PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 22 | Issue 1 Article 8

12-15-1994

California Supreme Court Survey - A Review of Decisions: December 1992 - December 1993

Jeanne M. MacCalden

California Supreme Court Survey

December 1992 - December 1993

The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. APPELLATE REVIEW

A. *Under the California Constitution, appellate courts are required to apply harmless error review to any conviction obtained in a trial during which an "involuntary" or "coerced" confession was admitted:* **People v. Cahill.**

I. INTRODUCTION

For many years the United States Constitution has compelled automatic reversal of criminal convictions resulting from trials during which "involuntary" or "coerced" confessions[1] were admitted.[2] In *Arizona v. Fulminante*,[3] however, the United States Supreme Court reversed a long line of decisions requiring automatic reversal, holding that courts should review the wrongful admission of an involuntary confession under the "harmless beyond a reasonable doubt" standard.[4]

In light of this federal law development, the Supreme Court of California, in *People v. Cahill*,[5] addressed whether the California Constitu-

---

1. "Involuntary" or "coerced" confessions include those confessions "obtained by physical or psychological coercion, by promises of leniency or benefit, or when the 'totality of circumstances' indicate the confession was not a product of the defendant's 'free and rational choice.'" People v. Cahill, 5 Cal. 4th 478, 482 n.1, 853 P.2d 1037, 1040 n.1, 20 Cal. Rptr. 2d 582, 585 n.1 (1993) (citing 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2 (1984); 1 B.E. WITKIN, CALIFORNIA EVIDENCE, *The Hearsay Rule* §§ 614-623 (3d ed. 1986)).

2. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560, 568 (1958) (holding that a coerced confession obtained from a nineteen-year-old defendant with fifth grade education compelled automatic reversal of conviction "even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction"); Culombe v. Connecticut, 367 U.S. 568, 621 (1961) (finding that a coerced confession elicited from an illiterate and mentally defective man required the reviewing court to set aside the conviction, "however convincingly supported by other evidence").

3. 499 U.S. 279 (1991). For criticisms of this decision, see Dale W. Aronson, Note, *Constitutional Law—Harmless Constitutional Error Analysis—Are Coerced Confessions Fundamentally Different from Other Erroneously Admitted Evidence?* Arizona v. Fulminante, *111 S. Ct. 1246 (1991)*, 27 LAND & WATER L. REV. 581 (1992); Charles J. Ogletree, Jr., Comment, Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

4. *Fulminante*, 499 U.S. at 312; *see also* Chapman v. California, 386 U.S. 18, 22 (1967) (overruled on other grounds) (holding that the violation of a federal constitutional right at trial was harmless error where the error did not influence the "substantial rights of the parties.").

5. 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993). Justice George deliv-

tion, independent of the United States Constitution, requires automatic reversal in such cases.[6] The court held that the California Constitution compels appellate courts to review these cases under a "harmless error" standard, overruling the line of decisions that interpreted the state constitution as requiring automatic reversal.[7]

II. BACKGROUND

Prior to 1911, if a "substantial error" occurred during trial,[8] appellate courts presumed prejudice and automatically reversed the trial court decision without inquiring into whether the error was harmless.[9] In 1911, however, article VI, section 4 1/2 was added to the California Constitution.[10] This provision requires appellate courts to affirm criminal convic-

---

ered the opinion for the court, in which Chief Justice Lucas and Justices Panelli, Arabian, and Baxter concurred. *Id.* at 481, 853 P.2d at 1039, 20 Cal. Rptr. 2d at 584. Justice Mosk wrote a dissenting opinion. *Id.* at 511, 853 P.2d at 1060, 20 Cal. Rptr. 2d at 605. Justice Kennard wrote a separate dissenting opinion, in which Justice Mosk concurred. *Id.* at 553, 853 P.2d at 1088, 20 Cal. Rptr. 2d at 633.

6. *Id.* at 482-83, 853 P.2d at 1040, 20 Cal. Rptr. 2d at 585.

7. *Id.* at 509 & n.17, 853 P.2d at 1059 & n.17, 20 Cal. Rptr. 2d at 604 & n.17. In *Cahill*, the defendant, Mark Steven Cahill, was convicted of numerous offenses including, among others, first-degree murder, rape, and first-degree burglary. *Id.* at 483, 853 P.2d at 1040, 20 Cal. Rptr. 2d at 585. The defendant was sentenced to life in prison without the possibility of parole. *Id.*

The defendant appealed the conviction, asserting that confessions obtained by police shortly after his arrest were wrongfully admitted at trial. *Id.* The court of appeal reversed the murder-related convictions, finding that the confessions were "involuntary," and invoked the rule of automatic reversal as enunciated in numerous federal and state court decisions. *Id.* at 483-84, 853 P.2d at 1041, 20 Cal. Rptr. 2d at 586.

The Attorney General sought review by the California Supreme Court, and while the petition was pending, the United States Supreme Court issued its opinion in *Fulminante*. *Id.* at 484, 853 P.2d at 1041, 20 Cal. Rptr. 2d at 586. The California Supreme Court remanded the case to the court of appeal for reconsideration in light of *Fulminante*. *Id.* The California Court of Appeal reaffirmed its prior decision, holding that California law, independent of the federal constitution, required reversal. *Id.* The California Supreme Court then granted review. *Id.*

8. The admission of an involuntary or coerced confession would clearly fall within the "substantial error" category. The California Constitution absolutely prohibits such confessions from admission into evidence at trial. *Id.* at 485, 853 P.2d at 1042, 20 Cal. Rptr. 2d at 587.

9. *See* People v. O'Bryan, 165 Cal. 55, 63-64, 130 P. 1042, 1045 (1913) (the "prejudice presumed" rule arose from article VI, § 4 of the California Constitution, which limited appellate court review to questions of law only).

10. CAL. CONST. art. VI, § 4 1/2 (amended 1966). Section 4 1/2 later became article VI, § 13. As originally adopted, § 4 1/2 read:

> No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error in any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be

tions, even if the trial court erred, when the error did not result in a "miscarriage of justice."[11]

The California Supreme Court first addressed section 4 1/2 in *People v. O'Bryan*.[12] The court suggested that while section 4 1/2 abolished the "prejudice presumed" requirement and permitted harmless error review in most cases, certain trial errors could result in an automatic miscarriage of justice, even when the evidence established the defendant's guilt beyond question.[13] This limited category of cases which evaded harmless error review involved errors depriving the defendant of an "orderly legal procedure."[14] Section 4/12 required appellate courts to apply the generally applicable harmless error test for all other errors.[15]

From the adoption of section 4 1/2 in 1911 until the late 1950s, California appellate courts reviewed convictions based on wrongfully admitted confessions under the harmless error standard.[16] These early inter-

---

of the opinion that the error complained of has resulted in a miscarriage of justice.

Id.

11. *O'Bryan*, 165 Cal. at 63-65, 130 P. at 1046. Section 4 1/2 was adopted to alleviate the adverse effect on law enforcement caused by the prejudice presumed requirement. *Id.* In *O'Bryan*, the California Supreme Court emphasized that "to grant new trials to defendants on account of technical errors or omissions, even though a review of the evidence . . . would have shown that the guilt of the accused had been established beyond question and by means of a procedure that was substantially fair and just" produced unsatisfactory results "in not a few instances," and undermined the public's confidence in the criminal justice system. *Id.*

12. 165 Cal. 55, 130 P. 1042 (1913).

13. *Id.* at 65-66, 130 P. at 1046.

