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Inherently Dangerous or Inherently Difficult? Interpretations and Criticisms of Imposing Vicarious Liability on General Contractors for Injuries Suffered as a Result of Work Performed by Independent Contractors: Hooper v. Pizzagalli Construction Company

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I. INTRODUCTION

Under the rule of respondeat superior, a master is liable for the torts his servants commit in the scope of their employment. An exception to this rule exists, however, when the "servant" is not actually a "servant" in the true sense of the word. Courts generally classify such a person or organization as an independent contractor, and will not generally impose vicarious liability on their employers for injuries arising out of their work. This Note focuses on a major exception to this exception: courts will impose vicarious liability on employers of independent contractors for injuries arising from any employment involving inherently dangerous work. This doctrine's importance arises from several desirable policy objectives. First, by extending liability to both independent contractors and their employers, the doctrine establishes a greater quantity of concern such that necessary safety precautions will be taken, thus resulting in fewer injuries. Second, the employers who benefit from inherently dangerous work should bear some of the responsibility for injuries received by workers engaged in such work, and by third parties arising from such work. Finally, the employees of independent contractors, who have been injured while performing inherently dangerous work, rarely have the financial capacity to handle the entire bur-
den of medical expenses and lost income. Although workers’ compensation through their primary employers (the independent contractors) helps them some, equity dictates that the large, well-endowed general contractors, who ultimately benefit from the inherently dangerous work, should bear some of the burden.5

Just, what exactly do courts mean when they say, “inherently dangerous activity”? Since 1876,6 courts in England and the United States have grappled to find a working definition for the inherently dangerous exception in ordinary tort actions.7 With its newly-acquired significance in workers’ compensation actions, the doctrine threatens to stir even more confusion.8 Legal scholars and commentators concede the doctrine cannot be adequately defined,9 and the law pertaining to the area remains hopelessly murky. One cannot ignore, however, the fact that cases’ outcomes often turn on whether a court classifies a particular activity as “inherently dangerous.” The doctrine pervades not only cases involving large general contractors such as the defendant in

7. See generally Restatement (Second) of Torts § 413 (1965). This rule provides:

one who employs an independent contractor to do work which the employer should recognize is likely to create, during its progress, a peculiar and unreasonable risk of 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 independent contractor shall take such precautions, or
(b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.

Id.

See also comments b, c, and f to the above rule: Comment b purports to clarify the rule, stating that special risks must arise out of the character of the work to be done, or out of the place where it is done, and the reasonable person should recognize that special precautions are necessary. The risk created is not a normal, routine matter of customary human activity, such as driving a car, but the risk does not have to be abnormally great. Comment c gives examples of activities which are inherently dangerous as a matter of law, including demolitions and excavations. Comment f adds that the extent of the employer’s knowledge and experience in the field of work to be done should be taken into account. Restatement (Second) of Torts § 413 cmts. b, c, f (1965).

Hooper v. Pizzagalli Construction Co.,\textsuperscript{10} but also cases involving homeowners, small businesses, or anyone else who might hire another person to perform work for them.\textsuperscript{11}

The \textit{Hooper} decision represents the first interpretation of the inherently dangerous doctrine as the North Carolina Supreme Court defined it in the now famous workers' compensation case, \textit{Woodson v. Rowland}.\textsuperscript{12} A quick overview, at this point, of the \textit{Woodson} decision is helpful in understanding the ensuing discussion. \textit{Woodson} involved a subcontractor's employee who was killed by a trench cave-in. The estate brought actions against both the general and subcontractors.\textsuperscript{13} The court stated the general rule that any person or general contractor, who employs an independent contractor to perform work inherently dangerous in nature, may not delegate to that independent contractor the duty to provide for the safety of others.\textsuperscript{14} In remanding the case, the court held material issues of fact existed regarding whether the trenching could be considered an inherently dangerous activity for the purpose of finding the general contractor liable.\textsuperscript{15} In formulating a working definition for the phrase "inherently dangerous," the court stated an inherently dangerous activity differs from an "ultrahazardous" activity. An activity classified as "inherently dangerous" involves risks of harm to others which may be reduced by taking proper and reasonable safety precautions. That an activity can be performed safely with the proper procedures does not alter its inherently dangerous nature, however.\textsuperscript{16} Courts should apply negligence standards to inherently dangerous activities, because the exercise of reasonable care can control the risks involved in such activities.\textsuperscript{17} If, on the other hand, an activity's safety risks cannot be reduced, regardless of even the most pru-
dent precautions, such activity qualifies as "ultrahazardous." Courts should apply strict liability standards to such activities.\textsuperscript{18} The \textit{Woodson} court outlined inherently dangerous work, generally, as work to be done from which mischievous consequences will arise unless proper safety measures are adopted,\textsuperscript{19} and work which involves recognizable and substantial dangers inherent in it, as distinguished from dangers collaterally created by the independent negligence of contractors, which latter might take place on jobs themselves involving no inherent danger.\textsuperscript{20} The court further stated that certain activities, such as installing electrical wiring, are considered inherently dangerous as a matter of law.\textsuperscript{21} Similarly, the court stated certain other activities can never be considered inherently dangerous as a matter of law.\textsuperscript{22} The \textit{Woodson} court stressed that these extremes, however ideal they seem for the purpose of doctrinal application, denote in reality only a select few cases. Most cases require a court to view a questioned activity in light of the attendant circumstances in order to decide whether such activity can be considered inherently dangerous.\textsuperscript{23} Moreover, the court concluded no bright-line rules apply in determining whether a given activity in a given case exhibits inherently dangerous characteristics sufficient to satisfy the exception.\textsuperscript{24} The ruling provides some useful guidelines, however, in cautioning lawyers and courts concerning ultrahazardous activities, or with activities which are safe unless performed negli-

\textsuperscript{18} \textit{Id.} at 350-51, 407 S.E.2d at 234. The rationale behind applying strict liability to such activities is they should "pay their own way." \textit{Id.} (quoting \textsc{Charles E. Daye \& Mark W. Morris}, \textit{North Carolina Law of Torts} \textsection{} 20.40, at 355 (1991)).

\textsuperscript{19} \textit{Id.} at 352, 407 S.E.2d at 235 (citing \textit{Greer v. Callahan Constr. Co.}, 190 N.C. 632, 637, 130 S.E. 739, 743 (1925)).

\textsuperscript{20} \textit{Id.} at 351, 407 S.E.2d at 235 (citing \textit{Evans v. Elliott}, 220 N.C 253, 258-59, 17 S.E.2d 125, 128 (1941)).

\textsuperscript{21} \textit{Id.} at 353, 407 S.E.2d at 236 (citing \textit{Peters v. Carolina Cotton \& Woollen Mills, Inc.}, 199 N.C 753, 155 S.E. 867 (1930)). Examples of proper safety precautions include making sure no power is running to the wires, making sure the wiring has proper insulation, and making sure conduits contain no defects.

\textsuperscript{22} \textit{Id.} The court cites earlier cases which define certain activities which are not considered inherently dangerous as a matter of law, including \textit{Brown v. Texas Co.}, 237 N.C. 738, 76 S.E.2d 45 (1953) (sign erection is not inherently dangerous), and \textit{Vogh v. F.C. Geer Co.}, 171 N.C. 672, 88 S.E. 874 (1916) (general building construction is not inherently dangerous).

\textsuperscript{23} \textit{Woodson}, 329 N.C. at 353, 407 S.E.2d at 236.

\textsuperscript{24} \textit{Id.} at 353, 407 S.E.2d at 235.
Once a court determines an activity to be inherently dangerous, Woodson directs that court to consider whether the employer took reasonable steps to ensure the safety of independent contractors, their employees, and third parties. Obviously, this process is much more easily described than accomplished.

After the North Carolina Supreme Court formulated a working definition for the hard-to-apply doctrine in Woodson v. Rowland, the North Carolina Court of Appeals “tested the proverbial waters” when it applied parts of the Woodson test to another workers’ compensation case, Hooper v. Pizzagalli Construction Co. The Hooper court concluded the fatal accident in which an employee of a subcontractor was involved did not arise from inherently dangerous work, and affirmed the trial court’s summary judgment against the decedent’s estate and in favor of the general contractor involved in the case. The North Carolina Supreme Court subsequently denied review.

This Note has several objectives. First, it outlines how the Hooper court used parts of the Woodson interpretation to conclude that the work in which the plaintiff’s decedent was involved did not fall within the inherently dangerous exception. Next, it traces the origins of the doctrine itself, and how it has evolved in other jurisdictions as well as in North Carolina. The Note analyzes some criticisms of the doctrine, predicting what may become of it in the future.

Additionally, this Note analyzes the Hooper court’s decision by comparing it to the Woodson analysis, as well as to the definitions and trends of other jurisdictions, in order to determine whether the Hooper decision was the correct one. Finally, this Note outlines possible future trends in North Carolina tort law in the wake of this decision.

25. Id. at 350, 407 S.E.2d at 234. The court enumerated blasting as the only activity North Carolina courts consider to be truly ultrahazardous. Id. at 351, 407 S.E.2d at 234.

26. Id. at 351, 407 S.E.2d at 235.


28. Id. at 406, 436 S.E.2d at 149.

29. Hooper v. Pizzagalli Constr. Co., 335 N.C. 770, 442 S.E.2d 516 (1994). Thus, the Supreme Court denied review of a case in which the court used the high court’s interpretation, but arrived at an opposite result, finding no inherently dangerous activity, whereas in Woodson, the court found evidence tending to indicate the trenching at issue was inherently dangerous.
II. The Case

In Hooper, the estate of a deceased worker sued three defendants for wrongful death under a workers’ compensation claim. Defendant Pizzagalli Construction Company, the general contractor in charge of constructing a Durham building at least seven stories tall, had hired defendant Acme Plumbing and Heating, Incorporated, as the subcontractor in charge of plumbing the building. Decedent, Timothy Hooper, worked for Acme. On July 6, 1988, the decedent stood on an unsecured scaffold board, which was placed by unknown persons on the scaffold, to perform some plumbing work thirteen feet above the concrete slab on which the building was erected. The contract between Acme and Pizzagalli did not specify the use of scaffolding during the work. The scaffold board had no guard rails, and the decedent took no other measures to secure himself. Upon completion of the work, the decedent attempted to step from the scaffold to a catwalk. At that time, the scaffold board slid out from under him, and he plummeted thirteen feet to the concrete. He died in the hospital of severe head injuries two days later.

