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CCTLA in 2010: Continuing a Tradition of Excellence & Service

By: Kyle Tambornini, CCTLA President

I am honored to be serving as president of the Capitol City Trial Lawyers Association for the year 2010. When I first opened my law practice, I was lucky enough to be introduced to CCTLA member Ed Smith, who recommended that I join this great organization. The Capitol City Trial Lawyers Association has since provided me with a network of experienced attorneys and educational programs that have helped me to become a better trial lawyer. Through the years I have attended programs that have prepared me to effectively represent my clients, deal with insurance adjusters and handle defense attorneys.

I continue to use many of the forms and discovery I have collected through the many seminars provided by CCTLA's members. This year I hope to continue this tradition of providing excellent educational programs that will make all of us better trial lawyers!

The Calendar of Events on the back page of *The Litigator* shows the wide range of programs that will be available to our members this year. We have approximately 26 programs scheduled, including the annual Tahoe seminar that brings together premiere attorneys from throughout the state and a two-day, participatory, voir dire program in May.

In addition to our educational programs, the CCTLA members, through the listserv or the monthly Q&A luncheon, provide us with an extensive network of experienced attorneys, who are always willing to help answer questions or help determine the best legal strategy to take. Our members understand the common interest we share in helping the plaintiff's bar of Sacramento obtain the greatest recovery possible for our individual clients. Good recoveries for our individual clients help everyone in our community obtain better recoveries for their clients.

With that in mind, I want to take this opportunity to remind the CCTLA members that we represent the plaintiffs' bar in Sacramento, and we should continue to strive to make every plaintiff's lawyer in Sacramento the best possible advocate for their clients. If you know anyone who is not a member, encourage them to join. There is no other organization that can provide plaintiff attorneys with the quality of educational resources and networking potential, that CCTLA offers.

For those who are looking to obtain more trial experience, our members have the

Continued on page 8

By: Allan J. Owen

Here are some recent cases I found during a break from cruising in my '67 California Grand Sport. These come from the *Daily Journal*. Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication, so be sure to check and find official citationsbefore using them as authority. I apologize for missing some of the full *Daily Journa*l cites.

Workers' Compensation. In Esquivel v. WCAB, 2009 DJDAR 14782, claimant was injured over 100 miles away from her home while traveling to medical treatments near her mother's house. Court of Appeal holds that there is a reasonable geographic limitation on an employer's risk of incurring further responsibility for injury suffered en route to or from a medical appointment. The rule is vague; the court saying the employee must be travelling a reasonable distance within a reasonable geographic area to or from a medical appointment.

Unlicensed Contractor. In Light v. Cridlebaugh, 2009 DJDAR 15008, the court holds that in a lawsuit against an unlicensed contractor, the homeowner is entitled to disgorgement of all monies paid to the unlicensed contractor, and the contractor does not get an offset for costs and materials.

Judicial Admissions in Separate Statement of Facts on Motion for Summary Judgment. In Meyers v. Trend West Resorts, Inc., 2009 DJDAR 15225, the Third DCA holds that "undisputed facts" in a motion for summary judgment separate statement of undisputed facts are not judicial admissions and cannot be used against the party filing a separate statement.

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Auto Torts. In Cabral v. Ralph's Grocery Company, 2009 DJDAR 16018, defendant parked his vehicle on an emergency shoulder. Apparently, drunk driver drove up the road and ran into it. Court holds that the driver who parks in an emergency area is not negligent and that even if you could find negligence, there would be no proximate cause.

Product Liability. In Johnson v. Honeywell, 2009 DJDAR 16315, the court holds that the sophisticated user defense to product liability actions does not apply to a cause of action for strict liability design defect under the risk/benefit analysis but does apply to negligence causes of action.

Hanif. In Howell v. Hamilton Meats, 2009 DJDAR 16478, the Fourth District holds that Hanif does not apply to private insurance. The court states: "We hold that in a personal injury case in which the plaintiff has private health insurance the negotiated rate differential is a benefit within the meaning of the collateral source rule and thus the plaintiff may recover the amount of that differential as part of her recovery of economic damages for the past medical expenses she incurred for care and treatment of her injuries." This is the ***FIRST*** case to consider the Collateral Source rule ignored by Hanif and Nishihama.

Workers' Comp. In Duncan v. WCAB, 2009 DJDAR 16683, the Sixth District holds that disability payments on life pensions and total permanent disability indemnity get a cost of living adjustment beginning January 1, 2004 and every January 1 thereafter, even if the injury occurs after January 1, 2004. Labor Code 4659(c). WCAB had decided it goes up every January 1 after the date of injury; the appellate court holds it's January 1, 2004, even if the date of injury is after that date.

998 Offers. In One Star, Inc., v. Staar Surgical Company, the court holds that where there are multiple 998 offers but the latest one is withdrawn, it does not super-

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IN PRAISE OF *"Ordinary People"*

By Steve Davids and Jonathan Marcel

One of the acknowledged rites of spring involves even somewhat-respectable magazine hacks and Internet bloggers complaining bitterly about the fact that Martin Scorsese's "Raging Bull" "lost" the Oscar to Robert Redford's "Ordinary People" in 1981. This was recently trumpeted as an indictment of the Oscars themselves, although the larger indictment is that the Academy promotes artistic competition amongst wildly divergent works. We are unapologetic partisans of "Ordinary People" and believe that the differences between it and "Raging Bull" also provide much insight as to the presentation of personal injury cases to juries.

"Raging Bull" is *verismo* opera, and it is no surprise that Mr. Scorsese used the Intermezzo from "Cavalleria Rusticana" over the opening credits. The *verismo* school favored stories about the tragedies of "real people," as opposed to the machinations of royalty and the titled classes. "Raging Bull" is in-your-face filmmaking from opening shot to final credits. It virtually jumps off the screen, grabs you by the lapels, and says, "I am significant. Watch me!" The domestic scenes involving Robert DeNiro's and Joe Pesci's families are literally non-stop yelling, screaming, and head-slapping. It eventually made us start to giggle when we saw the film in theaters in 1980. Mr. Scorcese pushes his actors dangerously close (if not over the line) to parody.

The problem is that somehow the characters get lost in the atmosphere and the filmmaking. The storytellers (in this case, Mr. Scorsese and his cast) take center stage, allowing the story itself, or the subject of the film (boxer Jake LaMotta) to be overshadowed by all the weightiness and cinematic artistry. Particularly perplexing is the citation to the Testament during the closing credits, specifically comparing LaMotta, of all people, to the Redeemer: Mr. Scorsese quotes the blind man who says he knows not whether Jesus be savior or sinner, and instead only known that once he was blind, but now can see. Nothing in the film that comes before this citation, however, prepares us for such an audacious (blasphemous?) analogy. We walk away from the film very impressed by the acting and the directing, but what have we really learned about LaMotta, except that he was a generally loathsome person who showed the remarkable ability to beaten to a pulp in the ring without going down?

> That moment of agreement or cohesion between artist-lawyer and audience-jury is the essence not only of art, but of persuasion...It is putting together the moral and emotional building blocks that allow the audience to identify with the client and understand their loss.

If "Raging Bull" is opera, then "Ordinary People" is chamber music, as exemplified

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by Mr. Redford's use of the Pachelbel Canon in D on the soundtrack. The movie lives in the world of the small moment and subtle gesture that lies just beneath the surface of everyday life, especially when a family is dealing with tragedy.

In a relatively early scene in the upstairs hallway of the family home, Mary Tyler Moore's character tells her younger son (Timothy Hutton) that she has purchased him some clothes. But the moment is so pained and awkward. Mr. Redford's camera focuses on just a few facial expressions of Ms. Moore's, all of which convey the flood of feelings that she is experiencing: she wants to be a good mother, because that is who she is, but she knows she cannot connect with her younger son because of his involvement in the boating tragedy that cost her older son his life, even though it wasn't the younger son's fault. This is virtually a biography of Ms Moore's character, and it is all captured in a few deft camera angles and facial expressions, but with relatively few words. Sometimes less can indeed be more.

> This is the true work of the artist, or the plaintiff's lawyer: to pre-condition the audience, step-by-step, for the final revelation of human truth.

As the film develops, Ms. Moore finally reaches her breaking point in an almost-too-difficult-to-watch scene in which the kind-but-clueless father (Donald Sutherland) insists that mother and son pose for a photograph. Try as she might, and as much as she knows she needs to, Ms. Moore's character simply can't do it. She loves her dead son too much to ever forgive, even though she knows that such a refusal to forgive her (innocent) younger son is wrong. But she never, ever says this out loud: it's right there on the screen, in the choice of camera angles, the physical movement of the characters, and the looks on their faces.

By the end of the film, Mr. Sutherland finally tells Ms. Moore what's been eating at him: even on the day of their son's funeral, she seemed more concerned that Mr. Sutherland's shoes matched his tie (or whatever) than she was about burying their son.