14. *Id.* The court suggested that denying a defendant his right to trial by jury, or subjecting him to double jeopardy, would constitute a per se miscarriage of justice. *Id.* Other cases finding a miscarriage of justice without inquiry into whether the evidence otherwise established guilt include: People v. Mroczko, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983) (potential conflict of interest); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (jury selection discrimination); People v. Douglas, 61 Cal. 2d 430, 392 P.2d 964, 38 Cal. Rptr. 884 (1964) (denying right to separate counsel); People v. Holmes, 54 Cal. 2d 442, 353 P.2d 583, 5 Cal. Rptr. 871 (1960) (improper waiver of right to jury).

15. *O'Bryan*, 165 Cal. at 65-66, 130 P. at 1046. In People v. Watson, 46 Cal. 2d 818, 299 P.2d 243 (1956), *cert. denied*, 355 U.S. 846 (1957), the California Supreme Court refined the test for determining whether an error at trial resulted in a miscarriage of justice: A miscarriage of justice results when after reviewing the evidence, the court finds "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Id.* at 836, 299 P.2d at 254.

For a good discussion of harmless error review of criminal convictions in California, see 22 CAL. JUR. 3D *Criminal Law* §§ 3769-3778 (1985 & Supp. 1993).

16. *See, e.g.*, People v. Stroble, 36 Cal. 2d 615, 623-24, 631, 226 P.2d 330, 335-36, 340

pretations of section 4 1/2 did not construe the wrongful admission of involuntary or coerced confessions as an automatic miscarriage of justice.[17]

Starting in the late 1950s, however, California courts began holding that the admission of an involuntary confession required automatic reversal without regard to its prejudicial effect.[18] These holdings were consistent with federal law in force at the time which compelled automatic reversal in such cases.[19] In a number of decisions, the California Supreme Court addressed whether the federal or state law required the reversible per se rule set forth in these cases,[20] and repeatedly suggested that both the federal and state constitutions compelled automatic reversal.[21]

In *People v. Jacobson*,[22] the court discussed the rationale underly-

---

(1951), *aff'd sub nom.* Stroble v. California, 343 U.S. 181 (1952); People v. Gonzales, 24 Cal. 2d 870, 877-78, 151 P.2d 251, 255 (1944); People v. Jones, 24 Cal. 2d 601, 604, 150 P.2d 801, 802 (1944); People v. Ferdinand, 194 Cal. 555, 565-70, 229 P. 341, 343-47 (1924); People v. Sourisseau, 62 Cal. App. 2d 917, 930-31, 145 P.2d 916, 923-24 (1944); People v. Mellus, 134 Cal. App. 219, 220-26, 25 P.2d 237, 238-40 (1933); People v. Day, 125 Cal. App. 106, 110-11, 13 P.2d 855, 857 (1932); People v. Dye, 119 Cal. App. 262, 271-73, 6 P.2d 313, 316-17 (1931); People v. Reed, 68 Cal. App. 19, 20, 228 P. 361, 362 (1924).

17. *Cahill*, 5 Cal. 5th at 494, 853 P.2d at 1047-48, 20 Cal. Rptr. 2d at 592-93.

18. *See, e.g.*, People v. Jimenez, 21 Cal. 3d 595, 614, 580 P.2d 672, 683, 147 Cal. Rptr. 172, 183 (1978), *overruled in part by Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582; People v. McClary, 20 Cal. 3d 218, 230, 571 P.2d 620, 627, 142 Cal. Rptr. 163, 170 (1977); People v. Randall, 1 Cal. 3d 948, 958, 464 P.2d 114, 120-21, 83 Cal. Rptr. 658, 664-65 (1970); People v. Fioritto, 68 Cal. 2d 714, 720, 441 P.2d 625, 628, 68 Cal. Rptr. 817, 820 (1968); People v. Sears, 62 Cal. 2d 737, 743-44, 401 P.2d 938, 942, 44 Cal. Rptr. 330, 334 (1965); People v. Schader, 62 Cal. 2d 716, 728-31, 401 P.2d 665, 672-74, 44 Cal. Rptr. 193, 200-02 (1965); People v. Dorado, 62 Cal. 2d 338, 356-57, 398 P.2d 361, 373, 42 Cal. Rptr. 169, 181, *cert. denied*, 381 U.S. 937 (1965); People v. Matteson, 61 Cal. 2d 466, 469-70, 393 P.2d 161, 163-64, 39 Cal. Rptr. 1, 3-4 (1964); People v. Brommel, 56 Cal. 2d 629, 634, 364 P.2d 845, 848, 15 Cal. Rptr. 909, 912 (1961); People v. Trout, 54 Cal. 2d 576, 585, 354 P.2d 231, 236-37, 6 Cal. Rptr. 759, 764 (1960); People v. Berve, 51 Cal. 2d 286, 290, 832 P.2d 97, 99 (1958).

19. *See supra* note 2.

20. *See, e.g., Schader*, 62 Cal. 2d at 728-31, 401 P.2d at 665, 672-74, 44 Cal. Rptr. at 200-02; People v. Jacobson, 63 Cal. 2d 319, 329-31, 405 P.2d 555, 562-63, 46 Cal. Rptr. 515, 521-23 (1965), *cert. denied*, 384 U.S. 1015 (1966); *Berve*, 51 Cal. 2d at 290, 332 P.2d at 99.

21. *See, e.g., Schader*, 62 Cal. 2d at 728-31, 401 P.2d at 672-74, 44 Cal. Rptr. at 200-02 (finding that article VI, § 4 1/2 of the California Constitution compelled automatic reversal).

22. 63 Cal. 2d 319, 405 P.2d 555 (1965), 46 Cal. Rptr. 515, *cert. denied*, 384 U.S. 1015 (1966). *Jacobson* concerned a trial in which the court admitted a total of 10 confessions made by the defendant. *Id.* at 327-29, 331, 405 P.2d at 560-62, 563, 46 Cal. Rptr. at 520-23. Although eight were validly admitted, the remaining two violated the defendant's right to counsel. *Id.* The question presented was whether the two invalid

ing the rule of automatic reversal in California.[23] The *Jacobson* court reasoned that because confessions provide extremely "'persuasive evidence of guilt,'" and it is generally very difficult for appellate courts to accurately determine the extent of their prejudicial effect, reviewing courts should refrain from inquiring into the prejudicial effect of wrongfully admitted confessions.[24]

In 1991, the United States Supreme Court abolished its reversal per se rule for the erroneous admission of confessions.[25] In *People v. Cahill*, the California Supreme Court decided whether California should do the same.[26]

III. ANALYSIS

Justice George began the opinion by discussing the relevant background principles in California governing the reversal of convictions when involuntary or coerced confessions are admitted at trial.[27] The court acknowledged that its decisions since the late 1950s interpreted the California Constitution as requiring automatic reversal for such convictions, and addressed whether it should reconsider California's independent reversible per se rule in light of *Fulminante*.[28] For numerous rea-

---

confessions compelled reversal of the conviction despite the existence of eight validly admitted confessions. *Id.* at 329, 405 P.2d at 562, 46 Cal. Rptr. at 522. While acknowledging that the wrongful admission of a confession normally required automatic reversal, the court went on to hold that reversal was not warranted under the facts presented in *Jacobson*. *Id.* at 333, 405 P.2d at 564, 46 Cal. Rptr. at 524. The court reasoned that because eight of the confessions were validly admitted, the two invalid confessions were only cumulative and could not plausibly have altered the outcome of the trial. *Id.* at 331, 405 P.2d at 563, 46 Cal. Rptr. at 523. Thus, *Jacobson* set forth a specific exception to the reversible per se rule for multiple confessions when some of the confessions are lawfully admitted.