On July 3, 1990, the decedent’s estate instituted this action for the wrongful death of the decedent. The trial court granted defendant Pizzagalli’s summary judgment motion on September 26, 1991.

The estate appealed the trial court’s ruling, contending the general contractor had breached a non-delegable duty to the decedent, and that the breach had proximately caused the decedent’s death. The estate claimed the plumbing work performed in conjunction with the use of a scaffold qualified as inherently dangerous work.

30. Hooper, 112 N.C. App. at 402, 436 S.E.2d at 147. The estate also sued West Durham Mechanical, Inc., which does not concern the issue explored by this Note. Id. at 401, 436 S.E.2d at 147.
31. Id. at 402-03, 436 S.E.2d at 147.
32. Id. at 406, 436 S.E.2d at 149.
33. Id. at 403, 436 S.E.2d at 147.
34. Id. at 403, 436 S.E.2d at 148.
35. Id.
36. Id.
37. Id.
38. Id. at 402, 436 S.E.2d at 147.
39. Id. at 403, 436 S.E.2d at 148.
40. Id. at 405, 436 S.E.2d at 149. The estate also contended Pizzagalli maintained sufficient control over the manner and method of Acme’s work to hold
In quoting Woodson v. Rowland, the Hooper court defined “inherently dangerous activity” as any activity from which “mischievous consequences” will result without proper safety precautions, which has a “recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger.”\(^41\) In applying this part of the Woodson interpretation to the facts of Hooper, the North Carolina Court of Appeals found no inherently dangerous activity, and thus affirmed the trial court.\(^42\) The court of appeals based its decision on the fact that use of the scaffold to complete the plumbing work was not mentioned in the contract between Acme and Pizzagalli, and therefore, the court found the decedent’s choice to use the scaffold was totally collateral to the work contracted.\(^43\) The court of appeals also stated plumbing does not constitute an inherently dangerous activity, a proposition supported in other jurisdictions.\(^44\) Additionally, the court noted that since the decedent did not properly secure the scaffold board, or take any other precautions, he created the danger through his own independent wrongful act.\(^45\) The court thus held the “danger” a totally collateral one, which did not in any way inhere to the work.\(^46\) Thus, the North Carolina Court of Appeals, in its first interpretation of the Woodson definition, quickly concluded the decedent’s work was not sufficiently dangerous to impose vicarious liability on the general contractor.\(^47\)

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\(^{41}\) Id. at 405, 436 S.E.2d at 149 (quoting Woodson, 329 N.C. at 351, 407 S.E.2d at 234).

\(^{42}\) Id. at 406, 436 S.E.2d at 149.

\(^{43}\) Id.

\(^{44}\) Id. (citing Goolsby v. Kenney, 545 S.W.2d 591 (Tex. Civ. App. 1976)).

\(^{45}\) Id.

\(^{46}\) Id. In North Carolina, collateral negligence completely bars a plaintiff from recovery because North Carolina still honors the doctrine of contributory negligence. See generally infra note 176 and accompanying text.

\(^{47}\) Hooper, 112 N.C. App. at 406, 436 S.E.2d at 149-50.
III. BACKGROUND

A. Development of the Doctrine in Other Jurisdictions: Confusion Abounds

The inherently dangerous exception to non-liability for torts arising from work performed by independent contractors has been recognized at English common law since 1876.\(^48\) \textit{Bower v. Peate} defined inherently dangerous activity as activity during which "if, in the course of the work, injurious consequences might be expected to result unless means are taken to prevent them."\(^49\)

Even now, one hundred eighteen years after its inception, the doctrine remains hopelessly vague. Some American jurisdictions have become confused with the differences between "inherently dangerous" activities, and "ultrahazardous" or "abnormally dangerous" activities.\(^50\) "Inherently dangerous" activity, however, denotes something separate and distinct from "abnormally dangerous" or "ultrahazardous" activity.\(^51\) One Michigan case, \textit{Funk} 48. Bower v. Peate, 1 Q.B. 321 (1876).

49. \textit{Id.}

50. \textit{See, e.g.}, Paul Harris Furniture Co. v. Morse, 139 N.E.2d 275 (Ill. 1956) (holding inherently dangerous instrumentalities are those things imminently dangerous in kind, such as explosives and poisonous drugs); Funk v. General Motors Corp., 220 N.W.2d 641 (Mich. 1974) (applying a strict liability standard to inherently dangerous activities). For further insight on the confusion over the standard to be applied to inherently dangerous activities in other jurisdictions, see \textit{Negligence—Liability for Transmission of HIV}, \textit{Mich. Law Wkly.}, Mar. 29, 1993, at 11A (stating courts apply strict liability to "inherently dangerous activities"); \textit{Strict Tort Liability}, \textit{Conn. L. Trib.}, Aug. 16, 1993, at L3 (stating strict liability may be imposed on inherently dangerous or ultrahazardous activities); Henry Sokolski, \textit{Adjusting to North Korea's Reality}, \textit{Newsday}, Apr. 8, 1993, at 103 (stating inherently dangerous activities "cannot be safeguarded," thus implying a strict liability standard). For more examples of courts' general ignorance of the difference between "inherently dangerous activities" and "ultrahazardous activities," see \textit{Hauling Steel Not Inherently Dangerous}, \textit{Am. Machinist}, Aug., 1993, at 38; Laurie A. Rich, \textit{Bhopal Lawsuit Begins in India}, \textit{Chemical Wk.}, Sept. 17, 1986, at 15 (both citing courts equating "inherently dangerous" activities with "ultrahazardous" activities).

51. \textit{See Restatement (Second) of Torts} § 427 cmt. b (1965), which clearly points out that if an activity qualifies as "inherently" or "intrinsically" dangerous, it does not mean the activity cannot be done without risk to others. Such activities do not have to involve a particularly high degree of risk, or the possibility of very serious harm. All that is required is a risk recognizable in advance, such that precautions may be taken to eliminate the risk. \textit{Compare Restatement (Second) of Torts} § 520 (1965), which clearly defines an "abnormally dangerous activity" as one which involves a very high degree of risk, which will likely result in great harm, and which cannot be eliminated with even
v. General Motors Corp.,\textsuperscript{52} exemplifies this confusion, applying a seemingly correct approach to the doctrine, but then attaching to it a strict liability standard.\textsuperscript{53} This causes a paradoxical effect in the court's interpretation, since the "due diligence" required to reduce risks associated with inherently dangerous activities necessarily implies a negligence standard.\textsuperscript{54} Other examples of inconsistencies include cases where courts intermix correct interpretations with incorrect ones, holding that inherently dangerous work may be carried on safely with the correct precautions, but otherwise involves "grave risks of serious harm."\textsuperscript{55} This construction exemplifies confusion, however, since activities classified as inherently dangerous need not involve great risk and the possible harm need not be severe.\textsuperscript{56}

Other jurisdictions have taken pains to define the doctrine as narrowly as they can, in order to avoid inconsistencies and to make its application more practical for courts, attorneys, employers and independent contractors.\textsuperscript{57} The vagueness inherent in the

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\item \textsuperscript{52} 220 N.W.2d 641 (Mich. 1974).
\item \textsuperscript{53} See id.
\item \textsuperscript{54} Funk, 220 N.W.2d at 658.
\item \textsuperscript{56} See generally supra note 51 and accompanying text.
\item \textsuperscript{57} See, e.g., Reynolds v. Manley, 265 S.W.2d 714, 719 (Ark. 1954). The court cited Black's Law Dictionary (4th ed.), in determining the definition of "imminent": near at hand; mediate rather than immediate; close rather than touching; impending; at the point of happening; threatening; perilous. Id. The court also stated there "must be knowledge of danger, not merely possible but probable." Id. See also Watts v. Bacon & Van Buskirk Glass Co., Inc., 155 N.E.2d 333, 335 (Ill. Ct. App. 1958), aff'd, 163 N.E.2d 425 (Ill. 1959). This court defined "inherently dangerous" as "that type of danger which inheres in the
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doctrine, however, causes the definitions to become long and convoluted, thus complicating their application. Still other states have posited relatively simple definitions which contain no inconsistencies.58 These interpretations prove just as problematic as those containing inconsistencies, though, because they provide few, if any, guidelines for courts and attorneys to follow.

An exception to the typically problematic approach to the doctrine was handed down in a recent Colorado Supreme Court case, Huddleston v. Union Rural Electric Ass'n.59 In reaching its decision, the Huddleston court provided a detailed, yet consistent guideline for applying the inherently dangerous doctrine in discerning general contractor liability for injuries arising from the work of independent contractors.60 The court defined an inherently dangerous activity as one presenting

a special or peculiar danger to others that is inherent in the nature of the activity or the circumstances under which it is to be performed, that is different in kind from the ordinary risks that commonly confront persons in the community, and that the employer knows or should know is inherent in the nature of the activity or in the particular circumstances under which the activity is to be performed.61

This interpretation explicitly adds a foreseeability element, thus making clear the proper application of a negligence standard. The interpretation also makes clear that often an activity's inherently dangerous character turns on the circumstances under which it is performed.62

instrumentality or condition itself at all times, thereby requiring special precautions to be taken with regard to it to prevent injury..." Id. It "does not mean danger which arises from mere casual or collateral negligence of others with respect to [the instrumentality] under particular circumstances." Id.