It is an important moment in the movie, but the real accomplishment is that we, as the audience (jury) don't really need it. Everything that has come before in the film—every little facial grimace of Ms Moore's, every little awkwardness or flash of pained anger when she is around her family—has helped to prepare us for this moment of truth. When Mr. Sutherland pronounces his emotional sentence on Ms. Moore, it is as if we can sit and nod, "Yes, that's right. That's exactly what she would have done: she would have hidden her grief in her concern about how her husband was dressed." This is the true work of the artist, or the plaintiff's lawyer: to pre-condition the audience, step-by-step, for the final revelation of human truth.

A similar moment in "Raging Bull," unfortunately, is rather botched. As Mr. DeNiro gazes into a mirror, he rehearses some material and monologues that LaMotta apparently used in his nightclub routine after his descent into alcoholism and obesity. He recites the brief "I coulda been a contender" speech of Marlon Brando's from "On the Waterfront." This is, of course, cheating. Mr. Scorsese wants to hijack the dramatic tension from another film to add dramatic intensity to "Raging Bull," but the analogy just doesn't work. The problem is that nothing that comes before (or after) Mr. DeNiro's scene in the mirror prepares us for his character to be considered a self-sacrificing hero.

The cab ride conversation between Rod Steiger and Marlon Brando in "On the Waterfront," in contrast, doesn't just spring out of nothing. It builds upon the situations and the characters, and is reliant on every previous scene as it reaches its famous crescendo: Brando's haunting line, "I coulda been a somebody!... instead of a bum, which is what I am, let's face it." This moment is Mr. Brando's character's apotheosis. Having seen inside his own soul, he now knows he must pave the way for his own symbolic self-destruction in order to finally become a moral "contender" who stands for what is ethically necessary. But the point is that the writing, direction, acting (and musical score) of "On the Waterfront" have all led us to this place, and we nod to ourselves and say, "Yes, he's right: about who he has been, and who he must become."

That moment of agreement or cohesion between artist-lawyer and audience-jury is the essence not only of art, but of persuasion. It is this kind of presentation of a character—whether by Marlon Brando or Mary Tyler Moore—that generates compassion. This does not involve naked appeals to sympathy. It is the ability to choose the right photograph or the right video clip, the ability to ask the right question that triggers the small recollection. It is putting together the moral and emotional building blocks that allow the audience to identify with the client and understand their loss.

It seems that trial lawyers often feel the need to "take over the courtroom," or "destroy the opposing witness on cross," or "bury the other side." Some of that is, of course, necessary. But neither trial nor art can always be taken over by the ethos and language of war.

In personal injury cases, movie directors like Robert Redford and Elia Kazan ("On the Waterfront") can be useful teachers in how the small, ordinary moments can be keys to character, and to emotional truth.

GOVERNMENT TORT WARS

Episode 5: The Feds Strike Back

By: Steve Davids and Jonathan Hayes

It is, unfortunately, necessary to explain the bait-and-switch for those who were expecting (based on the last installment of this series) a riveting discussion of the statutory bases for government tort liability in California. It seemed appropriate to defer that topic until we have provided at least a cursory examination of the quite different world of federal government tort claims.

There are plenty of federal agencies in and around the Sacramento area, many of which have their employees driving on the highways and by-ways, resulting in not infrequent occurrences of injury accidents. Given the pathological fear of federal court that afflicts most plaintiffs' attorneys like a contagion, we are expecting you to quickly turn the page and peruse the ads from our loyal advertisers. Comfortable in the knowledge that few, if any, will continue reading, we will feel totally unconstrained in our comments.

As a prologue to this section, please remember that federal tort claims are unique in that *there is no right to a jury trial*. (28 U.S.C. section 2402.) There is not a lot you can do about this, since injuries caused by a federal government agency or department are within the exclusive jurisdiction of the federal courts. Along these lines, please be aware that under Ninth Circuit law, a challenge to the plaintiff's failure to comply with claim filing requirements takes the form of a motion to dismiss for want of appropriate subject matter jurisdiction. (Jerves v. U.S., 966 F.2d 517, 519 (9th Cir. 1992).)

The procedural mechanism is a motion to dismiss under Fed. R. Civ. Proc. 12(b)(1). Since lack of subject matter jurisdiction can be raised at any time, this likely trumps the requirements that a motion to dismiss be made before the defendant answers (or otherwise pleads). Just as a side note, in the federal system, the various circuits have their own law, and aren't required to follow cases from

Federal tort claims are unique in that there is no right to a jury trial.

any sister circuit that they don't like. In California, of course, Auto Equity Sales v. Superior Court (1962) 57 Cal.2d 450, 455 specifically holds that all trial courts are bound by the rulings and holdings of all appellate districts, unless two or more appellate districts are in direct conflict, which is *not* the case in Howell, by the way. But that's for another day…

As always, and monotonous though it may be, we begin with the statutory basis for federal government tort claims: 28 U.S.C. section 2675 is a part of Chapter 171 of 28 U.S.C., and governs tort claims procedures. Subsection (a) contains the first important requirement: the claim must be presented to the *relevant federal agency*. California, as we have learned, has a centralized repository for claims against all state agencies: the Victim Compensation and Government Claims Board. For federal claims, however, you have to present the claim to the specific federal agency or department involved: Department of Forestry, Department of Justice, *etc*.

Thanks to Al Gore and his invention of the Internet, many agency claim forms may be found online. Many of the agencies have their own individual requirements. Since there is only a rudimentary over-arching statutory scheme as to the content of the claims, you are in some ways at the mercy of the agency and its individual desires. In our experience, most agencies expect a full and complete demand package with medical and other expenses, income loss, and sufficient documentation of all economic damages. Your claim may be considered inadequate without these documents.

1. The claim must be presented to the agency within two years of the injury. That's right: two years! (28 U.S.C. 2401(b).)

2. Any denial of the claim by the agency must contain language specified by 28 C.F.R. 14.9(b) in order for the agency to rely upon it as a final denial for

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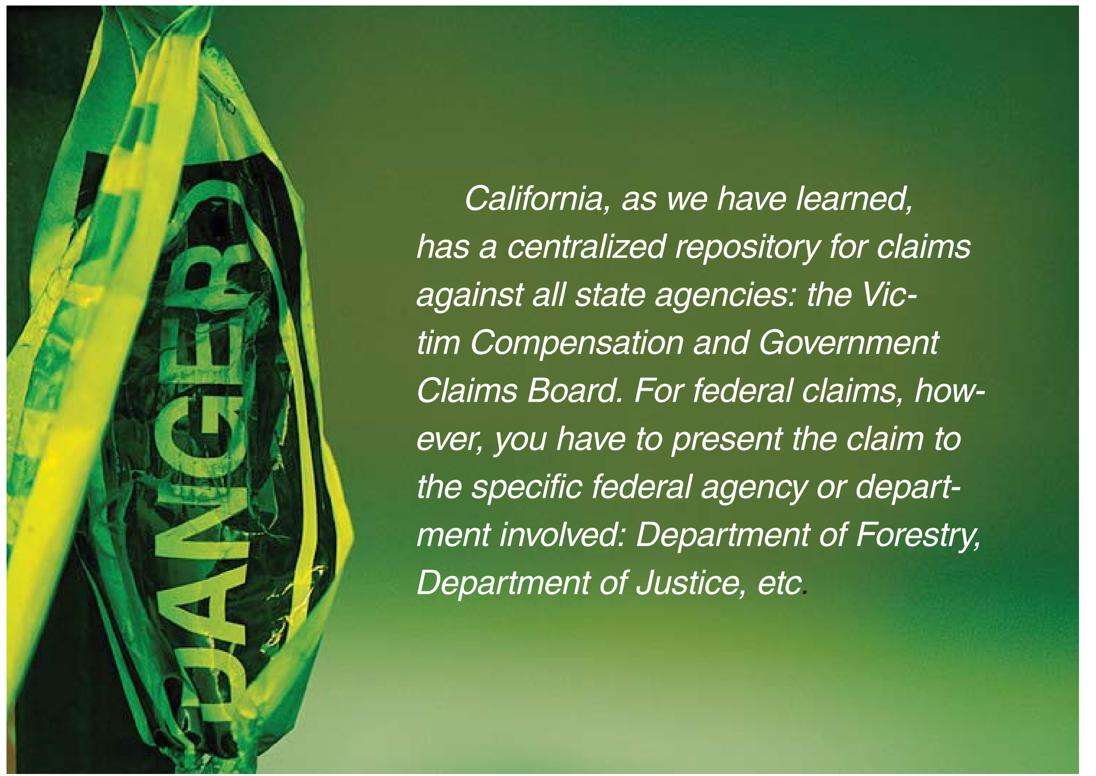

purposes of the statute of limitations (discussed later). Also, the denial must be sent by certified mail. Our recommendation is that if there is any ambiguity as to whether the claim has been denied, contact the federal agency and ask for a formal denial letter. The alternative is to wait for the six months and then exercise your option to sue (discussed below). As we shall see later in discussing amended claims, filing a complaint too soon is potentially disastrous. *Always* make sure six months has passed from the date of the claim (or an amended claims, as we shall see below) before filing suit.