23. *Id.* at 329-30, 405 P.2d at 562, 46 Cal. Rptr. at 522.

24. *Id.* (quoting People v. Parham, 60 Cal. 2d 378, 385, 384 P.2d 1001, 1005, 33 Cal. Rptr. 497, 501 (1963), *cert. denied*, 377 U.S. 945 (1964)). The court expressly rejected the rationale found in many federal decisions that one objective underlying the automatic reversal rule is to deter police misconduct. *Id.* at 329-30, 405 P.2d at 562, 46 Cal. Rptr. at 522; *see also infra* note 42 and accompanying text.

25. Arizona v. Fulminante, 499 U.S. 279, 312 (1991).

26. *Cahill*, 5 Cal. 4th at 482-83, 853 P.2d at 1040, 20 Cal. Rptr. at 585.

27. *Id.* at 487-93, 853 P.2d at 1043-47, 20 Cal. Rptr. 2d at 588-92.

28. *Id.* at 500, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 596-97. Because the prior California decisions relied in part on the California Constitution and *Fulminante* interpreted only the federal constitution, *Fulminante* did not by its own force abrogate the California rule for involuntary confessions. *See supra* note 21 and accompanying text.

sons, the court found reconsideration appropriate.[29]

The court first examined California's constitutional provision governing reversible error.[30] While determining that on its face, the provision would subject all trial errors, including the admission of an involuntary confession, to a quantitative "prejudicial error" analysis, the court specifically acknowledged that some errors which deprive a defendant of "an orderly legal procedure" would result in a miscarriage of justice without examining the evidence admitted at trial.[31] The question, then, was whether admitting an involuntary or coerced confession into evidence was an error that would deny the defendant an orderly legal procedure, and thereby place such errors within the purview of California's automatic miscarriage of justice rule.[32]

The court noted that for more than forty years after the enactment of section 4 1/2 in 1911, California courts did not construe these errors as warranting automatic reversal.[33] Only after the U.S. Supreme Court first required automatic reversal in the late 1950s[34] did California courts begin construing such errors as an automatic miscarriage of justice under the California Constitution.[35] Therefore, the court observed that even if the California provision did require automatic reversal, California courts were compelled to reverse such convictions automatically under the federal constitution.

The court next addressed the validity of the reasoning in the Califor-

---

29. *Id.* at 501, 853 P.2d at 1053, 20 Cal. Rptr. 2d at 598. In his dissent, Justice Mosk criticized the majority's decision to review California's automatic reversal rule in light of *Fulminante*. *Id.* at 512, 853 P.2d at 1060, 20 Cal. Rptr. 2d at 605 (Mosk, J., dissenting). According to Justice Mosk, not only was the *Fulminante* decision wrong, but it had absolutely no effect on California's independent reversible per se rule for involuntary confessions. *Id.* at 512 & n.1, 853 P.2d at 1060 & n.1, 20 Cal. Rptr. 2d at 605 & n.1 (Mosk, J., dissenting). He concluded that the policy against admitting illegal confessions was to protect the defendant's fundamental right against self incrimination, and that this interest requires automatic reversal to assure fairness in the contest between the government and the individual. *Id.* at 515, 853 P.2d at 1063, 20 Cal. Rptr. 2d at 608 (Mosk, J., dissenting) (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2251 (McNaughton rev. ed. 1961)).

30. *Id.* at 501, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 597; *see also* CAL. CONST., art. VI, § 13. For the text of the original article VI, § 4 1/2 enacted in 1911, see *supra* note 10.

31. *Cahill*, 5 Cal. 4th at 501, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 597. The court emphasized, for example, that errors denying one's right to trial by jury or an unbiased judge are "structural defects" which deny the defendant a fair trial. *Id.* at 501, 853 P.2d at 1053, 20 Cal. Rptr. 2d at 598; *see also* note 14 and accompanying text.

32. *See supra* notes 13-14 and accompanying text.

33. *Cahill*, 5 Cal. 4th at 502, 853 P.2d at 1053, 20 Cal. Rptr. 2d at 598; *see also supra* note 16 and accompanying text.

34. *See supra* note 2 and accompanying text.

35. *Cahill*, 5 Cal. 4th at 502, 853 P.2d at 1053, 20 Cal. Rptr. 2d at 598.

nia decisions requiring automatic reversal under the California Constitution.[36] The court noted that these holdings were based on the extremely persuasive nature of confessions and the difficulty in determining their precise effect on the jury.[37] The court criticized this reasoning as contrary to the purpose of California's reversible error provision which was enacted to avoid "such a prophylactic approach to reversible error."[38] None of these decisions suggested that the admission of an involuntary confession deprived a defendant of an "orderly legal process."[39] Thus, the only rationale discussed in these decisions, the prejudicial nature of confessions alone, did not justify automatic reversal under the California Constitution.[40]

The court then explored other rationales advanced for maintaining a reversible per se rule in California.[41] One objective for such a rule con-

---

36. *Id.*

37. *Id.* at 502-03, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599. This rationale was succinctly stated in People v. Parham, where the California Supreme Court stated:

> "Almost invariably . . . a confession will constitute persuasive evidence of guilt, and it is therefore usually extremely difficult to determine what part it played in securing the conviction. These considerations justify treating involuntary confessions as a class by themselves and refusing to inquire whether in rare cases their admission in evidence had no bearing on the result."

People v. Parham, 60 Cal. 2d 378, 385, 384 P.2d 1001, 1005, 33 Cal. Rptr. 497, 501 (1963), *cert. denied*, 377 U.S. 945 (1964) (citations omitted).

38. *Cahill*, 5 Cal. 4th at 503, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599. The court also noted that these later decisions did not attempt to place involuntary confessions into the limited category acknowledged under People v. O'Bryan, which included only errors constituting a "structural defect" in the trial that denied a defendant his right to an orderly legal procedure. *Id.*; *see supra* note 14 and accompanying text.

39. *Id.* at 502, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599. In dissent, Justice Mosk argued that depriving a defendant of his right against self incrimination, in and of itself, undermines the policy of preventing government overreaching. *Id.* at 55, 853 P.2d at 1063, 20 Cal. Rptr. 2d at 608 (Mosk, J., dissenting); *see supra* note 29. But Justice Mosk did not explicitly state that improper admission of a confession fell within the limited category of trial errors constituting a per se miscarriage of justice as enunciated in *O'Bryan*. *Cahill*, 5 Cal. 4th at 512, 853 P.2d at 1060, 20 Cal. Rptr. 2d at 605 (Mosk, J., dissenting).

40. *Id.* at 503, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599.

41. *Id.* at 506, 853 P.2d at 1056, 20 Cal. Rptr. 2d at 601. In her dissent, Justice Kennard argued that abolishing the rule of automatic reversal would send "the wrong signal to police, to prosecutors, and to trial courts," emphasizing that the automatic reversal rule put governmental officials on notice that courts will not tolerate "the use of overbearing tactics to secure confessions." *Id.* at 558-59, 853 P.2d at 1092, 20 Cal. Rptr. 2d at 637 (Kennard, J., dissenting).

cerns the deterrence of police misconduct.[42] Both the California and federal constitutions prohibit eliciting involuntary or coerced confessions, and law enforcement officials may refrain from eliciting involuntary or coerced confessions if the confessions obtained could not sustain a criminal conviction. The court rejected this rationale for many reasons, including the fact that some involuntary confessions result from conduct less egregious than other forms of police misconduct not warranting automatic reversal,[43] and that the California reversible per se rule was never based on an attempt to deter police misconduct.[44]

Finally, after concluding that the foregoing reasons did not justify an automatic reversal rule in California, the court addressed whether principles of stare decisis required continuance of the reversible per se rule given its application in numerous decisions spanning a total of thirty five years beginning in the late 1950s.[45] The court found that before *Fulminante*, there was no need for California courts to closely scrutinize California's constitutional provision governing reversal in these cases because the U.S. Constitution required automatic reversal regardless of state law.[46] In addition, the court noted that the California decisions suddenly requiring automatic reversal in the late 1950s and 1960s did not distinguish prior California decisions covering a span of more than forty years which applied harmless error analysis when reviewing such convictions.[47] The court also emphasized that the public policy underlying the enactment of the reversible error provision, to maintain confidence in the judicial system, is still of vital importance today.[48] Thus, the court held that stare decisis principles did not preclude abolishing the reversible per se rule in California.[49]

Therefore, there is no compelling justification for an automatic reversal rule in California.[50] The court held that California appellate courts

---

42. *Id.* at 506, 853 P.2d at 1057, 20 Cal. Rptr. 2d at 602.