58. See, e.g., Hand v. Harrison, 108 S.E.2d 814, 816 (Ga. Ct. App. 1959) (stating an inherently dangerous activity is one with which a little more than ordinary care, but not extraordinary care, is necessary in dealing with such activity). See also Begley v. Adaber Realty & Inv. Co., 358 S.W.2d 785, 791 (Mo. 1962) (holding the inherently dangerous rule applies only to latent defects known by the general contractor which the independent contractor could not discern with reasonably careful inspection); Downs v. A & H Constr., Ltd., 481 N.W.2d 520, 526 (Iowa 1992) (spelling out simply that an inherently dangerous activity yells "danger!").

60. See id.
61. Id. at 290.
62. See generally infra text accompanying note 180 for further discussion of Colorado's elemental approach.
A few jurisdictions have replaced the "inherently dangerous" doctrine with a "peculiar risk" doctrine. Courts in these jurisdictions hold an employer of an independent contractor liable for even the independent contractor's own negligence, in cases where the work involves certain "peculiar risks." The employer has a right to indemnity, however, where the independent contractor has in fact been found negligent.

Some jurisdictions address the collateral negligence issue on which the *Hooper* court so heavily relied. For instance, Illinois courts have held that any negligent manner in which workers perform allegedly inherently dangerous activities negates the inherently dangerous character of the activities. In other words, those who employ independent contractors cannot be held liable for injuries sustained because such independent contractors have negligently failed to take proper precautions.

Many courts apply the doctrine to non-traditional contexts, such as medical procedures and recreational activities. The general consensus seems to hold that medical procedures, even those which involve life and death, cannot be considered inherently dangerous for the purpose of holding employers (such as hospitals and insurance companies) liable for the negligence of independent contractors (doctors, nurses, dentists, etc.). In the recreational con-


64. Id. The risks involved are analogous to those normally mentioned in inherently dangerous work (injury is likely to result of proper precautions are not taken).


66. See generally infra note 138 and accompanying text.


68. See Neil A. Goldberg et al., *Higher Stakes for Parties to All Insurance Contracts: Pressures Increase as Focus Expands Beyond Primary Insurer*,
text, litigation continues to surround high-risk sports concerning whether such sports are sufficiently dangerous to hold the employers of the independent contractors who administer them vicariously liable. Since participants in recreational activities have more choice in whether they wish to participate (as opposed to employees whose supervisors often mandate certain activities), courts more easily tend to find assumption of the risk or something closely akin thereto. Even in the age of safe sex and HIV awareness, courts generally find sexual activity lacks inherently dangerous characteristics.

Even scholars seem to confuse the doctrine, including within their definitions of “inherently dangerous” activities those activi-

N.Y.L.J., Nov. 2, 1992, at S-10 (stating that administering stress EKG's to people with serious heart disease is not inherently dangerous); Medical No-Fault System is Not the Answer—Make Them Stand Trial, N.Y. TIMES, May, 17, 1990, at A28 (expressing a viewpoint that medical care and treatment, unlike driving an automobile, is not inherently dangerous in the sense that a no-fault insurance scheme should be applied).

69. Rafting guides, ski instructors, hiking guides, etc. often work as independent contractors for larger operations.

70. For various examples of recreational activities which may become subject to litigation over the inherent danger issue, see Negligence, Reckless Disregard and Parasailing, TEx. LAW., Mar. 22, 1993, at 13 (describing a case holding mere negligence on the independent contractor's part can never support a plaintiff's recovery for injuries received while engaged in an inherently dangerous sport, such as parasailing); Drew Corsello, Rafting Tragedy Tied to Employer, AM. LAW., Jan./Feb. 1991, at 106 (discussing a case holding rafting to be an inherently dangerous sport, and arguing that companies who run rafting operations should be held vicariously liable for injuries received by their patrons on rafting expeditions); John Hanc, Training for In-Line Skating, NEWSDAY, July 30, 1994, at B7 (stating that without the proper precautions and equipment, in-line skating is likely to result in injury; implying that such a sport qualifies as inherently dangerous in that without the proper precautions, mischievous consequences may result); Richard Tapscott, Delegates Move Against Bungee Jumping, WASH. Post, Mar. 24, 1993, at C3 (discussing opposition to bungee jumping as an “inherently dangerous activity”). Bungee jumping arguably qualifies as ultrahazardous, however, because the harm risked in performing such an activity is always severe (usually death).

71. Since assumption of the risk applies only to strict-liability activities, one cannot “assume the risk” when participating in inherently dangerous activities, to which courts apply a negligence standard. When dealing with recreational activities defined as inherently dangerous, however, courts still tend not to allow vicarious liability.

72. Liability for Transmission of HIV, MICH. LAW. WKLY., Aug. 30, 1993, at 2B. This example is for illustrative purposes only; this activity usually involves no employer/independent contractor relationship.
ties having "ultrahazardous" characteristics. One commentator has defined the doctrine to include activities dangerous unless proper precautions are taken, as well as those that are dangerous without such precautions. Comments like these, whether made carelessly or in honest belief that the doctrine should be interpreted in such a manner, serve only to confuse its application even more, further frustrating courts, attorneys, and anyone else who might benefit from a clear understanding of exactly what the doctrine encompasses.

B. Development of the Doctrine in North Carolina

In North Carolina, a court may determine as a matter of law whether a given activity is sufficiently dangerous to impose vicarious liability on employers of general contractors. In 1916, the North Carolina Supreme Court determined that building construction, even though it often results in physical injury, cannot be considered inherently dangerous as matter of law. The state courts agree that certain activities are truly inherently dangerous as a matter of law.

Since the inherently dangerous doctrine pertains only to inherently dangerous work performed by independent contractors, North Carolina courts have endeavored to clarify what, exactly, constitutes an independent contractor. One early North Carolina case, Greer v. Callahan Construction Co., defined the term as one who exercises an independent employment, doing work according to his own judgment without being subject to the employer except as to the results of his work; he has the right to employ and direct workers and is free from any superior authority.

77. 190 N.C. 632, 130 S.E. 739 (1925).
of the employer regarding how the work is to be done.\textsuperscript{78} The \textit{Greer} court held the law does not hold an employer to be an insurer of safety, stating a general rule that an employer could not be held liable for an independent contractor’s negligence.\textsuperscript{79} In determining what constitutes inherently dangerous work, the court described a difference between work, which when properly done, generally produces no injuries, and work from which mischievous consequences will arise, if proper safety precautions are not taken.\textsuperscript{80} The court stated liability often turns on foreseeability, holding that where a general contractor knows or should know of the inherently dangerous nature of the work, it may be held vicariously liable for injuries suffered by subcontractors’ employees.\textsuperscript{81}

In another early North Carolina case, \textit{Evans v. Elliott}, the state high court conceded it could not draw a bright-line rule between inherently dangerous work and work considered safe unless performed negligently.\textsuperscript{82} The \textit{Evans} court stressed that other courts should never equate activities considered “inherently dangerous” with those considered “ultrahazardous.”\textsuperscript{83} The court held it well-settled law in North Carolina that if an employer orders an independent contractor to perform work from which “in the natural course of things, injurious consequences must be

\textsuperscript{78} Id. at 635, 130 S.E. at 742. \textit{See also} \textit{Restatement (Second) of Torts} § 409 cmt. a (1965) (defining independent contractor as any person who does work for another under conditions not sufficient to make him a servant of that other); \textit{Restatement (Second) of Agency} § 2(3) (1958) (defining an independent contractor as a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking). For another perspective on the independent contractor concept, see \textit{Premises Liability—Open and Obvious Danger, Mich. Law. Wkly.,} May 9, 1994, at 20 (explaining a Michigan case which held that a situation in which one neighbor helps another, even where that neighbor receives a benefit, cannot be considered an independent contractor relationship).

\textsuperscript{79} Greer, 190 N.C. at 635, 130 S.E. at 742. This is known as collateral negligence, which often serves as an effective defense for general contractors in these cases. For more information on the collateral negligence doctrine, see generally \textit{infra} notes 138 and 183 and accompanying text.

\textsuperscript{80} Greer, 190 N.C. at 637, 130 S.E. at 742.

\textsuperscript{81} Id. \textit{See also} Dockery v. World of Mirth Shows, Inc., 264 N.C. 406, 142 S.E.2d 29 (1965) (holding that, although a general contractor cannot become an insurer of safety, it bears the continuing responsibility of ensuring that adequate safety precautions are taken by subcontractors’ employees).

\textsuperscript{82} Evans v. Elliott, 220 N.C. 253, 17 S.E.2d 125 (1941).

\textsuperscript{83} Id.
expected to arise, unless [proper precautions] are taken," then that employer cannot escape liability. The Evans court also stated, when determining whether an activity qualifies as inherently dangerous within the purview of the exception to the general rule of non-liability, courts must view the activity in light of the circumstances attendant to each case. Thus, courts must discern, on a case-by-case basis, whether the conditions under which work was performed warrant labelling such work as "inherently dangerous."