3. The agency has six months to consider the claim. If no action is taken within the 6 months, then you may consider the claim denied, and you have the "option" to file suit. (28 U.S.C. section 2675(a).) Importantly, a suit that is filed too early *must be dismissed*, based on the doctrine of failure to exhaust administrative remedies. (Jones v. U.S., 966 F.2d 517, 519 (9th Cir. 1992).) You cannot deprive the federal agency of its full opportunity to evaluate the claim. Unlike state government and its word-processed denials, our (limited) experience is that federal agencies often actually scrutinize and evaluate the merits of at least some claims.

4. Once the claim has been denied, you then have six months to file the complaint. However, "The failure of an agency to make final disposition of a claim within six months after it is filed small, at the option of the claimant *any time thereafter*, be deemed a final denial of the claim…" (28 U.S.C. section 2675(a); italics added.) We recommend you exercise your option reasonably soon *after* the expiration of the six months for the agency to rule on the claim. Just don't do it before that six month expiration, or you will be in serious trouble!

5. Unlike California, the feds require that the claim be submitted with a specified sum certain for the amount of the claim. Your complaint *may not seek damages in excess of the claim amount*. (28 U.S.C. 2675(b).) There is an exception for newly discovered not reasonably available when the claim was filed. This can be cured, in some instances, by filing an amended claim, which we will discuss below. This issue probably should be treated in the same fashion as statements of damages in state court: aim high!

6. Federal regulations permit you to request that the claim denial be reconsidered. (28 C.F.R. section 14.9.) This must be done *prior to* commencement of the suit, and prior to the expiration of the six month deadline for filing the complaint. Upon timely filing of the written request for reconsideration, the agency then has another six months to evaluate the request for reconsideration, at which time you can exercise your option to file suit. In essence, the request for reconsideration (also considered an administrative appeal) "prevents the agency's [initial] denial from becoming a final denial for purposes of 28 U.S.C. section 2401(b) and tolls the six-month limitation period until either the agency responds or six more months pass." (Berti v. V.A. Hospital, 860 F.2d 338, 340 (9th Cir. 1988).) If reconsideration is denied, then you have six months to file suit.

7. Now we get a little tricky. Pursuant to 28 C.F.R. 14.2(c), a claim can be amended "any time prior to final agency action or prior to the claimant's option" to file suit discussed above. (See 28 U.S.C. 2675(a).) Upon timely filing of that amendment, the agency has—you guessed it—six months to make a "final disposition of the claim as amended," and the "option" to sue discussed above does not accrue until six months after the filing of the amendment. (28 C.F.R. section 14.2(c).) The potentially tricky part is that you absolutely must wait for the new six month period to pass after filing of the amended claim.

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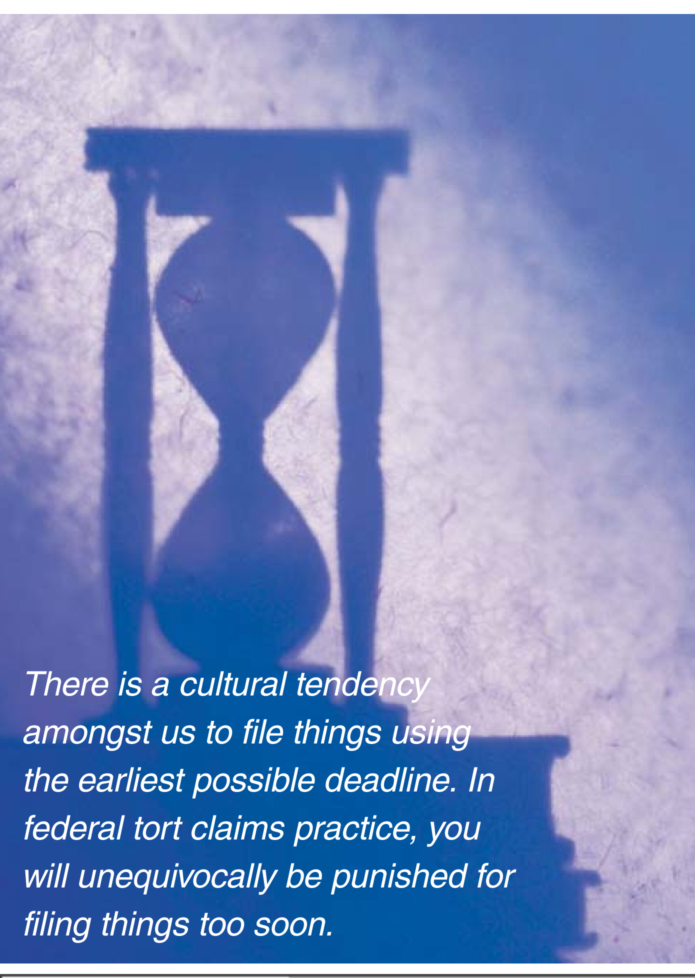

If you file complaint based on the expiration of the *initial six-month period* before the claim was amended, you will end up filing the complaint too early. What the U.S. Attorney will do is then wait for the six months from the denial of the amended claim to pass, and then file a motion to dismiss your complaint for failure to exhaust administrative remedies, because you didn't give the agency the full six months to evaluate the amended claim. *Please be careful!!* There is a cultural tendency amongst us to file things using the earliest possible deadline. In federal tort claims practice, you will unequivocally be punished for filing things too soon.

8. Also, do not fall into the trap of construing a low-ball (or, for that matter, any) settlement offer from the agency as a denial of the claim. You still need to wait for the formal denial or the ability to exercise your option to sue after the six months passes.

9. Relief from mistakes or errors in the claim filing process may be available (but don't count on it) under the doctrine of equitable tolling. This tolling is available if (1) the plaintiff is prevented from presenting the claim due to some wrongful conduct on the part of the defendant, or (2) the plaintiff was prevented from presenting the claim due to extraordinary circumstances beyond the Plaintiff's control, thereby making it impossible to have filed on time. Case law is clear that equitable tolling does *not* apply to "what is at best a garden variety claim of excusable neglect." (Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 111 S.Ct. 453, 458 (1990): a situation where the letter from the agency triggering the running of the statute of limitations was received at a time the lawyer was out of the office did not fall within the equitable tolling doctrine.)

10. While there may be exceptions of which we are not currently aware, attorney's fees on a case settled at the administrative claim stage are capped at 20%. Fees on a case that was settled (or went to judgment) following the filing of a lawsuit are capped at 25%. Even better (sorry for the sarcasm), it is a *federal* offense to charge, demand, receive, or collect more than the capped fee amounts. (28 U.S.C. section 2678.)

11. The United States can be sued for negligence only, and intentional torts or strict liability are not generally allowed. (28 U.S.C. section 2680.)

12. The lawsuit can only be brought against the United States of America, and *not* the individual employee. The Federal Tort Claims Act is the sole remedy for negligent acts of omission of federal employees, and therefore they cannot be individually named. (28 U.S.C. section 2679.)

13. Not surprisingly, punitive damages are not allowed. (28 U.S.C. section 2674.) Neither is prejudgment interest. (*Ibid.*)

Well, sports fans, does this admittedly very cursory summary make you chomp at the bit to handle your next federal tort claim case? If not, you are far from alone. On the other hand, favorable settlements have been known to occur both at the administrative (agency) level, and from the U.S. Attorneys. A hard-wired fear and loathing of federal court should not dissuade the adventurous from undertaking one of these challenging and often quite rewarding cases.

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Allan's Corner

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sede the earlier offer.

Medi-Cal. In Lopez v. Daimler Chrysler, 2009 DJDAR 17060, the Third District holds that the Department of Health Services has the burden to establish what portion of a settlement is allocated to medical expenses, and their lien can attach only to those medical expenses. Dan Wilcoxen's case; the CCTLA Board joined in Dan's request for publication of this important case.

Workplace Injuries. In Suarez v. Pacific Northstar Mechanical, Inc., 2009 DJDAR 17625, subcontractor's employee was injured by a pre-existing hazard, told his employer, but employer did not report it to the general contractor. Later, two employees of the general contractor were injured based on the same hazard and sued the subcontractor. Court held that subcontractor has a statutory duty of care to report hazards to which employees are exposed and therefore is liable to the contractor's employees.

Court's Dismissal for Delay in Prosecution. In Sakhai v. Zipora, 2009 DJDAR ___, the trial court gave more than 20 but less than 45 days notice of hearing on a discretionary dismissal under CCP 583.410. Appellate court affirms finding that Rule 3.1340(b) applies, allowing the court to bring a motion for dismissal with 20 days notice. Appellant contended the court had to comply with Rule 3.1342 which applies to a party seeking a dismissal and requires 45 days notice.

Medical Negligence. In Massey v. Mercy Medical Center Redding, 2009 DJDAR 17795, the court holds that a nurse placing a patient in a walker and leaving him unattended poses a question of common knowledge, not expert opinion, and therefore no expert on the standard of care was necessary.