43. The court noted that admission of evidence resulting from unlawful searches or seizures, which is often more egregious than involuntary confessions, has not warranted automatic reversal by the courts. *Id.* at 506, 853 P.2d at 1056, 20 Cal. Rptr. 2d at 601.

44. *Id.* at 506, 853 P.2d at 1057, 20 Cal. Rptr. 2d at 602; *see also supra* note 24 and accompanying text.

45. *Id.* at 508, 853 P.2d at 1057, 20 Cal. Rptr. 2d at 602.

46. *Id.* at 508, 853 P.2d at 1058, 20 Cal. Rptr. 2d at 603. In light of *Fulminante*, however, the proper interpretation of California's Constitution is now critical to whether automatic reversal is required in California.

47. *Id.*

48. *Id.*

49. *Id.* In her dissent, Justice Kennard argued that principles of stare decisis should prevent reconsideration of California's automatic reversal rule to facilitate "stability in the law" and "'certainty of adjudication.'" *Id.* at 557, 853 P.2d at 1091, 20 Cal. Rptr. 2d at 636 (Kennard, J., dissenting) (quoting 6 B.E. WITKIN, CALIFORNIA PROCEDURE § 758 (3d ed. 1985)).

50. Other reasons which purportedly necessitate a rule of automatic reversal not

must assess the erroneous admission of coerced or involuntary confessions under the general harmless error test,[51] thereby overruling the long line of California decisions holding that such an admission automatically constituted a miscarriage of justice.[52]

IV. CONCLUSION

Cahill stands for the proposition that, under California law, appellate courts must apply a harmless error analysis to the wrongful admission of confessions at trial. To restore confidence in the criminal justice system, and to comply with the mandates of the California Constitution, California now joins the U.S. Supreme Court in abolishing the rule of automatic reversal.

DOUGLAS J. DENNINGTON

---

specifically discussed by the majority, include preventing the erosion of the harmless error standard, providing a bright line rule that would conserve appellate resources, and remedying the wrong caused by the wrongful admission of a confession. *Id.* at 558-59, 853 P.2d at 1091-92, 20 Cal. Rptr. 2d at 636-38 (Kennard, J., dissenting).

51. *Id.* at 509-10, 853 P.2d at 1059, 20 Cal. Rptr. 2d at 604. In California, this test has come to be known as the "reasonable probability" test as set forth in People v. Watson, 46 Cal. 2d 818, 837, 299 P.2d 243, 255 (1956), cert. denied, 355 U.S. 846 (1957). Although this test is less rigorous than the federal harmless beyond a reasonable doubt standard, the federal requires that reviews of such convictions comply with the guidelines set forth in *Fulminante*. *See* Arizona v. Fulminante, 499 U.S. 279, 312 (1991).

52. *See supra* note 18 and accompanying text.

B. *An appellate court may not employ the "general verdict rule" when reviewing a general verdict containing special interrogatories:* **Tavaglione v. Billings.**

In *Tavaglione v. Billings*,[1] the California Supreme Court considered whether an appellate court may affirm a lower court decision arising out of a general verdict with special interrogatories using the "general verdict rule."[2] The court granted review to determine whether the court of appeal correctly affirmed a trial court decision based on a single theory of recovery, and dismissed issues on appeal raising other theories of recovery.[3]

In *Tavaglione*, the plaintiff filed a lawsuit after being ousted as a member of Riverside National Bank's (RNB) board of directors by several other members of RNB's board.[4] The trial court ordered a general verdict with special interrogatories,[5] directing the jury to allocate damages on various theories of liability identified in the complaint.[6] The jury returned a verdict in favor of the plaintiff, finding RNB and other defendants liable for damages.[7]

The defendants appealed the judgment claiming erroneous jury in-

---

1. 4 Cal. 4th 1150, 847 P.2d 574, 17 Cal. Rptr. 2d 608 (1993). Chief Justice Lucas delivered the majority opinion, with Justices Panelli, Kennard, Arabian, Baxter, and George concurring. *Id.* at 1152, 847 P.2d at 576, 17 Cal. Rptr. 2d at 610. Justice Mosk dissented in a separate opinion. *Id.* at 1160, 847 P.2d at 581, 17 Cal. Rptr. 2d at 615 (Mosk, J., dissenting).

2. *Id.* at 1152, 847 P.2d at 576, 17 Cal. Rptr. 2d at 610. The general verdict rule is discussed *infra* note 10.

3. *Id.*

4. *Id.* The plaintiff borrowed money from RNB and occasionally failed to make timely payments on loans. The board of directors of RNB subsequently enacted a bylaw disqualifying any borrower in default for 30 days or more from acting as a director. As a result, the board dismissed the plaintiff prompting him to sell his interest in RNB to another bank. *Id.* at 1152-53, 847 P.2d at 576, 17 Cal. Rptr. 2d at 610. The plaintiff pleaded seven causes of action: illegal ouster; defamation; wrongful disclosure of confidential information; tortious breach of implied covenant of good faith and fair dealing; intentional interference with contractual relations; interference with prospective economic advantage; and negligent interference with relations with financial institutions. *Id.* at 1153-54, 847 P.2d at 576-77, 17 Cal. Rptr. 2d at 610-11.

5. *See* 7 B.E. WITKIN, CALIFORNIA PROCEDURE, *Trial* §§ 323-25 (3d ed. 1985 & Supp. 1994) (providing a general description and overview of the use, procedure, and form of special interrogatories contained within general verdicts).

6. *Tavaglione*, 4 Cal. 4th at 1154, 847 P.2d at 577, 17 Cal. Rptr. 2d at 611.

7. *Id.* at 1154-55, 847 P.2d at 577-78, 17 Cal. Rptr. 2d at 611-12. The jury returned a verdict finding the defendants liable for the plaintiff's removal from the board, defamation, breach of the implied covenant of good faith, conspiring to interfere, and actual intentional interference with contractual relations. *Id.* at 1154, 847 P.2d at 577, 17 Cal. Rptr. 2d at 611.

structions and insufficient evidence supporting the various causes of action.[8] The court of appeal applied the general verdict rule[9] and, consequently, limited its review to the supporting evidence relating to one cause of action.[10] In upholding the judgment below, the court of appeal stated that the "'plaintiff was entitled to recover the same amount of damages under any theory alleged and proved at trial.'"[11] Therefore, the appellate court deemed the special interrogatories "'meaningless and . . . irrelevant'" and upheld the judgment based solely on the evidence supporting the defamation cause of action.[12]

On review, the supreme court relied upon section 625 of the Code of Civil Procedure,[13] thereby giving effect to the jury answers to the special interrogatories.[14] In disapproving the use of the general verdict rule, the court distinguished the cases the appellate court cited because the verdict supplied by the jury in the instant case contained special interrogatories.[15] Recognizing that the award for the defamation cause of action

---

8. *Id.* at 1155, 847 P.2d at 578, 17 Cal. Rptr. 2d at 612.

