

Rare is the contractor that doesn't ever ask an employee to move supplies, tools, or machinery with a personal truck.

Broadening the scope

A guide to building a vehicle-use exception case to the Goings and Comings rule

By Willie Stein

A client comes to your office with a catastrophic injury from a motor vehicle collision. The defendant driver has a minimum-limits policy. Before you decide this is a sad victim of an underinsured driver, what will you do to determine whether the driver was in the scope of employment with a better-insured defendant?

This article provides an overview of California law on when a trip in a personal vehicle becomes part of the scope of an employee's employment, with actionable steps for you to identify and develop such cases.

Goings and comings

The default rule in California is that an employee who is going from or coming to work, i.e., commuting, is not in the scope of their employment. But this rule is riddled with exceptions, and knowing them is critically important to spotting a case where an employer may be held vicariously liable. This article focuses on the vehicle-use exception.

CACI 3725 states the rule:

> In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.
>
> The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

(CACI 3725.)

The jury instruction combines two closely related doctrines: the "required vehicle exception" and the "incidental use exception." (*Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624-630.) The required vehicle exception is in the first paragraph of CACI 3725; the incidental use exception is in the second. The *Pierson* case further subdivides the jury instruction. It states that the incidental-use exception may be proven either by showing a direct or incidental benefit, or by the agreement of the employee and the reasonable reliance of the employer. (*Id.* at 629-630.)

These doctrines are based on the policy that if a business requires an

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employee to drive to work so their car is available for company business during the workday, the risks of bringing that car to work should be borne by the deeper-pocketed employer. (See *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 810.) The law shifts the risk of crashes occurring on the employee's commute to the employer where the act of bringing the car to work is for the employer's convenience.

The law is in flux as to *when* the employee must confer the benefit on the employer. Earlier cases are consistent that the employee's conferral of a benefit to the employer with their personal vehicle is measured in the overall course of employment. For example, in *Lobo v. Tamco*, 182 Cal.App.4th 297, a metallurgist responsible for quality control was occasionally required to visit his employer's customers in his personal car. He had been required to do site visits in his car fewer than 10 times over 16 years of employment. He had not used his car for his employer's benefit on the day when he hit and killed a motorcycle deputy on his commute home, but the appellate court held he had been in the course and scope under the required-vehicle exception.

A more recent case, *Newland v. County of Los Angeles* (2018) 24 Cal.App.5th 676, calls this concept into question. There, a deputy public defender used his personal vehicle regularly for work-related tasks. He was on his way home from work when he was in a collision that injured the plaintiff. He had not used his car for his employment that day. The appellate court held that the plaintiff had to show the employee's use of their car "provided a benefit to the County at the time of the accident." Because the defendant had not done so, he was not in the scope of employment.

The *Newland* case, taken to its logical conclusion, severely undermines this doctrine. It effectively vitiates the vehicle-use exception, because the employee must be providing a benefit at the time of the crash. This verges into a different exception (not treated here), called the special-errand exception.

The Judicial Council Advisory Committee notes on CACI 3725 should be very useful to limit the damage of a defense argument based on *Newland*. The notes suggest *Newland* does not overrule earlier cases that do not impose a "time-of-the-accident requirement." They also suggest that *Newland* can be read to impose a "day of the accident" requirement rather than a "time-of-the-accident" requirement.

A final note on the law: The goings and comings rule has only been applied in commutes between work and home in the third-party tort context in California. However, there is an argument, analogizing to the rule in workers' compensation, that trips to and from the workplace on unpaid breaks, such as lunch or a rest break, are "goings and comings." Because they are goings and comings, the various exceptions to the rule should also apply. Cases to look at for this argument are *Mission Ins. Co. v. WCAB* (1978) 84 Cal.App.3d 50; *Western Pipe & Steel Co. of California v. Industrial Acc. Commission* (1942) 49 Cal.App.2d 108; and *Duncan v. WCAB* (1983) 150 Cal.App.3d 117.

Identifying early leads

Investigating scope of employment thoroughly should be part of any catastrophic motor vehicle case.

You can develop leads from police reports, bodycam footage, or statements of the defendant driver at the scene. Even if the defendant driver doesn't expressly talk about using their car for their employment, a mention of employment anywhere can be a hook to investigate further. The initial hook is a statement that the defendant driver was just coming from or going to work.

Some types of employers frequently use employees' cars for their convenience. Most contractors don't require employees to leave tools at work and drive company vehicles. If the defendant driver is in a truck with a toolbox, they are often transporting tools used for their employer to and from work each day. Rare is the contractor that doesn't ever ask an employee to move supplies, tools, or machinery with a personal truck.