President

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opportunity to volunteer for two weeks at the Sacramento District Attorney's Office in exchange for valuable trial experience. If you are interested, please contact Cindy Bessermer at (916) 874-6556.

Please also make plans to attend Lobby Day on May 4. Last year, Orange and San Diego counties had two to three times more members present than Sacramento. As this event is held in our home town, we should have more attorneys present than any other county. Please set this day aside to join consumer attorneys from across the state to take our message to the state Capitol. For more information go to www.caoc.com.

If you would like to become more involved with the organization, speak at seminars or provide articles to *The Litigator*, please do not hesitate to contact either Debbie Keller (debbie@cctla.com) or me at kyle@capcitylaw.com.

Feel free to email me at any time if you have a suggestion or comment on how CCTLA can better serve you. Thank you, and I look forwarding to seeing you at our programs.

Save the Date!

49th Annual Convention
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VISITOR FROM A SMALL PLANET

By Jonathan Marcel

Having been summoned for jury duty, I was eagerly anticipating being paid by my employer for an entire day of sitting around doing nothing: in other words, situation normal. Striding up the courthouse steps in a completely sunny mood, I was struck by an odd little man in an overcoat, dressed all in black, and wearing an anachronistic bowler hat. He had spookily pale skin and a sharp, pointed nose.

Standing outside the security doors, he looked confused. I resisted the temptation to call out, "Hey, there, little fella," and instead just offered to help. He said he was a researcher from a small planet closer to the center of the galaxy, and had been sent to the "outer rim" to do a comparative study of emerging civilizations in the backwater of the Milky Way. He confessed to being a prodigious researcher, which explained his knowing wink when he employed the too-obvious Star Wars reference. He was looking for an escort to acquaint him with local administration of the legal system, and despite my solemn duties as a prospective juror, I gladly offered to help. He produced a holographic business card that made me look around for the film crew, and he beamed with pride as I read off his membership in the IGRC: Intra-Galactic Research Consortium.

I brought him along with me, and we settled into uncomfortable chairs in the jury lounge just in time to listen to a silver-haired gentleman with a definite Phil Donahue vibe lecture the assembled multitudes, all of whom (my odd little tag-along had already remarked) looked miserable. I whispered to the little man that they were miserable because jury duty was not voluntary, it was compulsory, and they were taking time from their jobs and families. He said he wasn't enthusiastic about having such people decide any case he might be involved in, which I found understandable.

Meanwhile, Phil was inveigling us to guess what constitutional protections were involved in the jury process. He compared and contrasted our legal system, favorably, to that of the former Evil Empire and the current Islamic Republics, where the governments were malefic and could not be trusted. My friend conceded this point, but wondered: why were the jurors here involuntarily, if their role was to safeguard the people against abuses of the government.

"Who compels them to be here today?" he asked. "Well, the government, of course. This courthouse is a government building, run by the state government." "So, the government that can't be trusted to decide matters of guilt and innocence still has the power to force jurors to come here against their will to decide if the government properly arrested someone?" "Exactly. Now you're thinking like an American!" He wasn't amused, however, and I began to conclude this venture might be a barren source of amusement for me.

The diminutive researcher's questions, annoyingly, did not abate: why did people need protection against the government in a system where government leaders were chosen by the people? This compelled me, in a whisper, to explain the essential tawdriness of human nature, and how power infected people with a desire to lord it over others. "Well, then, just elect different leaders!"

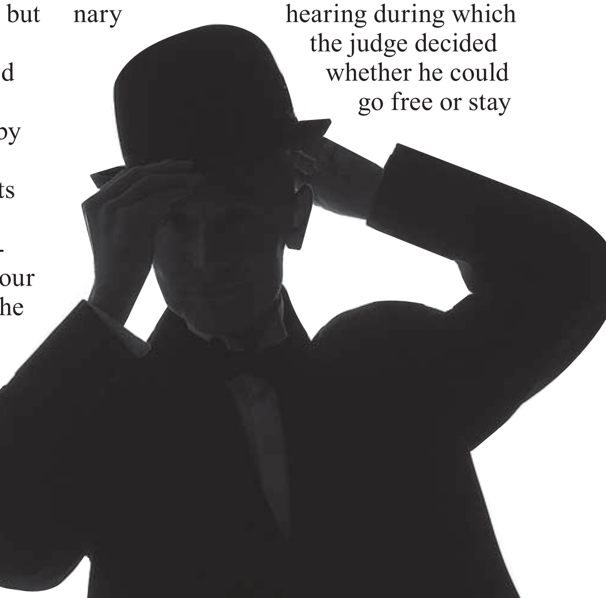
I was taken aback by his naiveté, considering his great research acumen, but told him it wasn't that easy. Politicians, many of whom were lawyers, were good at obfuscation and persuasion, turning elections into popularity contests won by mesmerizing speakers from either end of the political spectrum, like Presidents Ronnie R. and Barry O.

"Well, that might have been understandable in Nazi Germany, but can't your electorate see through the deception?" he queried. "Of course not! Most people are idiots!" "Then why do they get to serve on juries?" I told him, in a stern tone, that he was being impertinent and rude: the jury system was a bedrock of our culture and civilization. "Well, what about the judges? Are they educated in the law?" "Of course!" "Does someone review their qualifications for office?" "Definitely! They are evaluated by a blue-ribbon panel of experts, and the prominent lawyer organizations get to weigh in on their qualifications. They are appointed by the executive branch and confirmed by the legislative branch."

"So, they're supposed to be the best and brightest that your legal system can offer?" "Of course, what else?" "But you don't let them decide cases. Instead, you leave that to people who are possibly school drop-outs or drug traffickers and child molesters lucky enough never to have been convicted of a felony." I told him to keep his research to himself, but he declined, reminding me of a prominent survey done a few decades ago in which (American) respondents were read passages from the Declaration of Independence; a substantial majority of them identified the language as coming from The Communist Manifesto.

I told him that intelligence test for jurors was unconstitutional, and such concepts smacked of elitism and un-Americanism. I figured the only solution to his petty bickering was to show him justice in action, so we ditched Phil Donahue and headed across the hall to a criminal arraignment court.

As we entered and sat down, we observed a man in an orange jumpsuit being remanded to custody without bail. The little man began his annoying whispered questions again. Where was the jury that was supposed to decide if he committed a crime? I explained this was just a preliminary hearing during which the judge decided whether he could go free or stay



in jail before trial. "Well, the judge is appointed by the other two branches of government: the same government against which the jury system is supposed to protect the man in the orange jumpsuit." "No, no, you've got it all wrong. In the eyes of the law, that man is presumed innocent until proven guilty."

"Then why is the judge sending him back to jail pending trial?" "That's not the freaking point!! He could be a flight risk, or could pose a risk of harm to the people he is alleged to have harmed." "So, he has to wait in jail until the government decides it's time for the jury to decide if the government was wrong to arrest him? My research shows that could take 2-3 months, depending on the condition of the court's docket." "Yeah, that's possible." "Well, that man was charged with a misdemeanor. My research shows that his maximum sentence might be as little as 30 days in jail." "So?" "He's in the ridiculous position of having to plead guilty so that he can get out of jail, whereas if he pled not guilty (because he was in fact innocent) he would stay in jail! I cannot imagine how that comports with any civilization's view of what is right and just." I told him to restrain his blatant sedition, not to mention unwarranted intrusion into our great country's domestic matters.

I took him to the fourth floor, where a medical malpractice case was proceeding with jury selection. My querulous companion was thrilled to see a jury in the box: the system was working! He expressed amazement that so many qualified medical specialists were available and present to pass judgment on the conduct of the defendant physician. Laughing, I explained that the jury was made up of ordinary people, not medical specialists.

"What? Why would you want laypeople on the jury? The judge just said this is a technical case involving proper procedures for delivering a baby." "Don't worry, they'll be educated by expert witnesses, who are qualified in their field." "That's an excellent idea! Many civilizations I have studied have governing tribunals that call upon experts for input." "Well, it's not quite like that. The Court doesn't hire experts in a civil case. The lawyers on both sides hire them."

"Well, if they're beholden to the lawyers for compensation, then aren't they likely to adopt the lawyer's position?" "Sure, everyone knows that." "So, how is the ignorant jury, made up of people who don't want to be there, supposed to decide which expert is right?" "The lawyers try to destroy the credibility of the opposing expert." "What does that have to do with who has the better medical opinion? It sounds like the case is won by who has the better lawyer and the more likeable expert." "You make it sound like that's a bad thing."

The little guy was very puzzled. We exited the courtroom, and he looked at me with a pained expression. He said he really sympathized with the defendant doctor: his entire reputation could be ruined by 12 people, none of whom ever attended to medical school, second-guessing his professional judgments in the sterile environment of a courtroom, and without being able to be there when the doctor was making his judgments and giving his advice. It just didn't seem right to him, and he appeared quite perturbed.