In many recent North Carolina cases, the courts have hesitated to find questioned activities inherently dangerous. For example, in McCollum v. Grove Manufacturing Co., the court held a crane not to be an inherently dangerous instrumentality. Similarly, in Olympic Products Co. v. Roof Systems, Inc., the court held that re-roofing a building could not be considered inherently dangerous such that it falls within the exception to non-liability. Before the Woodson decision, the general trend in the State favors narrowing the doctrine's application. Perhaps the courts are afraid of allowing too many favorable applications of the doctrine, especially in light of Woodson. Favorable rulings would encourage plaintiffs to litigate, and allowing too much litigation over the issue in workers' compensation cases might

84. Id. at 258, 17 S.E.2d at 128.
85. Id. at 259, 17 S.E.2d at 129. The court mentioned some very early cases upholding this principle: Thomas v. Hammer Lumber Co., 153 N.C. 351, 69 S.E. 275 (1910); St. Louis & S.F.R. Co. v. Madden, 93 P. 586 (Kan. 1908); Cameron Mills & Elevator Co. v. Anderson, 81 S.W. 282 (Tex. 1904).
86. Evans, 220 N.C. at 260, 17 S.E.2d at 129.
87. Id. For example, a trench dug in a heavily populated city might be considered inherently dangerous, whereas that same trench dug on a rural farm might not. For another doctrinal interpretation from an earlier decision, see Cole v. Durham, 176 N.C. 289, 97 S.E. 33 (1918) (holding that where the work itself is dangerous and care must be taken to render it harmless, it can be considered inherently dangerous; although collateral negligence of the independent contractor can excuse the general contractor from vicarious liability, such negligence is no excuse if the general contractor could have reasonably foreseen it).
89. Id.
91. Id. at 334, 363 S.E.2d at 378.
92. The Woodson court made clear the doctrine applies in the workers' compensation context, opening the potential for a flood of litigation.
encourage "hyperlexis." Moreover, the inherently dangerous doctrine is not only tough to apply and litigate, but also very tough to decide, given the typical scenario where the activity in question is not inherently dangerous as a matter of law and the case is sent to a jury. The issues involved are often very technical, involving areas of expertise with which very few potential jurors have any experience or knowledge. Coupled with the inherent vagueness in the doctrine itself, its application presents very real problems to juries as well as judges. Thus, North Carolina courts may want to discourage unnecessary claims by finding activities to be inherently dangerous in only a small percentage of the cases they hear. Another possible reason for this trend toward a narrower definition lies in the discussion on criticisms below. Perhaps the courts fear a movement toward abolishing the doctrine altogether. Thus, they may attempt to narrow its parameters as far as is practicable in hope that such action will provide easier application and less frustration.

North Carolina courts realize in order to effectively utilize the inherently dangerous exception to non-liability for work performed by independent contractors, they must define the doctrine narrowly in order for it to be applicable to the particular facts of each case. Presently, Woodson v. Rowland dictates the law in North Carolina: An inherently dangerous activity is one from which mischievous consequences will arise without proper precautions; it involves a recognizable and substantial danger inherent in it, as distinguished from a danger collaterally created by the

93. This term of art has been used by critics of the American legal system to refer to the extreme litigiousness which has developed in society of late. These critics argue hyperlexis is a major culprit behind the extra-heavy burden on today's court system.

94. The exception imposing vicarious liability on general contractors for injuries arising from inherently dangerous activities has confused the legal community for over a century; obviously, the doctrine is no less confusing to the laypeople who usually comprise a jury.

95. See generally infra text accompanying note 99 for more discussion on criticisms of the doctrine itself, as well as arguments for its abolition.

96. See, e.g., Dunleavy v. Yates Constr. Co., 114 N.C. App. 196, 202, 442 S.E.2d 53, 56 (1994) (holding that where an independent contractor is employed to perform an inherently dangerous activity, and the hiring person or company knows or should know of the dangerous circumstances, that person or company has the nondelegable duty to the independent contractor's employees to exercise due care to see that they are provided a safe place to work where proper precautions have been taken against any dangers that might be incident to such work).
independent negligence of the independent contractor, which latter might take place on a job itself involving no inherent danger. 97 This "official" definition as it now stands emphasizes the collateral negligence exception to the finding of an inherently dangerous activity. Although it seems complete on its face, it ignores some important considerations, such as the foreseeability element. The Woodson court alluded to other important factors in its opinion, but it did not include them in its final definition. 98 The omission may serve only to mislead courts trying to follow the decision, causing them to arrive at incorrect conclusions.

C. Criticisms of the Inherently Dangerous Doctrine: Possible Abolition?

Chief Justice Rovira's dissenting opinion in Huddleston v. Union Rural Electric Ass'n, 99 which criticizes the doctrine as impractical to apply and "unnecessary, as clearer and more predictable theories [ ] are available. . . .," clearly exemplifies the frustration shared by most courts over the doctrine's vagueness. 100 The dissent further asserts the doctrine fails to achieve its purpose, and the costs it imposes far outweigh its benefits. 101 The argument reflects many of the problems inherent in the doctrine, and may well predict a national trend toward abolishing the doctrine for something more functional. Given that the Huddleston opinion was delivered recently, 102 a discussion of Justice Rovira's concerns is warranted in light that courts are obviously frustrated with the doctrine and may become so frustrated that they will choose to abrogate it altogether.

Justice Rovira's primary concern centers around a belief that the doctrine fails to accomplish its intended policy goals. 103 Application of the inherently dangerous exception fails to ensure any extra safety precautions will be taken during inherently dangerous activities, because the doctrine imposes no new obligations on

98. Id. at 351, 407 S.E.2d at 235. The court cites several definitions used in previous North Carolina cases, apparently presuming to incorporate them into its own interpretation.
100. Id. at 295.
101. Id.
103. Huddleston, 841 P.2d at 295-96.
the employer.104 Second, the dissenting opinion expresses concern about the impracticalities imposed by the doctrine. Not only does the exception apply to large corporations and general contractors, it necessarily applies also to sole proprietors or even homeowners—those whose lack of expertise form the basis of their reason to hire an independent contractor in the first place. Given that these individuals are often not financially equipped to bear the burden of vicarious liability, imposing such liability on them would be manifestly unfair.105 Third, Justice Rovira turns to some well-founded concerns about the doctrine’s patent ambiguity, which has led to numerous contradictory decisions, and rendered the doctrine virtually useless in providing any guidelines to courts and attorneys, and also to employers of independent contractors regarding their possible liabilities.106 Finally, the dissent asserts that the costs of imposing such a doctrine far outweigh any benefits gained through its imposition. Even the most prudent employer must insure against the possible negligence of independent contractors, and the cost of this insurance is passed to consumers.107 The criticism further states the ambiguity of the doctrine only exacerbates the insurance problem, because many cautious employers (not knowing which activities qualify as “inherently dangerous”) may buy unnecessary insurance because they fear being held vicariously liable for activities which may or may not actually qualify as inherently dangerous.108

Other authorities have heavily criticized the doctrine.109 They illustrate the common concern that “irrational categories develop” when courts try to distinguish inherently dangerous activities from those activities that are dangerous unless performed negligently, and when courts attempt to distinguish inherently dangerous activities from “ultrahazardous” activities,

104. Id. Justice Rovira argues the doctrine provides the employer with no new incentive “to more carefully select, instruct, or provide for the independent contractor.” Id. at 296. Furthermore, imposing vicarious liability on the general contractor will in no way create incentive for the independent contractor to perform his work with more care. Id. In fact, the doctrine may work to the unfair advantage of the independent contractor, especially if a court imposes vicarious liability on a general contractor for failure to foresee the independent contractor’s negligence.
105. Id. at 296-97.
106. Id. at 297-98.
107. Id. at 298.
108. Id.
109. See generally McHugh, supra note 73.
thereby resulting in inconsistencies.\textsuperscript{110} Authorities cite several examples of cases in which blatantly inconsistent results have been reached, some of which arise in the same jurisdiction.\textsuperscript{111} One North Carolina court held steam sawmills to be inherently dangerous, while a Georgia court disagreed, holding steam sawmills not to be inherently dangerous.\textsuperscript{112} North Carolina courts routinely hold excavations to be inherently dangerous, while Texas courts disagree.\textsuperscript{113} Other examples include a West Virginia case which held building a dam to be inherently dangerous, compared to a North Carolina case which held building a bridge not to fall within the purview of the doctrine.\textsuperscript{114} James McHugh expresses some of the same policy concerns surrounding the doctrine as does Chief Justice Rovira above. For example, McHugh suggests the doctrine does not achieve its means, stating that neither employers nor independent contractors are, by virtue of their status as such, better risk averters.\textsuperscript{115} Furthermore, the doctrine does not

\textsuperscript{110} Id. at 664. McHugh discusses the further complications caused by the collateral negligence factor, which operates as a defense if an independent contractor is negligent in an operative detail so detached from the work contracted that it absolves the employer of vicarious liability. Id. at 664 n.24. Where must courts draw the line? For cases demonstrating inconsistencies surrounding the collateral negligence doctrine, see id. at 664 n.24 (comparing Hyman v. Barrett, 121 N.E. 271 (N.Y. 1918) (holding a board falling from a window not to be collaterally negligent) \textit{with} Philadelphia, B. & W.R. Co. v. Mitchell, 69 A. 422 (Md. 1908) (holding a hammer falling from a bridge to be collaterally negligent)).

\textsuperscript{111} Id. at 665 nn.25-26. \textit{See}, e.g., Baker v. Knight, 205 S.W.2d 65 (Tex. Civ. App. 1947) (holding fumigating is inherently dangerous); Crow v. McAdoo, 219 S.W. 241 (Tex. Civ. App. 1920) (holding disinfecting railroad cars with creosote is not inherently dangerous). \textit{See also} Bill Kisliuk, \textit{Will Legal Strategy Hit Target?}, \textsc{Legal Times}, May 30, 1994, at 4 (explaining a California case where the court held the manufacture and distribution of guns not to be considered inherently dangerous activities); Dan Feldman, \textit{Gunning for Gun-Makers}, \textsc{Newsday}, Apr. 27, 1992, at 38 (describing a Maryland case which held the manufacture and distribution of assault weapons to be inherently dangerous activities).


\textsuperscript{115} McHugh, \textit{supra} note 73, at 665.
necessarily effect a more careful choice by employers to hire competent independent contractors. 116

Few solutions exist which could remedy some of the policy concerns surrounding the doctrine. But some of its pervasive inconsistencies could be reduced by defining the doctrine’s parameters specifically, perhaps through legislation, such that it becomes not only more practicable, but also more uniform throughout jurisdictions and the nation. If such inconsistencies persist, the doctrine itself may fall into demise simply because courts, lawyers, and others encounter divers frustrations when trying to apply it.