9. For a definition of the "general verdict rule," see Crogan v. Metz, 47 Cal. 2d 398, 403, 303 P.2d 1029, 1032 (1956) (stating that a general verdict with various causes of action may be upheld on review by relying on only one cause of action); *see also*, 7 B.E. WITKIN, CALIFORNIA PROCEDURE, *Trial* § 331 (3d. ed 1985) ("Where there are *several counts* or causes of action, a general verdict will stand if the evidence supports it on any one sufficient count") (emphasis in original).

10. *Tavaglione*, 4 Cal. 4th at 1155, 847 P.2d at 578, 17 Cal. Rptr. 2d 612.

11. *Id.* at 1156, 847 P.2d at 578, 17 Cal. Rptr. 2d at 612 (quoting the court of appeal).

12. *Id.* (quoting the court of appeal).

13. Section 625 of the Code of Civil Procedure states in pertinent part: "Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." CAL. CIV. PROC. CODE § 625 (West 1976 & Supp. 1993).

14. *Tavaglione*, 4 Cal. 4th at 1156-57, 847 P.2d at 579, 17 Cal. Rptr. 2d at 613. The court relied on this part of the code to refute the appellate court's statement that the special findings were "meaningless and . . . irrelevant." *Id.* For an example of inconsistent findings with general verdicts, see Hasson v. Ford Motor Co., 19 Cal. 3d 530, 540, 564 P.2d 857, 863-64, 138 Cal. Rptr. 705, 711-12 (1977) (discussing the application of California Code of Civil Procedure § 625 to inconsistent answers to special interrogatories relating to defects and negligence in the manufacturing of automobiles).

15. *Tavaglione*, 4 Cal. 4th at 1158, 847 P.2d at 580, 17 Cal. Rptr. 2d at 614. The court noted that the general verdict rule is based on the assumption that juries find for the theory on which there was substantial evidence, but that this assumption may be refuted by the use of special interrogatories. *Id.* at 1157, 847 P.2d at 579, 17 Cal. Rptr. 2d at 613 (citing McCloud v. Roy Riegels Chem., 20 Cal. App. 3d. 928, 935-36, 97 Cal. Rptr. 910, 915 (1971) (defining the rationale for the general verdict rule)). The court noted that both Crogan v. Metz, 47 Cal. 2d 398, 303 P.2d 1029 (1956), and

amounted to only a fraction of the total jury award, the court held that limiting review to defamation in order to substantiate the general verdict was improper.[16] The court also dismissed the plaintiff's argument that the defendants waived their right to assert inconsistencies in the findings.[17] The court further discredited the appellate court's statement that the plaintiff was entitled to recover the same amount regardless of the theory relied upon.[18] Accordingly, the court dismissed the use of the general verdict rule and remanded the case for a thorough review of each issue of recovery.[19]

As the dissent noted, the application of the general verdict rule is rooted in statutory and case law,[20] and this decision only clarifies the proper use of the general verdict rule. In the future, courts below must review a general verdict on all theories of recovery when there are special interrogatories relating to each cause of action.

ERIC MASAKI TOKUYAMA

Gilman v. Nemetz, 203 Cal. App. 2d 81, 21 Cal. Rptr. 317 (1962), applied the general verdict rule to verdicts without special interrogatories where specific dollar amounts were assigned to the different theories of recovery. *Tavaglione*, 4 Cal. 4th at 1158, 847 P.2d at 580, 17 Cal. Rptr. 2d at 614.

16. *Id.* at 1158, 847 P.2d at 579-80, 17 Cal. Rptr. 2d at 613-14. The court observed that the award for defamation amounted to only $604,787, while the total verdict awarded to the plaintiff was $2,254,787. *Id.*

17. *Id.* at 1157-58, 847 P.2d at 579-80, 17 Cal. Rptr. 2d at 613-14. The court emphasized that the only issue on appeal is the use of the general verdict rule and not the reconciliation of the special findings with the verdict. *Id.* at 1158, 847 P.2d at 579-80, 17 Cal. Rptr. 2d at 613-14.

18. *Id.* at 1158-59, 847 P.2d at 580, 17 Cal. Rptr. 2d at 614. The court explained that the plaintiff is not entitled to double recovery for one compensable damage; therefore, the reviewing court should ensure that substantial evidence, through the use of special findings, supports each award of damages. *Id.*

19. *Id.* at 1159, 847 P.2d at 580-81, 17 Cal. Rptr. 2d at 614-15. The majority disregarded Justice Mosk's dissenting opinion by stating that, on remand, the appellate court can dismiss issues either on procedural or substantive matters. *Id.* at 1159, 847 P.2d at 581, 17 Cal. Rptr. 2d at 615. Justice Mosk adamantly concluded, however, that the defendants failed to abide by procedural rules, and therefore, the affirmation by the appellate court should be upheld. *Id.* at 1160-63, 847 P.2d at 581-83, 17 Cal. Rptr. 2d. at 615-17 (Mosk, J., dissenting). Justice Mosk stated that the defendants failed to point out and to support the alleged error in their brief to the court of appeal. *Id.* at 1160-61, 847 P.2d at 581-82, 17 Cal. Rptr. 2d at 615-16 (Mosk, J., dissenting). Therefore, Justice Mosk concluded that the court of appeal, when considering the case on remand, should affirm the decision based on the defendants' procedural error. *Id.* at 1162, 847 P.2d at 582-83, 17 Cal. Rptr. 2d at 616-17 (Mosk, J., dissenting).

20. *Id.* at 1160, 847 P.2d at 581, 17 Cal. Rptr. 2d 615; *see supra* notes 14-16 and accompanying text.

II. CIVIL PROCEDURE

Evidence Code section 1157(a) precludes a plaintiff suing for medical malpractice from discovering a physician's application or reapplication for medical staff privileges: **Alexander v. Superior Court.**

I. INTRODUCTION

In *Alexander v. Superior Court*,[1] the California Supreme Court considered whether Evidence Code section 1157(a) prevents a medical malpractice plaintiff from discovering a physician's application or reapplication for hospital medical staff privileges.[2] The court unanimously held that medical staff applications and reapplications are within the scope of Evidence Code section 1157(a) and are, therefore, undiscoverable.[3] It reasoned that the legislative purpose underlying the statute is to promote

---

1. 5 Cal. 4th 1218, 859 P.2d 96, 23 Cal. Rptr. 2d 397 (1993). Chief Justice Lucas wrote the unanimous opinion, with Justices Mosk, Panelli, Kennard, Arabian, Baxter, and George concurring. *Id.* at 1220, 859 P.2d at 97, 23 Cal. Rptr. 2d at 398.

2. *Id.* at 1223-28, 859 P.2d at 99-102, 23 Cal. Rptr. 2d at 400-03. Section 1157(a) of the California Evidence Code provides in pertinent part: "Neither the proceedings nor the records of organized committees of medical . . . staffs in hospitals, or of a peer review body . . . having the responsibility of evaluation and improvement of the quality of care rendered in the hospital . . . shall be subject to discovery." CAL. EVID. CODE § 1157(a) (West Supp. 1994).