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I told him we as a society have always placed our reliance on the innate wisdom of the people. He harrumphed and turned away, telling me I sounded like a cheap, crooked politician. He had come across scads of these in various civilizations. He believed that "the people" as some nameless, faceless, entity had no wisdom whatsoever. Individuals were what mattered.

Well, by this time I realized by this time that I had shirked on my jury duty responsibilities, and started checking my watch nervously. But despite my overwhelming desire to get away from this strange little alien, I started to wonder if he was too despondent to be left alone.

I suggested we drive over to Power Inn and watch the family courts in session, and was shocked that he wasn't interested. "What's the point? Just more examples of ignorant jurors who don't want to be there decided life-altering issues." I pointed out that family law did not involve jury trials, but that seemed to depress him even more.

"So, who decides whether a child lives with its family or somewhere else? A judge?" "Of course, who else would have the power to take a child from its home?" "But these are the same judges you don't trust to decide if someone was driving their car recklessly, or under the influence of alcohol." "Well, that's not the point. Criminal cases are different, because they decide whether someone is free or imprisoned, or has to pay fines to the government." "That's all well and good, but what about the children? Every civilization I have ever studied has always placed the highest priority on fair and appropriate treatment of children."

He sat down on a bench in the fourth floor hallway, removed his bowler hat, and leaned forward, placing his head in his hands. "Advanced civilizations have one thing in common: a sense of community. The community and its elders—the ones whose experiences have taught them so much—cooperate and negotiate and discuss what happens to the children. The process emphasizes the community, but it also has room for individualism. That's what you're missing: the community. You come to places like this…" He looked up and gestured down the hallway. "They are sterile and impersonal. Meaningless. Instead, you should be resolving disputes within the community. You have come a long way as a people, but have missed out on so much. You have so far to go, so far…"

I was getting exasperated by this point, and asked if there was anything positive he could say about us. "Oh, yes, indeed. Your dreams are wonderful things, and very unique in my experience: the mind unwinding and refreshing itself each night as you rest. That's wonderful! Your yearning to make connections with each other is very touching. You have such energy and curiosity. I love the variety of your art, music, and philosophy. Have you read any Schopenhauer?" "Uh, one of those things I always meant to get to..." "He

summarizes the problem very well. You are governed by this mysterious life-force, it pervades everything you do. It's all your desires: for justice, fairness, clarity of rules. You're so wrapped up in the desires! But you miss the spiritual essence, the 'numinous.' In 'The World as Will and Representation,' Schopenhauer says that this unconscious life-force is the Will, but if you become slaves to it, you end up disillusioned. The problem is that you see only artificial representations or symbols of the Will, and you eventually turn away from them as being empty and hollow. As a result, your legal system has become nothing but rules and exceptions. It's become an artifice, a representation, and therefore necessarily false. It's people in black robes acting like high priests. It's statues of a blindfolded woman holding a sword. It takes place in majestic courtrooms with flags and curtains and the judge on an elevated altar. The lawyers put witnesses through a trial by ordeal of answering trick questions designed to impugn their credibility, instead of getting at the real, human truth of what occurred. They try to make their client play a role, usually that of the put-upon victim, and without regard to the facts. What you have is a gussied-up primitive religious ritual, and not the best of what your civilization is capable of. You're missing the essence of justice. You mentioned when we were downstairs that people are presumed innocent in the eyes of the law until they are proven guilty. But your statute of justice is blind. In your great literature like Oedipus, physical blindness often correlates with spiritual blindness. I saw a better approach in one of your movies, where a philosopher of the barrio talks about Lady Justice, and notes in his neighborhood, at least, 'the b---h got eyes.' It's the difference between justice as a secular civil religion, and justice as a living thing that has to make hard decisions every day."

He stopped for a moment, and appeared frustrated. He took out a business card and tapped on it quickly, as if downloading information. "Think about your ancient Gnostics. They believed that the deity that created the world was not necessarily good. Like the Greek stoic philosophers, they felt that it was each person, and each person's individual mind and spirituality, carried the divine spark. These artificial constructs, whether one calls them 'religion' or 'justice,' have long since been discredited in the more advanced planets at the galactic hub, because they purport to be self-evident.

"Majoritarian beliefs are automatically proclaimed orthodox, and minority views are branded heretical. 'Justice' sounds good in theory, but the parties to any lawsuit will each believe that their side is just. Your system emphasizes rules of the contest, and now-discredited notions that hired advocacy on competing sides somehow magically yields to a synthesis that is 'truth' and 'justice.' It doesn't work that way: you're substituting edifice and theater for the divine spark," he said.

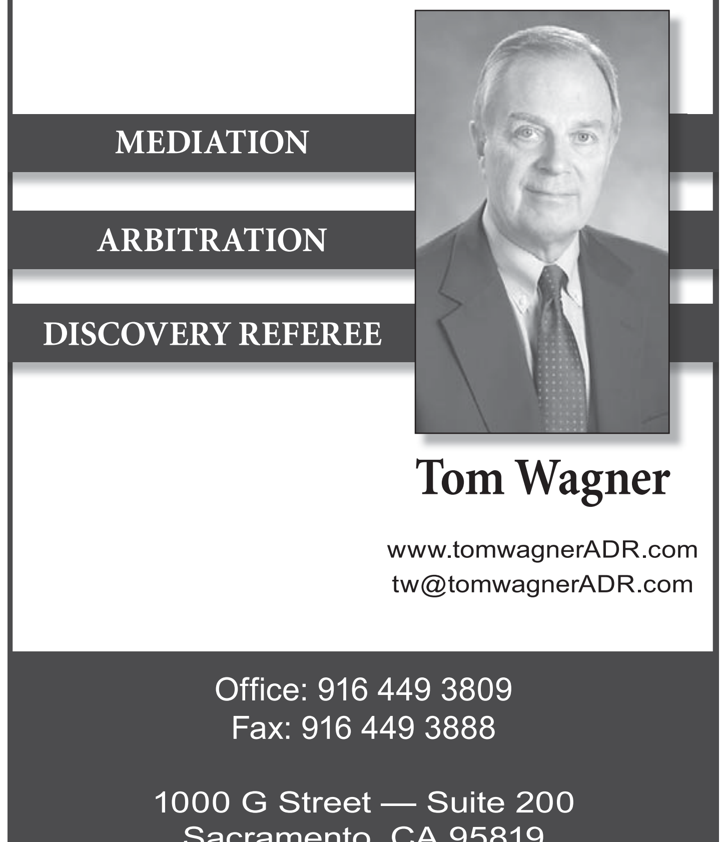
He paused again, but this time did not consult his business card. When he resumed, I began to detect real emotion in his words. "One of your recent thinkers said that the life of the law is reason, or rationality. You've allowed it to become subordinated to your rules and procedures. You need to trust your non-legal means of dispute resolution. You need to trust people actually living in their communities. You need to realize that divinity comes from the individual mind, and not a constitutional system of rules that is necessarily artificial. You're losing the numinous, the divine spark! You're losing it."

He bowed his head, and seemed so lost in thought that I was surprised when he started speaking again. "One or your most famous musicians (and an admirer of Schopenhauer's) talked about having the ability to will into existence what is necessary and right." He looked up at me, with glimmering eyes. "And to bring it about, even if it results in your own destruction. Think about that with regard to your legal system." He clenched his fist. "Out of that exercise of will and self-destruction can come something that is new, purer, and infused with compassion and understanding."

"Sure," I said, surprised at my own reaction, "but what if that process just brings about another artificial edifice?" I didn't have time to ponder my redundancy, however. "There's always that danger," he allowed. "But then the process can start anew. You may not get there the very first time, there may be many cycles of destruction and renewal, but you as a people can get there. It takes time, let me assure you, lots of time. And you have it. Another of your musicians said that you are a people still busy being born, not busy dying." He stopped speaking, closed his eyes, and bowed his head again. There followed one of those long silences that were far from awkward, and were actually comforting. I knew that, as a sadder and wiser man, I would wake the morrow morn. "I'm homesick," my new friend said, and without opening his eyes.

