lujan. Specifically the Court is expected to determine when a statutory duty (such as Cal/OSHA requirements) may be delegated to the subcontractors and when such regulations are non-delegable. To

**Assessing the Privette Doctrine**

By Michelle MacDonald

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the extent a duty is non-delegable and the failure to comply actually caused an injury, Privette would then not apply because it would be considered a form of affirmative negligence.

Currently there are two separate lower court decisions on this issue. In 2007, the Court of Appeal in the case of Evard v Southern California Edison found that a Cal/OSHA regulation requiring that a safety line be installed at all times on a billboard imposed a non-delegable duty on the defendant sign owner when the subcontractor employee changing the billboard fell.

However, in the following year, the Court of Appeal in Padilla v Pomona College found that a general contractor was not liable for injuries to an employee of the demolition subcontractor when he was injured by a pressurized pipe that was not secured as required by Cal/OSHA regulations. The Padilla court noted the regulations in question did not designate who was the party responsible for compliance but merely required that certain measures be taken to secure utilities. It further reasoned that although it might be easier for the general contractor to comply since they had control of the entire property, that duty could be delegated to the subcontractor directly responsible for the work.

The relevant facts of the Seabright case have elements of both prior cases. The Seabright employee worked for a company hired by owner/lessee US Airways to maintain baggage handling machinery at the San Francisco International Airport. At the time of his injury, there were Cal/OSHA regulations requiring safety guards on conveyors. The machinery guard was purportedly missing and the employee was severely injured when his arm was drawn into the machinery.

Arguably, under the precedent of Evard, the owner/lessee of the machinery should be responsible for maintaining safety devices. However like Padilla, the work being performed by the subcontractor should have addressed the risk by its nature. Like the Padilla demolition subcontractor, who the court found should have taken control of the area being dismantled, the Seabright subcontractor was entrusted to maintain the very machinery which injured him.

It is probable that the California Supreme Court will take this distinction into account in its ruling. The modern construction jobsite and workplace have numerous regulations. If all or most of them were to be found to be non-delegable as to the owner and/or general contractor, the presence of statutory duties would then become the exception that swallowed the rule. For that reason, we believe that the Court will require that the regulation by its terms designate who is to comply before it becomes non-delegable.

For subcontractors, it is important to recognize that Privette allows property owners and general contractors to shift liability away from themselves in the absence of affirmative acts. This is particularly relevant in multi-contractor litigation in which legal responsibility might be shared by a number of defendants potentially reducing the overall exposure for a single contractor.

However, nothing in Privette prevents a subcontractor from negotiating an agreement in its favor and inserting language regarding who is responsible for complying with certain regulations like those being considered in Seabright. For that reason, Privette should be considered before entering into a subcontract with an owner or general contractor.