However problematic the inherently dangerous exception to non-liability for the work of independent contractors may remain, it still effectively serves important policy goals in situations where large numbers of subcontractors’ employees perform dangerous work for very large, powerful, general contractors. Equity dictates that such financially well-endowed businesses should bear burdens of employee injuries incurred while performing the dangerous work. 117 Indeed, gross inequity results if the entire burden of paying for such injuries and dealing with other losses befalls “with crushing effect” the unfortunate employee, his dependent family, or estate, since he generally does not possess financial stability comparable to that of large general contracting operations. 118

For the foregoing policy reasons, complete abolition of the doctrine proves neither desirable nor reasonable. The proper remedy lies in endeavoring to define the term in such a way that it may be understood and applied correctly not only by lawyers and judges, but also by the general contractors, other employers, independent contractors and employees to which it directly applies. Unfortunately, as the cases have already proven, this is much easier said than done. The forthcoming analysis of the Hooper interpretation of the Woodson definition attempts to shed some light on the common difficulties encountered, and suggests some of the factors which should be included in a proper application of the doctrine.

116. Id. In other words, the employer would be immune if he could show he used “due care” in selecting an independent contractor. Without mind probes, however, there is no way an employer could prove this. Thus, such proof is impossible, thereby giving the employer no more incentive than he would have notwithstanding the doctrine.


118. Id.
IV. Analysis

Hooper v. Pizzagalli Construction Co.\textsuperscript{119} was the first North Carolina case interpreting the inherently dangerous concept as defined in Woodson v. Rowland.\textsuperscript{120} In Woodson, the North Carolina Supreme Court compiled parameters developed in earlier cases in an attempt to clarify the murky doctrine for application in the workers’ compensation context.\textsuperscript{121} The Hooper court based its decision not to hold the general contractor liable almost entirely on the “collateral negligence” aspect of the Woodson definition.\textsuperscript{122} The court’s decision in Hooper reflects the North Carolina trend toward narrowing the scope of the doctrine, thus reducing the range of activities which can properly be classified as “inherently dangerous” for the purpose of imposing vicarious liability for injuries resulting either directly to the employees of independent contractors, or to others as a consequence of work performed by those independent contractors.

A. The Court’s Decision

Unlike the Woodson decision, which held a certain trenching operation may or may not be inherently dangerous depending on the circumstances,\textsuperscript{123} the North Carolina Court of Appeals in Hooper quickly affirmed the trial court’s summary judgment favoring general contractor Pizzagalli, holding that the decedent was not involved in inherently dangerous work at the time of his death.\textsuperscript{124} The Hooper court first stated that plumbing subcontractor Acme, for whom the decedent worked, was required pursuant


\textsuperscript{121} See generally David L. Lambert, Comment, From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters, 20 N.C. CENT. L.J. 164, 196 (1992). This commentary sets out the elements for a full-blown Woodson workers’ compensation claim as a practical guide for attorneys: (1) The worker must be seriously injured or killed; (2) a prior injury or death has occurred on the same equipment or instrumentality; (3) there has been some sort of faulty operation (i.e., removal of safety guards); (4) prior warnings were received by the employer from employees or safety inspectors; and (5) the employer has continued using the equipment or instrumentality with the defect. \textit{Id.}

\textsuperscript{122} Hooper, 112 N.C. App. at 406, 436 S.E.2d at 149.

\textsuperscript{123} Woodson, 329 N.C. at 357, 407 S.E.2d at 238.

\textsuperscript{124} Hooper, 112 N.C. App. at 406, 436 S.E.2d at 149.
to the contract to provide all materials, tools and equipment necessary to complete the work.\textsuperscript{125} However, the contract was silent concerning provisions of a scaffold.\textsuperscript{126} The court of appeals stated the record indicated Pizzagalli retained no supervisory role over Acme during the course of the job.\textsuperscript{127} In analyzing whether the decedent had died from inherently dangerous work, the Hooper court defined the doctrine as follows:

> [W]ork to be done from which mischievous consequences will arise unless certain preventative measures are adopted, and that which has "a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which later might take place on a job itself involving no inherent danger."\textsuperscript{128}

Like the court in Woodson, the Hooper court created a hybrid definition, using those developed in Greer\textsuperscript{129} and Woodson.\textsuperscript{130} The Hooper court further held that since Pizzagalli hired the decedent's employer for plumbing work only, and since plumbing, by its nature, does not harbor "substantial or recognizable dangers" sufficient to meet the above definition, the decedent's estate could not claim the decedent had been killed while performing inher-

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 405, 436 S.E.2d at 149 (citations omitted) (citing Greer v. Callahan Constr. Co., 190 N.C. 632, 130 S.E. 739 (1925) and quoting Woodson v. Rowland, 329 N.C. 330, 351, 407 S.E.2d 222, 234 (1991)). See also RESTATEMENT (SECOND) OF TORTS § 426 (1965). This section provides:

> 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.

\textit{Id.}

\textsuperscript{129} See Greer v. Callahan Constr. Co., 190 N.C. 632, 130 S.E. 739 (1925). That court defined inherently dangerous work as work "from which mischievous consequences will arise unless preventive measures are adopted." \textit{Id.} at 637, 130 S.E.2d at 742.

\textsuperscript{130} The Hooper court used only parts of the Woodson definition. It did not meticulously pick through the high court's analysis in order to discern its full interpretation of the doctrine. Thus, its analysis appears weak in light of Woodson.
ently dangerous work.\footnote{Hooper, 112 N.C. App. at 406, 436 S.E.2d at 149. Although the court admitted no North Carolina case has addressed the issue of whether plumbing is an inherently dangerous activity, it asserted that other jurisdictions have found plumbing not to be inherently dangerous. See, e.g., Goolsby v. Kenney, 545 S.W.2d 591 (Tex. Civ. App. 1976).} The decision turned on the court’s belief that the decedent had committed collateral negligence sufficient to bar his estate’s recovery from the general contractor.\footnote{Id.} In supporting its opinion, the court stated simply the decedent negligently failed to secure himself or the scaffold board, thus the general contractor escaped vicarious liability.\footnote{Hooper v. Pizzagalli Constr. Co., 335 N.C. 770, 442 S.E.2d 516 (1994).} The North Carolina Supreme Court subsequently denied review of the case.\footnote{See Restatement (Second) of Torts § 416 (1965), providing generally that, one who employs an independent contractor to do work which he should recognize as likely to create during its progress a peculiar risk of physical harm unless special precautions are taken, is subject to liability for physical harm caused by failure of the contractor to exercise reasonable care to take such precautions, even though he has provided for such precautions in the contract or otherwise. See also comments a, d, and e to the above section: Comment a states that the above rule usually applies to situations where the employer should anticipate the need for some special precaution, such as painting carried on upon a scaffold above a highway; Comment d reiterates the normal characteristics of inherently dangerous activities, namely that they need not be extra-hazardous, abnormally dangerous, or involve a very high degree of risk; it is essential only that the risk is one differing from common risks to which persons ordinarily involved in the type of work are subjected [emphasis added]; Comment e suggests that it is sufficient that the employer should recognize the risk as likely to arise in the usual course of the work, or the particular method which the employer knows the contractor will adopt. Restatement (Second) of Torts § 416 cmts. a, d, and e (1965).} From the outset, the \textit{Hooper} court’s analysis seems problematic in light of the \textit{Woodson} analysis. For example, the \textit{Hooper} court never addressed the issue of whether Pizzagalli could have reasonably foreseen that the decedent might use a scaffold during his work on the building, which was at least seven stories high.\footnote{See 41 AM. JUR. 2d Independent Contractors § 43 (1968), which states that ordinary building activities including both construction and demolition cannot be considered inherently dangerous. For an early opinion on collateral negligence, see Cole v. City of Durham, 176 N.C. 289, 97 S.E. 33 (1918). This court stated the principle of collateral negligence has no application where the injury might have been anticipated as a direct and probable consequence of the performance of the work contracted for, even if reasonable care is omitted in the course of its performance. Id. at 299, 97 S.E. at 38. In such case the general contractor or other employer of the independent contractor remains liable even though the injury might have been anticipated as a direct and probable consequence of the performance of the work contracted for, even if reasonable care is omitted in the course of its performance. Id. at 299, 97 S.E. at 38.}
In contrast, the Woodson court considered foreseeability a large variable in the equation. Presumably, the scaffolding was supplied not by Acme but by Pizzagalli, since scaffolding was never mentioned in the contract. Thus, Pizzagalli should have known about the scaffold's presence on the site. Therefore, logic dictates that the general contractor should have foreseen the decedent's use of the scaffold. Usually, plumbers' work does not require scaffolding. Unless it could be proven that Acme Plumbing routinely engaged in work at great heights, and that its employees were properly trained to work at such heights, logic dictates that the general contractor could have foreseen the decedent's negligent use of the scaffold. If, in fact, the scaffolding did belong to Pizzagalli, negligence is that of an employee of the general contractor. Id. See also infra note 141 and accompanying text.


137. One common custom of "subcontracting" in the construction business, especially on very large jobs involving large general contractors such as Pizzagalli, entails the practice of bidding. Essentially, a general contractor asks a number of potential subcontractors to submit bids before the end of a certain time period. Once that time period expires, the general contractor selects its subcontractor on the basis of price and many other factors, such as expertise, quality, reputation, and fitness for the job. Logically, prudent general contractors often consider only those subcontractors who have experience with the particular circumstances the job will involve. Thus, potential subcontractors usually know, or have reason to know, what dangers a job might entail.

Although the facts of the Hooper case do not expressly stipulate that Acme was a large plumbing company which routinely performed jobs involving heights, quite certainly Acme was not "Bob, the friendly plumber." Possibly, Pizzagalli itself routinely employed Acme (this is another general practice in the construction business). If this scenario were in fact the case, then Pizzagalli may not have expected one of Acme's employees to negligently use a scaffold, and such expectation may have been entirely reasonable, given the general practices in the business. Thus, even though the court failed to actually analyze the foreseeability aspect of Woodson, it may have escaped the consequences of such lack of analysis because of an ordinary business custom. Indeed, this may be one reason the North Carolina Supreme Court denied review of the case.