It should be noted that subdivision (c) of § 1157 is not relevant to the issue addressed by the court. Subdivision (c) states that "[t]he prohibition relating to discovery or testimony does not apply . . . to any person requesting hospital staff privileges." *Id.* § 1157(c). This means that a physician who is requesting staff privileges may obtain medical staff committee records in an administrative action against the hospital. California Eye Inst. v. Superior Court, 215 Cal. App. 3d 1477, 1481, 264 Cal. Rptr. 83, 85 (1989).

See generally 27 CAL. JUR. 3D *Discovery and Depositions* § 32 (1987 & Supp. 1994) (discussing the privilege of hospital medical staff committee records against discovery); 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1096 (3d ed. 1986 & Supp. 1993) (discussing the scope of Evidence Code § 1157).

3. *Alexander*, 5 Cal. 4th at 1228, 859 P.2d at 102, 23 Cal. Rptr. 2d at 403. The supreme court reversed the court of appeal. *Id.* The court also disapproved Hinson v. Clairemont Community Hosp. to the extent that it is inconsistent with the court's view. *Id.* at 1228 n.10, 859 P.2d at 102 n.10, 23 Cal. Rptr. 2d at 403 n.10. In *Hinson*, the court concluded that an application for staff privileges did not fall within the scope of Evidence Code § 1157 because an "application is neither necessarily a 'proceeding' nor a 'record' of a committee; it is a document prepared and completed by an individual physician." 218 Cal. App. 3d 1110, 1128, 267 Cal. Rptr. 503, 514 (1990); see *supra* note 2 for the statutory text of Evidence Code § 1157(a).

the free and candid exchange of information among physicians.[4] If malpractice plaintiffs could gain access to medical staff applications, doctors seeking hospital privileges would be reluctant to disclose negative information that could be critical to the protection of patients.[5]

The supreme court also considered whether the court of appeal erred by processing the petitioner's writ application for review of discovery matter under the accelerated procedure authorized by section 1088 of the Code of Civil Procedure rather than processing it under the ordinary alternative writ procedure.[6] The supreme court reversed the court of appeal, holding that it improperly proceeded under section 1088 of the Code of Civil Procedure.[7]

II. TREATMENT OF THE CASE

A. *The Court of Appeal Improperly Processed the Writ Application Under the Expedited Procedure Authorized by Section 1088 of the Code of Civil Procedure*

The expedited procedure authorized by section 1088 allows for an issuance of a peremptory writ of mandate in the first instance.[8] The

---

4. *Alexander*, 5 Cal. 4th at 1226-28, 859 P.2d at 101-02, 23 Cal. Rptr. 2d at 402-03; *see* CAL. JUR. 3D, *supra* note 2, at § 32 (stating that the "statute was enacted to encourage candor and objectivity in peer investigations by hospital medical staff committees.").

5. *See infra* notes 24-28 and accompanying text.

6. *Alexander*, 5 Cal. 4th at 1222-23, 859 P.2d at 98-99, 23 Cal. Rptr. 2d at 399-400. California Code of Civil Procedure § 1088 provides in pertinent part: "When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance." CAL. CIV. PROC. CODE § 1088 (West 1980 & Supp. 1994). *See generally* Ng v. Superior Court, 4 Cal. 4th 29, 840 P.2d 961, 13 Cal. Rptr. 2d 856 (1992) (discussing the issuance of peremptory writ); Palma v. U.S. Industrial Fasteners, Inc., 36 Cal. 3d 171, 681 P.2d 893, 203 Cal. Rptr. 626 (1984) (involving the use of preemptory writ under § 1088).

7. *Alexander*, 5 Cal. 4th at 1223, 859 P.2d at 99, 23 Cal. Rptr. 2d at 400.

8. CAL. CIV. PROC. CODE § 1088 (West 1980) (stating that "if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance"); *see also id.* § 1087 (distinguishing between a peremptory writ and an alternative writ). Section 1087 provides:

> The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a time and place then or thereafter specified by court order why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted.

Id. See generally 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §§ 4, 65, 94 (3d ed. 1985 & Supp. 1994) (discussing the writ of mandate in general and as an

court explained that this accelerated procedure is an exception and should not be used generally.[9] The court further explained that the procedure is only justified when (1) there is an "'unusual urgency'" for resolution of petitioner's writ application, or (2) when the "'petitioner's entitlement to relief [is] so obvious'" that no purpose would be served by consideration of the issue; such as, when entitlement to discovery has been conceded or when there has been "'clear error under well-settled principles of law.'"[10]

The court held that the court of appeal erred in processing the petitioner's writ application for review of discovery matter under section 1088.[11] It reasoned that the record did not suggest any "unusual urgency" requiring acceleration of the normal process.[12] Moreover, the "petitioners' 'entitlement to relief' [was not] 'so obvious' that no purpose could reasonably be served by plenary consideration of the issue' or that the matter involved 'conceded or clear error under well-settled principles of law.'"[13] In fact, the court concluded that the petitioners were *not* entitled to relief because the documents sought to be discovered were protected by medical staff committee privilege.[14] Therefore, the supreme court held that the court of appeal incorrectly applied section 1088 of the Code of Civil Procedure.[15]

---

appropriate remedy to compel discovery or to prevent improper discovery); 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* § 195 (3d ed. 1985 & Supp. 1994) (discussing the peremptory writ without an alternative writ).

9. *Alexander*, 5 Cal. 4th at 1223, 859 P.2d at 98, 23 Cal. Rptr. 2d at 399 (citing Ng, 4 Cal. 4th at 35, 840 P.2d at 964, 13 Cal. Rptr. 2d at 859).

10. *Id.* (quoting *Ng*, 4 Cal. 4th at 35, 840 P.2d at 964, 13 Cal. Rptr. 2d at 859). The *Ng* court stated that "[i]f there is no compelling temporal urgency, and if the law and facts mandating the relief sought are not entirely clear, the normal writ procedure, including issuance of an alternative writ should be followed." 4 Cal. 4th at 35, 840 P.2d at 964, 13 Cal. Rptr. 2d at 859 (citations omitted).

11. *Alexander*, 5 Cal. 4th at 1223, 859 P.2d at 99, 23 Cal. Rptr. 2d at 400.

12. *Id.* (quoting *Ng*, 4 Cal. 4th at 35, 840 P.2d at 964, 13 Cal. Rptr. 2d at 895).

13. *Id.* at 1223, 859 P.2d at 98-99, 23 Cal. Rptr. 2d at 399-400 (quoting *Ng*, 4 Cal. 4th at 35, 840 P.2d at 964, 13 Cal. Rptr. 2d at 859).

14. *See infra* notes 16-29 and accompanying text.

15. *Alexander*, 5 Cal. 4th at 1223, 859 P.2d at 99, 23 Cal. Rptr. 2d at 400.

B. *Evidence Code Section 1157*

1. Applications and Reapplications for Staff Privileges Qualify as "Records" Under Section 1157 of the Evidence Code

Section 1157(a) states that "[n]either the proceedings nor the records of organized committees of medical . . . staffs in hospitals, or of a peer review body . . . shall be subject to discovery."[16] The court addressed the issue of whether applications and reapplications for staff privileges qualify as "records" under this provision.[17] The petitioners argued that section 1157(a) does not protect applications for staff privileges from discovery because such applications are not "generated by" the committee.[18] The court rejected this interpretation of the statute, stating that nothing in section 1157(a) suggests a legislative intent to draw a distinction between records that are "generated by" the medical staff committee and materials that are "submitted to" the committee.[19] The court also explained that because the legislature has defined the term "record" broadly in other contexts, "it is unlikely the legislature intended a narrow or limited definition of 'records' in section 1157(a)".[20]

2. The Legislative Purpose Underlying Section 1157(a)

The legislature enacted section 1157(a) on the theory that allowing malpractice plaintiffs access to peer investigations would stifle candor and inhibit objectivity.[21] The court asserted that the petitioners' interpre-

---

16. CAL. EVID. CODE § 1157(a) (West Supp. 1994).

17. *Alexander*, 5 Cal. 4th at 1223-24, 859 P.2d at 99, 23 Cal. Rptr. 2d at 400.