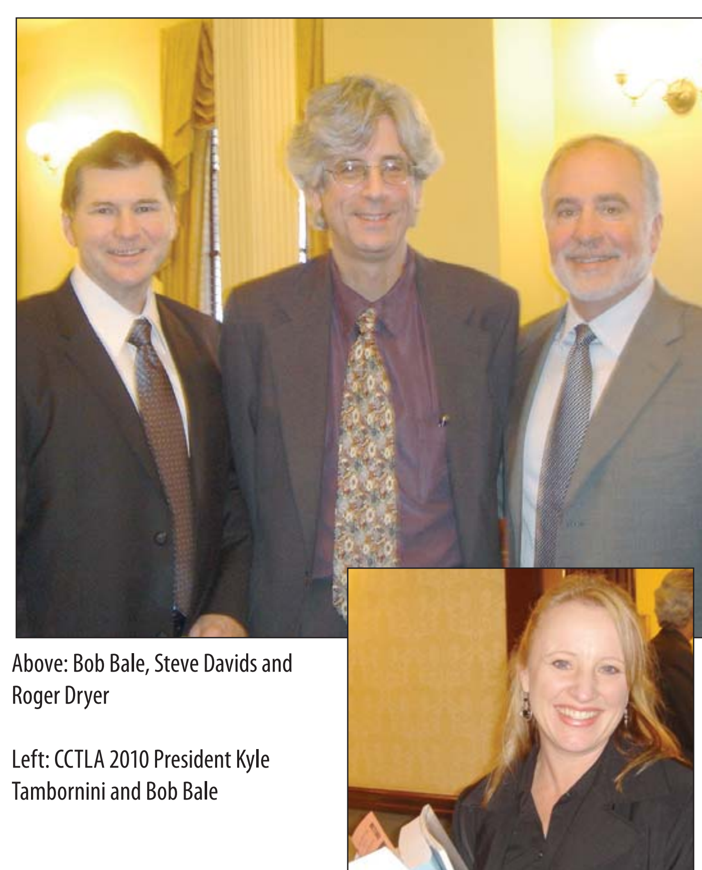
I felt badly for this poor little man, and how much he wanted to help, but I was—and possibly for the first time in my loquacious life—at a loss for words. I lamely joked that I'd be happy to transport him to the nearest intra-galactic research shuttle if he could point the way.

He appreciated the humor, and even smiled. His face brightened considerably. "If you have the time – I must say I am very impressed by your food. Very impressed." I was about to offer the sixth floor cafeteria, but thought better of it. He turned to me with a child-like look. "I don't suppose you can point me in the direction of a nice crème brulee, can you?" "Dude," I said, "this sounds like the beginning of a beautiful friendship."



January lunch includes info on using high-tech to win, from discovery to verdict

Roger Dreyer and Bob Bale left no one disappointed at CCTLA's well-attended January luncheon when they shared their expertise in "Using Technology from Discovery Through Verdict to Maximize Non-Economic Damages." The jury's verdict of non-economic damages in the Strange v. Entercom case was the largest for a wrongful death case in the history of Sacramento County. The foundation for that award was laid in discovery, and most especially, during plaintiffs' depositions of defendants, virtually all of which were videotaped. The presentation included pertinent portions of that video testimony, plus examples of how plaintiffs employed technology to maximize the impact of this testimony.



Above: Bob Bale, Steve Davids and Roger Dryer

Left: CCTLA 2010 President Kyle Tambornini and Bob Bale

Right: Laura Strasser

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CCTLA Salutes the Best of 2009

CCTLA presented it annual awards at the Annual Meeting & Holiday Reception at Sofia Restaurant in December. Honorees included Judge of the Year, the Honorable James M. Mize; Clerks of the Year; Charlie Clausen, Suzanne Slor, Patricia Banks and Master Calendar Clerk, Debbie Noggle; and Advocate of the Year, John M. O'Brien. The gathering included a benefit to the Mustard Seed School for Homeless Children. Special thanks go to organizers Margaret Doyle and Debbie Keller.

Above left: CCTLA 2009 President David Lee with Clerk of the Year Debbie Noggle and Judge of the Year James M. Mize. Above right, Kathy Long with Advocate of the Year John O'Brien and Brenda Marchant. Below: Judge Mize with Clerks of the Year (from left, with plaques) Susanne Slort, Debbie Nogle, Charlie Clausen and Patricia Banks. Below right: Lawance and Elizabeth Bohm.

From left: Glenn Ehlers, Jim Frayne, Judge Mize, Judge White, Judge Hight and Bill Kerhaw.

Above, Chris Whelan, Jack Vetter, David Lee, Chris Kreeger and Glenn Ehlers.

Above, Debbie Keller, Allan Owen, Denisa Palilonis and Dan Wilcoxen.

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Above, Judge Brown, Judge Culhane, Mike Jones, Roger Dreyer, Lena Dalby and Stanley Fleshmen. Below, Leonard Wong DC, Margaret Doyle, Travis Black, Richard and Lori Gingery, Molly McGinniss and Andrew Gallacher.

Historical note on origin of CCTLA

By Tom Lytle, CCTLA Member

In the late 1950s, the jury system in place in Sacramento County Superior Courts was managed by then-Jury Commissioner Harry Lilly, a former semi-pro baseball player of some note and skills. Jurors would serve a two-week tour of duty, often with service on multiple short three- or four-day trials.

The method of venire selection by Commissioner Lilly was shrouded in secrecy. Furthermore, the defense bar had a jury book that had been developed through the years, reflecting prospective jurors' votes on prior jury service in the same term and in earlier service.

The plaintiff bar, headed by Richard E. Crow; the Desmond brothers, Louis and Richard; E. Vayne Miller; Mamoru Sakuma; Nathaniel Colley; Ralph Drayton; Bill Lally; Jack Barbeau; Tom Loris; Kenny Cayocca and others, gathered together and challenged the entire panel one Monday in about 1958 to the dismay of Commissioner Lilly.

The Superior Court judges instituted some changes, including the appointment of a new commissioner and selection of the venire from lists of registered voters and property owners. Remember, this was before computers and even before the ubiquitous Xerox machine. From that effort, the plaintiff bar then formed the Capitol City Lawyers Club, predecessor of the current organization, for the purpose, primarily, of hiring a person to maintain a jury book for the members that included prior jury service voting, credit reports, DMV data, political affiliation, etc. An ancillary function of the club was regular monthly meetings, with guest speakers on topics of interest to the members.

As I near the end of my career, I thought it appropriate to record my memory of those early days to give a sense of history to the current organization. I also represent to the readers that I verified the contents of this account of matters with a retired Superior Court judge who was a member of the Club from its inception, and he authenticated this historical note.

CCTLA Briefs . . .

Seminar Materials Available

If you missed the Tort & Trial Seminar held January 19, we have the materials (book and CD) are available for $100. Please send your check payable to CCTLA and mail it to PO Box 541, Sacramento, CA 95812

Looking for a Fresh Viewpoint?

Come to our Q&A Luncheons! All you need is a question and your membership in CCTLA in order to participate. Members helping members. Add a couple fresh viewpoints to your own "take" on the cases in your drawer. You may find they are worth more than you thought!

Remember: the Second Tuesday of the month at noon. Next lunch is on Tuesday, March 9, at Vallejo's, on the corner of S and Fourth streets. We look forward to your viewpoint.

Spring Reception & Auction

You won't want to miss CCTLA's 8th annual Spring Reception & Silent Auction which will be held from 5:30-7:30 p.m. Thursday, May 27, at the home of Allan Owen & Linda Whitney. We are looking for auction items. If you have something to donate, please contact Debbie Keller in the CCTLA office at 916-451-2366 or debbie@cctla.com.

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RECENT VERDICTS & SETTLEMENTS

Late 2009 CCTLA Victories

Member ***Mark R. Swartz***, of the Law Offices of Mark R. Swartz, represented the Plaintiff in Vernon vs. Gregor in Superior Court in Stanislaus County, CA., with verdict/judment of $207,541 in a jury trial in late 2009. The Plaintiff, a motorcycle officer, was injured when a motorist backed into him in a parking lot. Case Type: Vehicle Negligence; Pedestrian; Vehicle Negligence; Motorcycle; Vehicle Negligence; Reverse Collision.

The trial, which lasted three days, followed by a day of deliberations, was heard before the Honorable Judge Hurl Johnson. Defendant's Attorney: Gayle Kono, Law Offices of Kenneth Goates, Sacramento.

SUMMARY:
Verdict/Judgment: Plaintiff
Verdict/Judgment Amount: $207,541
Range: $200,000-$499,999
$4,938 past medical; $11,218 future medical; $681 past loss of income; $3,204 future loss of income; $10,000 past general damages; $177,500 future general damages.

Experts:Plaintiff: Robert Cash, M.D.; Defendant: Roland Winter, M.D., orthopedic surgeon, Alpine Orthopedic Medical Group,

FACTS/CONTENTIONS:

According to Plaintiff: On May 5, 2007, Plaintiff Gary Vernon, age 42, was working as a motor officer for the Stanislaus County Sheriffs Department. He had pulled over a motorist for speeding, and the motorist pulled into a parking lot, into a parking stall, and Plaintiff parked his motorcycle behind the motorist.

As Plaintiff was beginning to cite the motorist, a Ford Explorer, driven by Defendant Miney Gene Gregory, a 53-year-old real estate agent, and which was parked on the opposite side of the lot and about 30 feet away from Plaintiff, backed into Plaintiff's motorcycle. As Plaintiff turned to run, the motorcycle fell on top of him, striking him just below his right knee on the lateral side of his right leg.

Plaintiff waited about a month and a half before being seen by Dr. Robert Cash, an orthopedic surgeon practicing in Modesto, CA, who was already treating Plaintiff for a prior injury to his left knee. An MR1 scan revealed swelling and a tear to the Hoffa's pad in Plaintiff's right knee. These injuries resolved in four to five months. Plaintiff developed numbness on the outside of his right leg, extending to his right foot, and he developed difficulty moving the toes on his right foot.