138. See RESTATEMENT (SECOND) OF TORTS § 426 (c) (1965). Subsection (c) generally provides the employer of an independent contractor may not be held liable for the negligence of such contractor if the employer had no reason to contemplate the contractor's negligence when the contract was made. Id. See also Backhoe Accident—Sovereign Immunity, MASS. LAW. Wkly., Feb. 14, 1994,
zagalli, and if Pizzagalli knew the decedent might perform work on the seventh floor of the building,\textsuperscript{139} then reason suggests that Pizzagalli could have foreseen the possibility of the decedent's accident. Furthermore, authorities suggest that any time a person uses a scaffold, there automatically exists a recognizable risk that the person may fall.\textsuperscript{140}

Turning to the collateral negligence issue, an employer cannot be held liable for any harm caused by some improper method used by an employee of the independent contractor, if such

\textit{See Restatement (Second) of Torts} § 426 cmts. a and b (1965): Comment a defines collateral negligence as negligence in the operative detail of the work, as distinguished from the general plan or method followed or result to be accomplished. Negligence in operative details is usually not within the contemplation of an employer at the time the contract was made; Comment b states that an employer is required to contemplate a contractor's negligence with respect to all risks inherent in the normal and usual manner of doing the work \textit{under the particular circumstances} [emphasis added]. In other words, an employer may be held liable if the circumstances under which the work is to be done give him warning of a special reason to take precautions. Id.

\textit{See also Keeton et al., supra note 9, at 515, professing that the essence of collateral negligence is its disassociation from any inherent or contemplated risk which may be expected to be created by the work} [emphasis added]. The authors cite the following examples of collateral negligence: dropping a board while doing repair work, and mistakingly crippling a ladder by removing ballast weights. Id.

\textsuperscript{139} Probably dispositive, given that since Pizzagalli knew the building to be at least seven stories tall, it must have known plumbing would be necessary on each floor. This is hardly arguable since Pizzagalli, a very large general contractor, cannot be considered an amateur in the field. \textit{See Restatement (Second) of Torts} § 413 cmt. f, supra note 7. The comment states that in determining whether to impose vicarious liability on the employers of independent contractors, courts should take the extent of the employer's knowledge and experience in the field into account.

\textsuperscript{140} \textit{Restatement (Second) of Torts} § 427 cmt. c (1965). This section provides the following general rule:

one who employs an independent contractor to do work involving special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, \textit{or which he contemplates or has reason to contemplate in 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 danger.

\textit{Id.} (emphasis added). \textit{But see} comment d, which states that the rule in this section does not apply where the employer may reasonably assume that the operative details of the work will be carried out by the contractor with proper care. \textit{Restatement (Second) of Torts} § 427 cmt. d (1965).
employee does so without any direction from his employer. It appears from the facts of Hooper that the decedent and his colleague were alone when the accident occurred. Apparently, no supervisor was present. Neither the decedent nor his companion took measures to secure themselves, the scaffold board, or otherwise attempt any precautions. If these findings of fact were correct, then the Hooper court correctly held the decedent collaterally negligent. This, however, should not have ended the court's analysis. For instance, the Woodson court also stated that any employer of an independent contractor has a duty to ensure that the contractor carries out the proper precautions. If Pizzagalli owned the scaffold rendered unsafe by its unsecured board, then Pizzagalli could have been held vicariously responsible simply through its failure to provide for adequate safety precautions. Furthermore, the Woodson court ignored the finding that

141. Restatement (Second) of Torts § 410 cmt. b (1965). See also Restatement (Second) of Torts § 426 cmt. a (1965). Comment a describes collateral negligence as negligence "in the operative detail of the work, as distinguished from the general plan or method followed or result to be accomplished." Id. Negligence in operative details is usually not within the contemplation of an employer at the time the contract was made. Id. But see Cole v. City of Durham, 176 N.C. 289, 97 S.E. 33 (1918), which discusses situations in which the collateral negligence doctrine does not apply. The case clearly points out that the doctrines of collateral negligence and foreseeability are closely intertwined. This thereby uncovers another possible flaw in the Hooper court's analysis because Pizzagalli could have easily foreseen the decedent's injury as a direct and probable consequence of the work contracted, such work entailing activity performed at great heights. In Cole, the court held the collateral negligence doctrine does not apply in such situations. Id.

142. Hooper, 112 N.C. App. at 403, 436 S.E.2d at 147.

143. See generally infra note 183 and accompanying text, discussing what must be done at the trial level to find contributory (or collateral) negligence in North Carolina.


145. Had Pizzagalli been reasonably prudent, its supervisors and employees would have ensured the security of the scaffold board. A general custom in the construction business dictates that where one company owns an instrumentality which directly results in the injuries of another company's employees, then the company owning the instrumentality bears responsibility. See also McHugh, supra note 73, at 665 n.32. The author quotes other jurisdictions which have found liability when the employer failed to order safeguards or to correct improper procedures he knows the contractor is using. See, e.g., Ruehl v. Lingerwood Rural Tel. Co., 135 N.W. 793 (N.D. 1912); Snow v. Marian Realty Co., 299 P. 720 (Cal. 1931).
unknown persons had placed the unsecured scaffold board on the scaffolding. Suppose those unknown persons had been Pizzagalli’s employees. Would not this have placed some duty on the employees or their supervisors to ensure that the scaffold board was properly secured? The trial court should have found facts sufficient to determine exactly from whom the scaffold board originated. Thus, the appeals court might properly have remanded the case to the trial court, holding the decedent’s collateral negligence conditional on these findings.

If, in fact, the scaffolding belonged to Pizzagalli, and if its employees carelessly placed an unsecured board on such scaffold, then one may argue that such action at least gave rise to a duty to warn. Moreover, North Carolina courts generally hold that where a general contractor knows or should know of any potentially dangerous circumstances, such general contractor has a non-delegable duty to an independent contractor’s employees to exercise due care to see that they are provided with a safe workplace where proper precautions have been taken against any dangers which may be incident to the work.146

As if the inherently dangerous doctrine were not already cumbersome, the collateral negligence doctrine, alone, often proves equally troublesome.147 The doctrine comes into play when an independent contractor, or an employee of such, performs negligently in an operative detail so detached from the work contracted that it absolves the employer of vicarious liability.148 This abstract definition often results in arbitrary line-drawing by courts. In the Hooper case, for instance, one may argue persuasively that the decedent’s negligence was detached from the work contracted—use of scaffolding was never mentioned in the contract. On the other hand, one may argue just as persuasively that since the scaffolding was ultimately necessary to complete the work contracted, the decedent’s negligence was not sufficiently detached to qualify as collateral negligence.

146. Dunleavy v. Yates Constr. Co., 114 N.C. App. 196, 202, 442 S.E.2d 53, 56. See generally Restatement (Second) of Torts § 416, supra note 135. See also comment a to that section, which provides that the non-delegable duty rule to provide for the safety of subcontractors’ employees usually applies to situations where the employer should anticipate the need for some special precaution, such as in painting carried on upon a scaffold above a highway. Restatement (Second) of Torts § 416 cmt. a (1965).
147. See generally McHugh, supra notes 73 and 110.
148. Id.
North Carolina courts have long held that insufficient evidence of contributory negligence gives rise to a presumption against such negligence,¹⁴⁹ and that contributory negligence is a jury question.¹⁵⁰ Courts generally hold the fact that a person has been killed in an accident does not give rise to a presumption of contributory negligence.¹⁵¹ Thus, a court should take care in applying the doctrine, and the Hooper court seems to have jumped to concluding contributory (collateral) negligence without dissecting all the possibilities. Therefore, the Hooper court probably should have remanded the case to the trial court on the collateral negligence issue, if that issue formed the true motive behind its holding.

One part of the Woodson and Hooper definitions of inherently dangerous work provides that mischievous consequences will arise if proper safety precautions are neglected.¹⁵² Is it not true that securing a scaffold board and “taking other precautions” qualify as proper safety measures? Thus, could it not be argued that if these measures were necessary to prevent injury while working on the scaffold, then such work would involve “mischievous consequences” without these preventive measures? It appears from this small analysis that the work in which the decedent was involved could have been considered, at least arguably, inherently dangerous in nature.¹⁵³ Moreover, the Woodson court emphasized this duty to warn, and its importance to the overall policy objectives of the doctrine, numerous times in its analysis.¹⁵⁴ If Pizza-

¹⁵². See supra text accompanying note 41.
¹⁵³. This proposition is strengthened by the Woodson court’s following quotation from Thomas v. Hammer Lumber Co., 153 N.C. 351, 69 S.E. 275 (1910):
   The liability of the employer rests upon the ground that mischievous [sic] consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that these precautionary measures are adopted rests upon the employer, and he cannot escape liability by entrusting this duty to another as an “independent contractor” to perform.
   Woodson, 329 N.C. at 352, 407 S.E.2d at 235 (emphasis added).
¹⁵⁴. See Woodson, 329 N.C. at 352, 407 S.E.2d at 235. The court quoted Dockery v. World of Mirth Shows, Inc., 264 N.C. 406, 142 S.E.2d 29 (1965) (holding the party that employs the independent contractor has a continuing responsibility to ensure that adequate safety precautions are taken, and this nondelegable duty of safety reflects the policy judgment that certain obligations
galli in fact owed Acme and its employees such a duty to warn or ensure safety, one can easily argue that the general contractor breached such duty by failing to secure the scaffold, failing to provide tethers or other safety devices, or failing to provide a means through which the scaffold could be secured (if these failures could be proven at the trial level). The facts indicated nothing about a posting of any warnings concerning the scaffold. Instead of jumping the gun at the first sign of the decedent’s possible collateral negligence, the Hooper court might have gone through an analysis more closely paralleling that of Woodson; it could have concluded the decedent acted reasonably in assuming the scaffold was safe.