18. *Id.* at 1225, 859 P.2d at 100, 23 Cal. Rptr. 2d at 401. The petitioners relied on Hinson v. Clairemont Community Hosp., 218 Cal. App. 3d 1110, 267 Cal. Rptr. 503 (1990). *Id.* The *Hinson* court stated that "[t]he privilege contained in Evidence Code section 1157 'applies *only* to records of and proceedings before medical investigative committees' [and that] '[i]nformation developed or obtained by hospital administrators or others which does not derive from an investigation . . . by a medical staff committee . . . is not rendered immune from discovery under section 1157 merely because it is later placed in the possession of a medical staff committee.'" 218 Cal. App. 3d at 1127-28, 267 Cal. Rptr. at 513 (quoting Schulz v. Superior Court, 66 Cal. App. 3d 440, 446, 136 Cal. Rptr. 67, 71 (1977) and Santa Rosa Memorial Hosp. v. Superior Court, 174 Cal. App. 3d 711, 724, 220 Cal. Rptr. 236, 245 (1985)). The court of appeal agreed with the reasoning in *Hinson*. *Alexander*, 5 Cal. 4th at 1225, 859 P.2d at 100, 23 Cal. Rptr. 2d at 401.

19. *Alexander*, 5 Cal. 4th at 1225, 859 P.2d at 100, 23 Cal. Rptr. 2d at 401.

20. *Id.* at 1225 n.6, 859 P.2d at 100 n.6, 23 Cal. Rptr. 2d at 401 n.6. For example, under the State Records Management Act, Government Code § 14741, "record" is defined as "all papers . . . and other documents produced, received, owned or used by an agency." *Id.* (quoting CAL. GOV'T CODE § 14751 (West 1980 & Supp. 1994)). Evidence Code § 1560(a)(2) states that a "business record 'includes every record maintained by . . . a business.'" *Id.* (quoting CAL. EVID. CODE § 1560(a)(2) (West 1966 & Supp. 1993)).

21. *Alexander*, 5 Cal. 4th at 1227, 859 P.2d at 101, 23 Cal. Rptr. 2d at 402 (citing

tation of section 1157(a), which distinguished materials submitted to the committee from those generated by the committee, undermined the legislative purpose underlying the statute.[22] It explained that a legislative policy promoting the truthful exchange of information among physicians applies equally to materials "submitted to" a hospital's medical committee as it does to materials "generated by" the committee.[23] It is crucial that physicians seeking hospital privileges disclose all pertinent information to the committee, including negative information.[24] The court suggested that a physician might withhold information critical to the protection of patients, fearing that the application might someday be used against him by a third party.[25]

Moreover, allowing discovery of medical staff application materials would permit the disclosure of letters of reference, which often contain negative information regarding a physician's competence.[26] As a result, physicians might not provide constructive criticism about their colleagues in order to protect one another from adverse decisions in malpractice lawsuits.[27] If physicians did not provide negative information or constructive criticism about themselves or their peers, medical staffs would not know when to restrict privileges, require monitoring, or require further education.[28] Therefore, the court found that section 1157(a) includes materials submitted to the committee, ultimately concluding that staff applications and reapplications are protected from discovery in a medical malpractice suit.[29]

Matchett v. Superior Court, 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320 (1974)). In *Matchett*, the court stated, "[s]ection 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality." 40 Cal. App. 3d at 629, 115 Cal. Rptr. at 320.

22. *Alexander*, 5 Cal. 4th at 1226, 859 P.2d at 101, 23 Cal. Rptr. 2d at 402.

23. *Id.* at 1227, 859 P.2d at 101, 23 Cal. Rptr. 2d at 402.

24. *Id.*

25. *Id.* at 1227, 859 P.2d at 101-02, 23 Cal. Rptr. 2d at 402-03.

26. *Id.* at 1227-28, 859 P.2d at 102, 23 Cal. Rptr. 2d at 403.

27. *Id.*

28. *Id.* at 1228, 859 P.2d at 102, 23 Cal. Rptr. 2d at 403.

29. *Id.*

III. CONCLUSION

In an effort to promote the legislative policy of encouraging the truthful exchange of information among physicians, the California Supreme Court interpreted Evidence Code section 1157(a) broadly. The *Alexander* decision may potentially make it more difficult for a plaintiff to recover in a malpractice suit by making recorded evidence of physician incompetence unavailable.[30] However, section 1157(a) does not prevent a plaintiff from otherwise discovering the information.[31] For example, a plaintiff may depose a physician and ask whether he or she was previously denied staff privileges, or a plaintiff may review public records to determine whether the physician has been subject to a malpractice judgment or a disciplinary action.[32]

APRIL LERMAN

30. In *Matchett*, the court asserted that the confidentiality requirement impairs a malpractice plaintiff's access to evidence. "Section 1157 represents a legislative choice between competing concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence." 40 Cal. App. 3d 623, 629, 115 Cal. Rptr. 317, 320-21.

31. *Alexander*, 5 Cal. 4th at 1223-24 n.4, 859 P.2d at 99 n.4, 23 Cal. Rptr. 2d at 400 n.4.

32. *Id.*

III. COMMUNITY PROPERTY

The death of one spouse, after final judgment dissolving marital status but before allocation of assets in a bifurcated dissolution proceeding, does not abate the proceeding or vest jointly held marital property in the surviving former spouse by right of survivorship where the trial court, upon bifurcation, reserves jurisdiction to determine all remaining issues: **In re Marriage of Hilke.**

I. INTRODUCTION

Former Civil Code section 4800.1 creates a presumption that property acquired by marital partners and held in joint tenancy is community property.[1] In *In re Marriage of Hilke*,[2] the California Supreme Court

---

1. *In re* Marriage of Hilke, 4 Cal. 4th 215, 217, 841 P.2d 891, 892, 14 Cal. Rptr. 2d 371, 372 (1992). Former Civil Code § 4800.1(b) stated:

> For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form, including property held in . . . joint tenancy . . . is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> (1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
>
> (2) Proof that the parties have made a written agreement that the property is separate property.

CAL. CIV. CODE § 4800.1(b) (West 1983), *repealed and replaced by* CAL. FAM. CODE §§ 2580-81 (West 1994). Effective January 1, 1994, Family Code §§ 2580, 2581 replaced Civil Code § 4800.1. These sections continue former Civil Code § 4800.1(a), 4800.1(b) "without substantive change." CAL. FAM. CODE §§ 2580, 2581 (West 1994) (Law Revision Commission Comments). The court's holding in *Hilke* thus has continuing validity when interpreting similar issues under the new Family Code.

2. 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992). Justice Panelli wrote for the unanimous court.

Mr. and Mrs. Hilke acquired a house in 1969 and held it in joint tenancy. Twenty years later Mrs. Hilke filed for divorce. The parties stipulated to a bifurcated proceeding in which the court would first dissolve the marriage and later divide the property at issue. After the trial court entered judgment dissolving the marriage but before the division of property, Mrs. Hilke died.