Likewise, many retail stores have tasks outside the workplace that hourly employees do in their personal cars. A typical retailer does not provide company cars for tasks like bank deposits and purchasing office supplies.

Examination under oath before accepting a tender

If you suspect there may be a scope of employment issue, don't take the tender from the underinsured defendant driver before finding out. Many attorneys serve limits demands contingent on the defendant driver filling out an asset declaration. A section where the defendant circles "I was/was not in the scope of my employment at the time of the accident" is not enough to find the facts. I have even seen a declaration that had "was not in the scope" as the only option.

These declarations foreclose the possibility of a larger recovery. We would never tolerate a defendant declaring to a bare legal conclusion like this in summary judgment, so why would we rely on such a statement to justify an inadequate recovery prefiling?

Instead, demand from adjusters that you will only take a tender on the condition that the defendant driver sit for an examination under oath. You can and should record it and swear the witness in as an officer of the court. Make it clear you won't be deposing the witness and won't ask liability-focused questions – only questions about the scope of employment and assets. If the assets are a stumbling block, focus the examination on scope of employment only.

Some adjusters may balk, but many will understand it's the only way to resolve an obvious excess claim without filing. The backstop without cooperation, of course, is the defendant driver's deposition in which you ask all the same things.

Only with live questioning can you follow the facts in real time. First, ask where they were coming from and where they were going. If their job is either answer, go further. If the defendant driver

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does a retail job, ask if they ever do errands for the store. You can explore what kinds of tasks would be done with personal cars in the job with follow-up questions you can't ask on paper.

If you must use a declaration, make it nuanced and factual. "Scope of employment" is a complex legal conclusion that few defendants filling out a declaration will understand or volunteer. Obtain information about the beginning and end of the trip, whether anything job-related was in the car, and whether the defendant had job duties that required a car.

Written discovery lays the foundation

Assuming you find a basis to proceed, use written discovery to find out about the employee's job duties. Look for policies, job descriptions, and task descriptions. Is the employee required to do anything out of the store? If the employer requires the employee to go anywhere for any reason, the next question for deposition is where that task is performed. If the task is miles away, you can ask a sequence of questions to establish that the employer impliedly requires the employee to do the task by car.

Deposition strategy

Defendant drivers and their supervisors are often reluctant to say their employer impliedly required their car. Box the defendant into admitting the tasks they were told to perform could only be reasonably performed by car. Highlight car-friendly distances, the difficulty of walking or using public transport to do tasks in an urban environment, and the fact that the employer's interest is getting the errand done as quickly as possible. Rule out other methods: Could the task be done on foot? Public transit? Uber? How long would walking take? Would taking that long to do this task be permitted? Remember, these errands don't need to be at the time of the crash. You are asking as a matter of general practice in the defendant's employment. To make a good record to avoid *Newland*, be sure to explore the day of the crash too.

Ask the defendant who supervised them at work. Depose their supervisors too. If the supervisors agree the employee was using their car for work, close them out by asking if any of *their* supervisors ever told them to stop employees from doing so. Also ask whether any supervisors above them visited the store or work site. The question is *not* whether corporate policy requires employees to use their cars. It is whether the employer has come to rely on the employee's car in reality.

Motion for summary adjudication

This type of case is ripe for a plaintiff's motion for summary adjudication. This doctrine is counterintuitive and has little curb appeal to a lay jury. If you make a good record, you can bring an offensive dispositive motion that will set the defense on their heels. If the defense is ready, they will often bring a counter motion for summary judgment on the same issue. In that posture, the path to losing the case completely on summary judgment is very slim and the most likely outcome is a material dispute of fact.

Defendant employers will likely bring a declaration by a managerial employee to the motion fight. This declaration will say they don't require a car for the duties at issue and that the employee's use of their personal car was not approved. If you have confirmed this declarant never went to the store or work site and has no idea what actually happens in practice, you can highlight that the declaration is objectionable for lack of foundation and relevance. It is irrelevant that the corporate employer doesn't like employees using their cars for this; it was the only feasible option and actually happened in practice.

Bifurcate your trial

Finally, if the issue is still live by the time of trial, consider moving for or stipulating to bifurcation, and aim for a first-phase bench trial for the scope of employment issue. This doctrine dovetails with defense arguments to juries about plaintiffs "looking for big pockets." A jury might respond to that argument, but you can argue to a judge that vicarious liability is a deliberate policy choice to shift risk to better-insured and more-solvent defendants. (See *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967.)

Conclusion

Seriously injured clients deserve serious due diligence about scope of employment issues. If you know what to look for, and how to develop the facts early, you can get great results in cases that appeared woefully underinsured at the outset.


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