Notwithstanding its flawed analysis pursuant to the Woodson interpretation of the inherently dangerous exception, the Hooper court probably reached the correct result according to North Carolina law. This may be so because of certain customs in the business. Had the court analyzed certain factors of the Woodson interpretation in more depth, it might have reached a different result. Since the North Carolina Supreme Court denied review of the case, however, given that the high court formulated the Woodson interpretation, something obviously pertinent to the case but lacking in the facts demonstrated the correctness of the holding. Correct or not, the Hooper court should have given a more sophisticated, Woodson-like treatment to the doctrine in this case.

B. Other Jurisdictions Compared: How Would They Hold Hooper?

Even today, inconsistencies abound. States cannot even agree over the meaning of the doctrine pertaining to scaffolding alone. For instance, at least one court has found justification for imposing vicarious liability on an employer for injuries sustained

are of such importance that employers should not be able to escape liability merely by hiring others to perform them). Woodson, 329 N.C. at 352, 407 S.E.2d at 235.

155. See generally supra note 137 and accompanying text for further illumination on customs of the business.

156. A different outcome would have been improbable, however, since North Carolina still honors the contributory negligence doctrine, which often leads to harsh results. See generally infra note 183 and accompanying text. The case seems devoid of some important facts, however. The appeals court could have remanded the case to find more facts surrounding the scaffold: who owned the scaffold; who placed the unsecured board on the apparatus; were there any tethers, safety belts, or devices which could have been used to secure the board available on site?
by an independent contractor's employee who fell from a scaffold.\textsuperscript{157} Another court has held a scaffold without guard rails to be an inherently dangerous instrumentality.\textsuperscript{158} This court would have concluded that since the scaffolding used by the decedent in \textit{Hooper} was devoid of guard rails, such scaffolding would qualify as an inherently dangerous instrumentality; thus the court would have held that the decedent had been involved in an inherently dangerous activity, and would have imposed vicarious liability on Pizzagalli.

Other courts swing the opposite way, holding no inherent danger in doing work on a high scaffold.\textsuperscript{159} Such courts would most likely quickly conclude the decedent's estate in \textit{Hooper} could not hold Pizzagalli vicariously liable under an inherently dangerous theory. In one case, the plaintiff was injured when he fell from a scaffold, after having apparently voiced concerns about the scaffolding the previous day.\textsuperscript{160} In that case, the court held there was no peculiar risk or inherent danger in scaffold work in residential construction.\textsuperscript{161} If \textit{Hooper} had been contested in this forum, the court would have had to address the issue whether the same standard would apply to commercial construction.\textsuperscript{162} According to the Michigan Court of Appeals, work on scaffolding is not in itself inherently dangerous.\textsuperscript{163} Where a defective scaffold board causes a subcontractor's employee's injuries, the injured employee cannot

\textsuperscript{157} \textit{See} Mackey v. Campbell Constr. Co., 162 Cal. Rptr. 64 (Cal. Ct. App. 1980). This is not the norm of most United States jurisdictions, however. This court used the "peculiar risk doctrine" adopted by California, which, although analogous to the "inherently dangerous doctrine" used in most other jurisdictions, imposes a stricter standard which sometimes forces an employer to bear the responsibility for even unforeseen conduct by a subcontractor's employees. \textit{Id.}

\textsuperscript{158} \textit{See} Clark v. Rental Equip. Co., 220 N.W.2d 507 (Minn. 1974).


\textsuperscript{160} Downs v. A & H Constr., Ltd., 481 N.W.2d 520 (Iowa 1992).

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} Most likely, the answer would be no. Common sense dictates that since commercial construction usually involves buildings of greater size (and thus work at greater heights) than residential construction, courts might be more inclined to find scaffold work in commercial construction an inherently dangerous activity.

hold the general contractor vicariously liable. The Michigan court could decide either way in the *Hooper* case. The decision would turn on whether an unsecured scaffold board falls within the meaning of a “defective” or “substandard” scaffold board as defined by the court.

In another case, where a subcontractor’s employee was seriously injured when he fell forty feet after the scaffold board on which he was working collapsed, the court held the general contractor liable because there existed an inherent danger of which he was aware, and which he could have prevented through the use of proper safety procedures. This court would probably have held Pizzagalli vicariously liable through a foreseeability theory. The myriad of inconsistencies surrounding the doctrine as applied to scaffolding is probably grounded in the simple fact that courts and other authorities have found it virtually impossible to generate a good working definition for what constitutes “inherently dangerous.” Frustration with the doctrine has even led some state legislatures to pass statutes dealing specifically with scaffolding.

Many jurisdictions apply rules interpreting the inherently dangerous doctrine which, although not at odds with the present North Carolina law, do not exemplify the same effort as did the *Woodson* court to create such a narrow, all-encompassing defini-

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164. *Id.*


166. If a general contractor knows of the existence of a scaffold, and knows it has taken no steps to assure the safety (i.e., warnings, security tethers, checks on the equipment) of subcontractors’ employees who may work on such scaffold, then the general contractor might properly be said to have been aware of possible danger.

167. *See, e.g., Keeton et al., supra* note 9, at 512. The authors admit the phrase has never been precisely defined. They state that the risk must be peculiar, but not necessarily unavoidable. They cite several examples of activities commonly considered inherently dangerous as a matter of law: construction of reservoirs; keeping vicious animals; high tension electric wires; blasting; fireworks; crop dusting; excavations near public highways; clearing land by fire; and construction or reparation of buildings adjoining highways. *Id.* at 513. North Carolina courts, however, specifically enumerate only electrical wiring as inherently dangerous as a matter of law. *See supra* note 76 and accompanying text.

tion.\textsuperscript{169} For instance, the Illinois courts state the phrase "inherently dangerous" applies to things "imminently dangerous in kind," such as explosives and poisonous drugs.\textsuperscript{170} If an inherently dangerous instrumentality is a necessary part of the work, then the work is inherently dangerous.\textsuperscript{171} One Illinois court has held inherent danger to be the type of danger which "inheres" in an activity at all times, thereby requiring special precautions to be taken to prevent injury.\textsuperscript{172}

Other jurisdictions have turned desperately to Black's Law Dictionary in an attempt to adequately define the vague phrase.\textsuperscript{173} One jurisdiction has applied the inherently dangerous exception to any situation in which there exist latent defects about which the general contractor knows, and which an independent contractor could not discover through reasonably careful inspection.\textsuperscript{174} Some jurisdictions equate "inherently dangerous activities" with "ultrahazardous" or "abnormally dangerous" ones.\textsuperscript{175} This interpretation, however, does not seem in keeping with the present trend in the law and the desire to keep the two doctrines separate and distinct from one another.\textsuperscript{176}

The \textit{Huddleston v. Union Rural Electric Ass'n} decision remains one of the few cases in which the court refused to "give up" on the doctrine, trying to assign a narrow, workable definition to it.\textsuperscript{177} Perhaps the court attempted this out of fear of the doc-

\textsuperscript{169} See Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). The court took great pains to analyze all existing North Carolina law and develop a definition encompassing all important aspects of the previous interpretations.

\textsuperscript{170} See Paul Harris Furniture Co. v. Morse, 139 N.E.2d 275 (Ill. 1956).

\textsuperscript{171} Id. The court's reasoning is circular.


\textsuperscript{173} See Reynolds v. Manley, 265 S.W.2d 714 (Ark. 1954).

\textsuperscript{174} See Begley v. Adaber Realty & Inv. Co., 358 S.W.2d 785 (Mo. 1962). This case exemplifies how a Missouri court applied the doctrine (not an attempt to define it). The court used the same standard all courts use in determining strict liability on a landowner for injuries suffered by an invitee. \textit{Id.}


\textsuperscript{176} See, \textit{e.g.}, \textit{RESTATEMENT (SECOND) OF TORTS} § 427 cmt. b (1965) and \textit{RESTATEMENT (SECOND) OF TORTS} § 520 (1965), \textit{supra} note 51. See also Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991) (stating a distinction must be drawn on a case-by-case basis).

trine's abolition, a "remedy" suggested by the dissenting opinion of the case.\textsuperscript{178} Or perhaps the Colorado court simply grew tired of putting up with so much inconsistency. Whatever the case may be, the majority in \textit{Huddleston} stated the following two policy goals sufficiently justify the doctrine: (1) Employers whose enterprises directly benefit from a dangerous activity should bear part of the responsibility; and (2) the doctrine creates "another layer" of concern, producing incentives to take measures which reduce the number of injuries.\textsuperscript{179} In its analysis, the \textit{Huddleston} court stated that if a plaintiff could not establish the following elements by a preponderance of the evidence, then a directed verdict should be entered against that plaintiff: (1) The activity in question presents a peculiar danger to others inherent in the activity or circumstances under which it is to be performed; (2) such danger is different in kind from ordinary risks that commonly confront persons in the community; (3) the employer knew or should have known of the dangerous activity or circumstances; and (4) the plaintiff's injury did not result from any collateral or contributory negligence on the plaintiff's part.\textsuperscript{180}

If the \textit{Huddleston} court had heard \textit{Hooper v. Pizzagalli Construction Co.},\textsuperscript{181} it may have reached a conclusion differing from that of the North Carolina court. For instance, the \textit{Huddleston} court may have found the circumstances under which the decedent's plumbing work was performed qualified as inherently dangerous, because such work took place on the seventh floor of an unfinished high-rise building. Thus, the decedent's estate might have satisfied the first element stated above. Furthermore, the danger created by work at heights is not a danger generally confronted by plumbers, unless it could somehow be stipulated that the injured plumber was accustomed to such dangerous work.\textsuperscript{182} Therefore, the decedent's estate might have satisfied the second element stated above. Finally, the fact remains that Pizzagalli hired Acme to plumb a building which Pizzagalli knew to be at least seven stories high, and Pizzagalli at least should have known the existence of a possibly dangerous circumstance, and provided for a safer workplace. Thus, the decedent's estate might

\textsuperscript{178} See generally supra text accompanying notes 99-101.
\textsuperscript{179} See \textit{Huddleston}, 841 P.2d at 287.
\textsuperscript{180} Id. at 294.
\textsuperscript{182} See generally supra note 137 and accompanying text.
have satisfied the third element stated above. Even given that the decedent's estate satisfied the first three elements above, there remains the fourth element concerning collateral negligence. That the decedent failed to check the security of the scaffold board, coupled with the fact he wore no safety harness in case of a fall, might qualify as substantial collateral or contributory negligence on the decedent's part. Although Colorado's opinion on the collateral negligence issue—just how much collateral negligence is needed, and what qualifies as collateral negligence—remains unclear, some courts allow recovery even in cases where injured workers have been found collaterally negligent. If Colorado had not intended a plaintiff's collateral negligence to at least par-

183. See Tort: Brain Injury, MICH. LAW. WKLY., Nov. 8, 1993, at S1B. This implies that in states which honor the doctrine of comparative negligence (where a plaintiff may still recover for injuries he or she receives even though his or her own negligence was partly to blame) the plaintiff's collateral negligence does not completely bar his or her recovery. Other states, such as North Carolina, still honor contributory negligence, through which a plaintiff's collateral negligence totally bars his or her recovery. See N.C. GEN. STAT. § 1-139 (1993) (providing a party asserting the defense of contributory negligence has the burden of proving such negligence). This may be one reason why the Hooper decision seems harsh at first glance.