CLAIMED INJURIES: According to Plaintiff: Knee tear; numbness in leg; difficulty moving toes; irritation of right peroneal nerve in right leg.

CLAIMED DAMAGES: According to Plaintiff: $4,938 past medical; $50,068 future medical; $681 past loss of income; $928 future loss of income; $100,000-$200,000 general damages.

SETTLEMENT DISCUSSIONS: According to Plaintiff: Demand: $100,000

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policy limits (CCP § 998). Offer: $40,001 (CCP § 998).

EXPERT TESTIMONYAccording to Plaintiff: Expert witnesses for both sides testified that Plaintiff's symptoms were most likely permanent and were due to an irritation of the peroneal nerve in Plaintiff's right leg. Two EMG studies showed that the impulses in Plaintiff's peroneal nerve were in the low-normal range. Plaintiff's expert Robert Cash, M.D. testified that Plaintiff will need to continue with his medication regimen of amitriptyline for his nerve symptoms and mobic and darvocet for both his right leg and left knee complaints for the remainder of his life. Defense expert Roland Winter, M.D. corroborated all of Dr. Cash's opinions, except it was his opinion that Plaintiff should be able to wean himself off his medications in the next three years or so.

COMMENTS: According to Plaintiff: The insurance carrier was Allied.

Member ***Adam Sorrells*** of Chico was awarded a verdict of $660,142 in San Francisco in a motor vehicle admitted liability case. The final offer from the defense before trial was $250,000. Plaintiff's (passenger) primary injury was an exacerbation of pre-existing L5/S1 spondylolisthesis, requiring surgery in the future. Plaintiff had a large wage loss claim; however, the medical bills were only $30,000.

Members ***Kevin Elder*** **and** ***Larry Eslinger*** of Penny & Associates secured a victory in Heldt, et al vs. Les Schwab in front of the Hon. Charles Wachob in a 10-day negligence trial. Plaintiff Donald Heldt was awarded $244,269.65 for past economic damages, $550,000 for past non-economic damages, $350,000 for future non-economic damages. Plaintiff Sharon Heldt was awarded $10,000 for past loss of consortium and $5,000 for future loss of consortium. Defense counsel: Doug Adams.

Donald Heldt, 71, was walking across the parking lot of Defendant Les Schwab Tire Centers when he was struck, knocked to the ground and dragged under a vehicle operated by defendant Andrew Martin, an employee of Les Schwab. Martin had just completed a brake job and was test driving the vehicle when the brakes malfunctioned.

Defendants admitted liability. Donald Heldt suffered 22 broken ribs, a laceration to his head, a near complete laceration/removal of his left ear, a traumatic brain injury, a broken left wrist that required the insertion of a metal plate, a fractured left scapula. He also suffered from an aggravation of his pre-existing right upper extremity neurologic symptoms from a stroke in June of 2005. Medical specials were $246,547.35.

Plaintiff served a CCP 998 Offer of $1,039,824.64. Defendants countered with $750,001.

Experts: Plaintiff—Dr. Don Van Boerum, Dr. Ling Shi-Bertsch, Cynthia Raczko,; Robert Clark; Jane Leweniquila; and Dr. Aaron Cook; Defense—Dr. Edward Younger, Dr. Michael Chun, Dr. Wong and Jeanine Perry.

Kevin Elder also tried Cross v Araiza, a motor vehicle vs. motorized scooter case-in front of the Hon. Gail Ohanesian with a well-deserved $172,386.28 verdict (60% negligence to Defendant, 40% negligence to Plaintiff); $22,386.28 past medical, $100,000 future medical, $50,000 for past pain and suffering. Defense: David Johansing.

On Oct. 4, 2007, Plaintiff, 44, and unemployed, was riding a motorized scooter the wrong direction (westbound) in the bike lane on eastbound Greenback Lane in Citrus Heights, CA, traveling at approximately 15 to 20 mph. At the same time, Defendant had come to a stop on a road intersecting Greenback Lane. Defendant intended to turn right onto eastbound Greenback Lane. Defendant pulled out directly into the path of Plaintiff and the bike lane. Plaintiff was approximately 10 to 15 feet from Defendant at that point in time, traveling at a speed of 15 mph. He applied his brakes and tumbled over the handlebars onto the ground. Plaintiff suffered neck and upper back injuries, including herniated discs at C5-6 and C6-7. He was transported to Mercy San Juan Hospital, evaluated and released.

Two months later, Plaintiff returned to the ER, complaining of ongoing neck pain and established care with Dr. Mikhail Palatnik and chiropractor James Vandal, who treated Plaintiff for approximately two months. Plaintiff was referred to Dr. Pasquale Montesano, who opined that Plaintiff's pain could be significantly reduced by a two-level cervical discectomy and fusion; with an estimated cost of $60,000-$100,000.

Defense expert: Dr. Jim Anderson of Benchmark. Dr. Anderson testified plaintiff's symptoms were longstanding degenerative changes unrelated to the trauma of Oct. 4, 2007. Defendant's Allstate policy limits: $100,000. Plaintiff served a CCP 998 policy limits demand and prior to trial another demand for $59,999. Defendant offered $17,500.

2010 CCTLA Victories

CCTLA member ***Lawrence Boehm & Charles Moore*** have received two impressive verdicts this year.

The first, Kell v. AutoZone, was tried in front of Judge Roland L. Candee, with Richard Gray and Barbara Blackburn of Littler Mendelson representing the Auto Zone in this wrongful termination action based on retaliation and related claims. The trial and jury deliberations lasted five weeks and resulted in a $136,827 award of compensatory damages and $1,231,848 in punitive damages. Defendant's last offer was $2,500.

The AutoZone district manager was terminated six months after complaining of harassment by his supervisors. He was the most profitable manager at the time he was terminated, allegedly for "falsification of company document." Plaintiff confessed to violating company policy when he prepared the document in hopes of keeping his job. After he was terminated, he joined the National Guard to mitigate damages. Operation Iraqi Freedom began, and he was shipped to Iraq. Plaintiff returned with memory damage caused by a "medical incident" which hospitalized him for several months. He returned with almost no memory of the critical incidents. At deposition, Plaintiff was confronted with an "after acquired" resume in which he falsely claimed a Purple Heart, exaggerated his military rank and military history. Fortunately, he told the truth at his deposition.

The second victory was in Crosby v. AutoZone, tried in front of the Hon. Lawrence K. Karlton, with Richard Gray and Barbara Blackburn again representing AutoZone. This wrongful termination action included claims of retaliation, disability discrimination, and failure to prevent retaliation and discrimination, The two-week trial ended in a $1,500,000 verdict. Plaintiff's Rule 68 Offer: $900,000 inclusive of fees and costs. Defendant never made an offer. Expert Witness: Economist

Charles Mahla, Ph.D. - EconOne.

Senior AutoZone district manager supervising 10-12 retail locations was restricted from driving until further testing could be completed to find out why he was exhibiting symptoms of narcolepsy.

AutoZone was provided a note restricting driving "until medical testing" could be completed. Manager requested to work from home or have his wife drive him. AutoZone decided it was more reasonable to put manager on an unpaid protected medical leave of absence because he would receive State Disability. After 30 days, Plaintiff was diagnosed with sleep apnea and returned to his full duties.

Within a week of his return, he received his first negative evaluation in 13 years, citing conduct related to his time away from work. Plaintiff was put on a Performance Improvement Plan. Six months later, Plaintiff was terminated based upon his poor sales performance and defiant attitude toward managers. Plaintiff sought no counseling for his emotional distress because he is a pastor, and relied on his church community for guidance. He found new employment after AutoZone earning, approximately $11,000 less per year.

Plaintiff's wife and his elderly parents attended trial. This assisted the emotional damages.

CCTLA Past President *Jill Telfe*r tried a denial of promotion case against the Department of Justice for five weeks in front of the Hon. David De Alba; James Rodriguez v. Department of Justice. Defense Counsel: Deputy Attorney Generals Peter Halloran and Jeffrey Schwartzchild. Verdict: $560,270 for Retaliation, Failure to Prevent and Breach of Contract. Defendant refused to offer any settlement, including a request to be promoted.

Plaintiff was unfairly denied promotion on seven occasions total while working for the Department of Justice (DOJ), Bureau of Narcotic Enforcement, as a sworn agent. He determined the first denial was racially motivated or based on his support of two coworkers who complained of discrimination. Rodriguez filed an internal complaint with the DOJ's EEO Department asking for help.

Although the department claimed it would assist, it never investigated, causing Rodriguez to eventually seek help from the EEOC and the Dept. of Fair Employment & Housing. He mediated and settled his claims in November 2006, with DOJ agreeing to provide Rodriguez career-enhancing assignments. The department breached this agreement and began to engage in further retaliatory conduct, including setting client up to fail and providing down-graded evaluations. Ultimately, Rodriguez was transferred to another bureau within the DOJ in 2007.