For general information on the doctrine of contributory negligence, see KEETON ET AL., supra note 9, at 451-62. Professors Prosser and Keeton define contributory negligence as follows:

Conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. Unlike assumption of risk, the defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather, although the defendant has violated his duty, has been negligent, and would otherwise be liable, the plaintiff is denied recovery because his own conduct disentitles him to maintain the action.

Id. at 451-52. The authors point out that, unlike comparative negligence, contributory negligence completely bars a plaintiff's recovery. Id. at 472.

For examples, pertinent to the Hooper case, of how North Carolina courts have interpreted the contributory negligence doctrine, see the following cases: Harris v. Bridges, 46 N.C. App. 207, 264 S.E.2d 804, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980) (holding plaintiffs must act or fail to act with knowledge, actual or constructive, of the danger involved in his activity); Goodson v. Williams, 237 N.C. 291, 74 S.E.2d 762 (1953) (holding the fact that a person was killed does not presume his contributory negligence); Miller v. Scott, 185 N.C. 93, 116 S.E. 86 (1923) (holding that contributory negligence is a jury question); Norton v. North Carolina R.R., 122 N.C. 910, 29 S.E. 886 (1898) (holding that insufficient evidence of contributory negligence gives rise to a presumption against such negligence).
tially bar his or her recovery from general contractors in applying the inherently dangerous doctrine, then it would not have added the fourth element stated above. Thus, the court probably would have reached the same, or a similar, result as the North Carolina court (depending on whether Colorado honors the comparative negligence doctrine), but its use of an elemental analysis appears much more thorough, and less subject to inconsistent results.

The foregoing fictitious analysis of *Hooper v. Pizzagalli Construction Co.* in another jurisdiction brings forth an interesting point. Neither the *Woodson* nor *Hooper* interpretations list elements for determining whether to impose vicarious liability through the inherently dangerous exception. The *Hooper* court might have held differently had it weighed the policy objectives of the doctrine, coupled with total satisfaction of three of the four elements stated above by the decedent’s estate, against the possibility that the decedent may have been collaterally negligent. At least, it may have remanded the decision to the trial court on the question of collateral negligence alone.

In short, this type of case could be decided any number of ways, depending upon the jurisdiction in which it is heard. This further reinforces a dominant theme throughout this Note: the inherently dangerous doctrine remains almost hopelessly riddled with inconsistencies, which not only confuse courts and other members of the legal profession, but also continue to work inequity on the parties involved.


185. This scenario would be more realistic if North Carolina recognized comparative negligence.

186. The facts surrounding the incident seem scanty; the jury should be given the opportunity to judge whether it was Pizzagalli’s duty to secure the scaffold board (or whether the decedent was collaterally negligent in not securing it himself); the jury should be told whether safety belts, etc. were freely available on the job site for decedent’s use (if so, the jury could properly decide that the decedent was collaterally negligent in failing to use readily-available safety devices). See also supra text accompanying note 149.

187. It seems a shame that the particular jurisdiction in which a fatal on-the-job accident takes place dictates whether a decedent’s family is allowed to recover certain damages from such decedent’s ultimate employer, the general contractor. Conversely, such a scheme is equally unfair to general contractors who are subject to such liability merely because they operate their businesses within a certain jurisdiction.
C. Future Outlook: The Inherently Dangerous Doctrine in North Carolina—Ramifications of the Hooper Decision

In Woodson v. Rowland,\textsuperscript{188} the North Carolina Supreme Court generated a narrowly tailored, possibly workable, definition of what constitutes an "inherently dangerous activity."\textsuperscript{189} In Hooper v. Pizzagalli,\textsuperscript{190} the first case interpreting the Woodson definition, the North Carolina Court of Appeals used only part of the complete Woodson interpretation to quickly dispose of the issue. The decision was denied discretionary review by the North Carolina Supreme Court,\textsuperscript{191} indicating a possible trend in North Carolina law toward finding fewer instances in which an activity may properly be deemed "inherently dangerous." The obvious policy, in this author's view, behind this stricter trend is to discourage frivolous claims by employees who may know they have been collaterally negligent, and who simply attempt to dig into the deepest pockets. This practice not only wastes courts' time, it also burdens general contractors with numerous lawsuits, and expensive, sometimes even unnecessary, insurance.

In one very recent North Carolina case, the plaintiff was injured while operating a circular saw on a steep roof on a cold, windy December day.\textsuperscript{192} The court determined that even in light of these extreme circumstances, the work in which the plaintiff had been engaged did not constitute an inherently dangerous activity.\textsuperscript{193} In another recent case, the court cited Hooper in determining that knowledge with substantial certainty requires more than just a possibility, or even substantial possibility, of serious injury or death.\textsuperscript{194}

All these cases, including Hooper, are likely to come under criticism. Although the goal to narrow the definition of "inherently dangerous" is desirable not only in the sense that it will ease the jobs of practitioners and courts, but also that it may save the doctrine from heavy criticism and possible abolition, there exists a point past which courts should not go if the doctrine is to remain

\textsuperscript{189} See generally supra text accompanying note 97.
\textsuperscript{192} Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994).
\textsuperscript{193} Id.
of any use at all. For instance, when a court attempts to apply the doctrine literally, it may determine a certain activity not to be inherently dangerous, when in fact it should be classified as such. The circumstances in Canady v. McLeod 195 point clearly to an extremely dangerous combination, yet the court, in applying the Woodson standard, failed to find an inherently dangerous activity. 196

Perhaps in the future, North Carolina courts will adopt an elemental approach to the doctrine, such as that used in the Colorado case, Huddleston v. Union Rural Electric Ass’n. 197 This type of approach effectively solves the vagueness problem while at the same time keeping all aspects of the doctrine in perspective. 198 This also seems an effective way to simplify convoluted, abstract interpretations like the ones described in Woodson and Hooper.

V. CONCLUSION

The doctrine imposing vicarious liability on employers of independent contractors who hire those contractors to do inherently dangerous work remains fraught with frustrations. Because of its sheer vagueness and accompanying difficulty in application, it has come to the attention of courts not only in North Carolina, but to courts across the nation.

In holding the decedent’s activity not inherently dangerous, Hooper v. Pizzagalli Construction Co. represents the first attempt of a North Carolina court to interpret the interpretation presented in Woodson v. Rowland. That the North Carolina Supreme Court denied discretionary review of the Hooper decision suggests a general desire in the state court system to narrow the scope of the doctrine as far as is possible. However, too much narrowing may only exacerbate the impracticability of the poorly-understood doctrine. Such extreme narrowing also causes courts to find fewer and fewer instances of inherently dangerous activity, in any circumstance. This proves detrimental to those people who benefit most from the doctrine—people like the decedent’s estate in

195. 116 N.C. App. 82, 446 S.E.2d 879 (1994).
196. See supra text accompanying notes 192-93. If this does not amount to inherently dangerous work, what does?
197. See supra text accompanying note 180.
198. Generally, when dealing with something which must be applied or interpreted on a case-by-case basis such as the inherently dangerous doctrine, an elemental approach seems easier not only for courts, but for practitioners alike.
Hooper, who are of modest means, compared to large general contractors who are burdened relatively little by the doctrine.\textsuperscript{199}

The inherently dangerous doctrine has one simple aim: to force general contractors and other employers to uphold their duties to warn or otherwise provide for the safety of subcontractors, their employees, and the public in general. Somewhere, however, a line must be drawn, if for no other reason than to reduce the inconsistent findings of courts throughout the nation. Perhaps the Commission on Uniform State Laws should adopt a “Uniform Definition for Inherently Dangerous Activities.” Perhaps North Carolina and other states should follow Colorado’s example, and adopt an easier to apply elemental approach.\textsuperscript{200} Whatever the solution, something must be done to save the doctrine. Otherwise, more and more courts will become frustrated with it, and it may eventually risk abolition. The North Carolina courts, through Hooper and Woodson, are at least making the effort. At least they make it clear that “inherently dangerous” does not equal “abnormally dangerous” or “ultrahazardous.” That is more than one can say for many courts in this country. As the law continues to evolve, however, perhaps North Carolina courts, as well as those across the nation, will adopt more workable and uniform interpretations of the inherently dangerous doctrine.

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\textsuperscript{199} This proposition is predicated on proper definitions and interpretations of the doctrine. As mentioned above, employers as well can be hurt by a poorly-defined doctrine, from which courts reach inconsistent results. This leaves employers with little idea whether they may be held vicariously liable for a given activity.

\textsuperscript{200} This appears the most practical approach.