His special damages were based on the difference in pay, had he been promoted, up until the age of 55. Challenges included Plaintiff did not lose his job, the case was against the State of California and the defense sought to portray Rodriguez as arrogant and condescending (with several entries in his past performance evaluations and numerous witnesses still employed by the state to attempt to prove this). However, the management of the Bureau of Narcotic Enforcement and the director of DOJ's EEO Department came across as incompetent at best. Numerous top officials within DOJ were impeached repeatedly. DOJ's arrogance was exhibited by the attitude of the witnesses and the fact they never offered my client anything to resolve his claims.

Experts: Economist Charles Mahla, Ph.D and treating psychologist Jo Danti, Ph.D.

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CONSUMER ATTORNEYS OF CALIFORNIA
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THE DONALD L. GALINE ANNUAL Tahoe Ski Seminar

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MARCH 19 - 20, 2010

MCLE: 9.75 GENERAL; .5 ETHICS

HOTEL RESERVATIONS

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Reservations: (800) 455-4770
Cut-Off: March 4, 2010 or until the block is sold out
Booking Code: SO3ATRN
Lake Tower: Thurs $119 / Fri $179 / Sat $179
Mountain Tower: Thurs $89 / Fri $159 / Sat $159

ALTERNATE HOTEL: EMBASSY SUITES
A small room block is being held here until February 17, 2010 or until the block is sold out.
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Rates: Friday (1 King) $159/Friday (2 Queens) $199
Saturday (1 King) $159 / Saturday (2 Queens) $199

SKI WITH THE STARS!

Ski Director Stuart Chandler will coordinate a meeting time and place on THURSDAY and/or FRIDAY for those who would like to meet up on the hill. Call Stuart at (559) 431-7770 or email stuart@chandlerlaw.com.

COMMITTEE

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CONSUMER ATTORNEYS OF CALIFORNIA • CAPITOL CITY TRIAL LAWYERS ASSOCIATION

ANNUAL TAHOE SKI SEMINAR

FRIDAY, MARCH 19

2:00 to 5:15 p.m.

♦ TRACK ONE: LIENS

MCLE: 2.5 GENERAL; .5 ETHICS

Moderator: Rene L. Sample

Recent Published *Lopez* Opinion
DANIEL E. WILCOXEN

Recent Published *Howell v. Hamilton* Opinion
SCOTT H.Z. SUMNER

ERISA Liens
DONALD M. DE CAMARA

Preparing For Absolute Medicare Compliance: Understanding The New Requirements And Their Effect On Your Practice And Set Asides
SYLVIUS VON SAUCKEN

Ethical Considerations In The Handling Of Lien Claims
DANIEL DEL RIO (.5 Ethics)

Medicare Liens – The "Hidden Private Remedy Cause Of Action" For Double Damages
DAVID E. SMITH

5:30 to 6:30 p.m.

♦ TRACK ONE: FOCUS GROUPS

MCLE: 1.0 GENERAL

Moderator: Christopher L. Kreeger

How To Do Your Own Focus Group – A Case Study Of "Awakening the Reptile" In A Focus Group
JOHN N. DEMAS

Things I Learned Using A Focus Group
MICHAEL W. JANSEN

The Mechanics Of Putting Together A Focus Group
SHAWN KHORRAMI

6:30 to 7:30 p.m.

COCKTAIL PARTY

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Mark Your Calendar

49TH ANNUAL CONVENTION
November 11-14, 2010
Palace Hotel, San Francisco

SATURDAY, MARCH 20

8:30 to 11:45 a.m.

♦ TRACK ONE: HOW TO TRY A TBI CASE: MEDICINE AND LAW

MCLE: 3.0 GENERAL

Moderator: S. David Rosenthal

Panel Discussion
RANDALL H. SCARLETT
DR. GEOFFREY MANLEY, MD, PHD
UCSF Department of Neurological Surgery
DR. RONALD RUFF, MD, PHD
Clinical Neuropsychologist and Rehabilitation Expert
DR. JONATHAN MUELLER, MD
San Francisco Neuropsychiatrist

8:30 to 11:45 a.m.

♦ TRACK TWO: TOOLS FOR SUCCESS

MCLE: 3.0 GENERAL

Moderator: Anne Marie Murphy

Depositions Done Right
MICHA STAR LIBERTY

Winning Through Motions In Limine
ANNE MARIE MURPHY

RFAs: Tell Me The Truth Now
BRYAN D. LAMB

Aggressive Discovery: Using Interrogatories To Win Your Case
KYLE K. TAMBORNINI

The Essentials Of E-Discovery
DON A. ERNST
STEVE WILLIAMS

IMEs: Protecting Your Client From Defense Doctors Harm
ROBERT E. CARTWRIGHT, JR.

12:00 to 1:15 p.m.

MCLE: 1.25 GENERAL

♦KEYNOTE LUNCH: ROGER A. DREYER

The Water Intoxication Verdict And Other Case Studies: Breaking The Glass Ceiling In Wrongful Death And Catastrophic Injury Cases

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1:30 to 3:30 p.m.

♦ TRACK ONE: TIPS FROM THE MASTERS

MCLE: 2.0 GENERAL

Moderator: Christopher B. Dolan

Pre-Trial Publicity – Ethics And Opportunities
CHRISTOPHER B. DOLAN

Discovering And Telling The Story
MILTON C. GRIMES

Persuasion Is Not A Talent – It Is A Science
R. REX PARRIS

Presenting the Psychological/Emotional Injury Case
ROBERT A. BUCCOLA

If you missed the Tort & Trial Seminar held January 19, the materials (book and CD) are available for $100.

Please send your check payable to CCTLA and mail it to PO Box 541 Sacramento, CA 95812

Capitol City Trial Lawyers Association
Post Office Box 541
Sacramento, CA 95812-0541

CCTLA Calendar of Events

MARCH

Tuesday, March 9
Q&A Luncheon
Location: Vallejo's-Noon
1900 4th Street
CCTLA Members Only

Thursday, March 11
CCTLA Problem Solving Clinic
Topic: TBA, Speaker: TBA
Location: Arnold Law Firm
(First Bank Building),
865 Howe Avenue, 2nd Floor
Time: 5:30 to 7 p.m.
CCTLA Members Only-$25

March 19-20
CAOC/CCTLA
Tahoe Ski Seminar
See pages 18-19 for
program information

Friday, March 26
CCTLA Luncheon
Topic: "Gravitational Injuries"
Speaker: Christopher Dolan
Location: Firehouse Restaurant
Time: Noon, CCTLA Members Only-$30

APRIL

Thursday, April 8
CCTLA Problem Solving Clinic
Topic: TBA, Speaker: TBA
Location: Arnold Law Firm
(First Bank Building),
865 Howe Avenue, 2nd Floor
Time: 5:30 to 7 p.m.
CCTLA Members Only-$25

Tuesday, April 13
Q&A Luncheon-Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Friday, April 30
CCTLA Luncheon
Topic: Employment Law
Speaker: Chris Whelan, Esq
Location: Firehouse Restaurant
Time: Noon, CCTLA Members Only-$30

MAY

Tuesday, May 4
CAOC-Lobby Day
Time: TBA

Tuesday, May 11
Q&A Luncheon-Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Friday, May 14
& Saturday, May 15
"CCTLA Voir Dire Seminar"
Speakers: TBA, Location: TBA

Thursday, May 20
CCTLA Problem Solving Clinic
Topic: TBA, Speaker: TBA
Location: Arnold Law Firm
(First Bank Building),
865 Howe Avenue, 2nd Floor
Time: 5:30 to 7 p.m.
CCTLA Members Only-$25

Friday, May 21
CCTLA Luncheon
Topic: TBA, Speaker: TBA
Location: Firehouse Restaurant
Time: Noon, CCTLA Members Only-$30

Thursday, May 27
CCTLA's 8th Annual Spring
Reception & Silent Auction
Location: Home of Allan Owen
& Linda Whitney
Time: 5:30 to 7:30 p.m.

JUNE

Tuesday, June 8
Q&A Luncheon-Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, June 10
CCTLA Problem Solving Clinic
Topic: TBA, Speaker: TBA
Location: Arnold Law Firm
(First Bank Building),
865 Howe Avenue, 2nd Floor
Time: 5:30 to 7 p.m.
CCTLA Members Only-$25

Friday, June 25
CCTLA Luncheon
Topic: Medicare Set Asides
Speaker: Doug Brand
Location: Firehouse Restaurant
Time: Noon, CCTLA Members Only-$30

Saturday, June 26
CCTLA Liens Seminar"
Speakers: TBA, Location: TBA

*Contact Debbie Keller @ CCTLA at (916) 451-2366
for reservations or additional information
about any of these events*

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA Board has developed a program to assist new attorneys with their cases. If you would like to receive more information regarding this program or if you have a question with regard to one of your cases, please contact:

Jack Vetter: jvetter@vetterlawoffice.com or Chris Whelan: chwdefamation@aol.com