After Mrs. Hilke's death, the trial court divided the jointly held house as if it were community property, applying the presumption of Civil Code § 4800.1. The court of appeal reversed, reasoning that the intervening death of the wife before the court divided marital assets, and thus before the statutory presumption could be applied, vested the jointly held property in the husband by right of survivorship. *In re* Marriage of

considered whether property held jointly vests in the surviving spouse by right of survivorship when one spouse in a bifurcated dissolution proceeding dies after the entry of judgment but before the division of community and separate assets.[3] The court held that with respect to a party's death after judicial determination of marital status but before property disposition, marital property jointly held does not vest in the other party by right of survivorship if the court reserved jurisdiction to decide the property issue.[4]

II. DISCUSSION

The court first addressed whether the presumption in Civil Code section 4800.1 applied to property disposed of subsequent to the death of a party in a bifurcated dissolution proceeding.[5] The surviving party argued that his former spouse's intervening death abated the dissolution proceeding, and therefore the trial court lacked jurisdiction to determine the nature of marital property held in joint tenancy.[6] The supreme court

---

Hilke, 3 Cal. Rptr. 2d 333, 336 (Ct. App. 1992) *rev'd*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992). The supreme court granted review and unanimously reversed the judgment of the court of appeal. *See* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 191 (Supp. 1993) (briefly discussing *In re* Marriage of Hilke); Susan Freinkel, *Community Property Trumps Right of Joint Tenancy*, THE RECORDER, Dec. 18, 1992, at 2 (same).

3. *Hilke*, 4 Cal. 4th at 217-18, 841 P.2d at 892-93, 14 Cal. Rptr. 2d at 372-73. The supreme court granted review to resolve an important question of law and the apparent conflict between the courts of appeal. *See also*, CAL. R. CTY. 29(a) (including the resolution of both an important question of law and an apparent conflict in the courts of appeal as grounds for supreme court review); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 188-201 (9th ed. 1990) (providing a historical perspective on the development of the presumption that property acquired during the marriage and held in joint form is community property); *Recommendation Relating to Civil Code Sections 4800.1 and 4800.2*, 18 CAL. L. REV. COMM'N REP. 1 (1993) (same); 32 CAL. JUR. 3D *Family Law* §§ 443-44 (1977 & Supp. 1993) (citing practice aids and case authority interpreting and applying Civil Code §§ 4800.1 and 4800.2.

4. *Hilke*, 4 Cal. 4th at 221, 841 P.2d at 895, 14 Cal. Rptr. 2d at 375; *see also* CAL. FAM. CODE § 2337(c) (West 1994) (requiring the same mandatory reservation of jurisdiction as former Civil Code § 4515(c)).

5. *Hilke*, 4 Cal. 4th at 220, 841 P.2d at 895, 14 Cal. Rptr. 2d at 375. All further statutory references are to the Civil Code unless otherwise indicated.

6. *Id.* at 220, 841 P.2d at 895, 14 Cal. Rptr. 2d at 375; *see also* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband and Wife* § 127 (9th ed. 1990) (stating the general rule in divorce, separate maintenance, dissolution, and legal separation cases "that the action abates on the death of either spouse prior to entry of final judgment"); 1 CAL. JUR. 3D *Actions* § 145 (1972) (stating that a dissolution proceeding and appeals thereto abate at the death of either party prior to entry of final judgment because dissolution is purely a personal action to determine the status of the parties). *But see id.* at § 83 (explaining that an action or proceeding does not abate because of the death or disability of a party if the cause of action survives); CAL. FAM. CODE § 2346

rejected this argument, reasoning that because the trial court reserved jurisdiction to determine property issues after adjudicating marital status, the spouse's intervening death did not abate the proceeding.[7]

The court also addressed the surviving former spouse's contention that section 4800.1 violated due process protections against retroactive application of laws which impair vested property rights.[8] The couple acquired their house in the form of joint tenancy in 1969; however the statutory presumption against joint tenancy was not given effect until 1986.[9]

The supreme court stated that section 4800.1(c)(3) mandated retroactive application and must be applied absent constitutional barriers.[10] Retroactive legislation is unconstitutional when it creates an ex post facto law or when it impairs either an existing contract right or a vested property right.[11] The court quickly dismissed the first two grounds as inapplicable and only addressed whether retroactive application of section 4800.1 impaired a vested property right.[12] The court stated that in order for the surviving spouse to have had a vested property right, he needed to have survived his wife while at the same time remaining married.[13] Because the former wife did not die until after dissolution, the court concluded that the surviving spouse had not fulfilled the condition precedent of remaining married. Therefore, the court constitutionally applied the statutory presumption against jointly held marital property in this case.[14]

(West 1994) (stating that after final judgment, if mistake, negligence or inadvertence results in a failure to sign, file or enter the dissolution order, it may be corrected with a nunc pro tunc entry).

7. *Hilke*, 4 Cal. 4th at 220, 841 P.2d at 895, 14 Cal. Rptr. 2d at 375.

8. *Id.* at 221, 841 P.2d at 895, 14 Cal. Rptr. 2d at 375.

9. *Id.*

10. *Id.* at 222, 841 P.2d at 896, 14 Cal. Rptr. 2d at 376.

11. *Id.*

12. *Id.*

13. *Id.* The joint-tenancy presumption is only applicable when determining property issues in dissolution and legal separation proceedings.

14. *Id. Cf.* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 198-201 (9th ed. 1990) (discussing the retroactivity problems found in *In re* Marriage of Buol, 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985) and *In re* Marriage of Fabian, 41 Cal. 3d 440, 715 P.2d 253, 224 Cal. Rptr. 333 (1986), based upon the fact that the statutory writing requirement interfered with a vested right in both cases). *But cf.* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 201 (9th ed. 1990) (discussing the unconstitutionality of retroactively applying Civil Code §§ 4800.1 and 4800.2, despite the legislature's enactment of an emergency statute, which counter-

III. CONCLUSION

The California Supreme Court's decision of *In re Marriage of Hilke* held that the death of a party between the court's determination of marital status and property disposition does not vest jointly held marital property in the other party by right of survivorship if the court reserved jurisdiction to decide property issues when it bifurcated the dissolution proceeding.[15] The court further held that the statutory presumption did not violate due process by being retroactively applied in this case because the trial court dissolved the marriage before the former spouse died.[16] This result is fair because the status quo of the respective parties' rights to marital property is preserved as of the date of dissolution.[17]

MICHAEL E. MURPHY

---

acts judicial decisions that find retroactive application of the writing requirement unconstitutional when it interferes with a vested right); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* § 191 (Supp. 1993) (stating that the legislature enacted Family Code § 2580 to avoid constitutional retroactivity problems).

15. *Hilke*, 4 Cal. 4th at 221, 841 P.2d at 895, 14 Cal. Rptr. 2d at 375.

16. *See supra* note 7 and accompanying text.

17. *See supra* note 14 and accompanying text.

IV. CONSTITUTIONAL LAW

A. *The Boykin-Tahl requirement that the defendant must be specifically notified of the constitutional rights he or she is waiving when entering a plea equivalent to a guilty plea is not applicable in a case where the defendant merely stipulates to evidentiary facts and the People still have the burden of proving the crime:* **People v. Adams.**

In *People v. Adams*[1], the California Supreme Court addressed the application of the *Boykin*[2]-*Tahl*[3] requirements to California Penal Code

---

1. 6 Cal. 4th 570, 862 P.2d 831, 24 Cal. Rptr. 2d 831 (1993). Justice Baxter authored the majority opinion, with Chief Justice Lucas and Justices Mosk, Panelli, Kennard and George concurring. *Id.* at 572-83, 862 P.2d at 831-40, 24 Cal. Rptr. 2d at 831-40. Justice Arabian wrote a separate concurring opinion. *Id.* at 583-84, 862 P.2d at 840, 24 Cal. Rptr. 2d at 840.

2. Boykin v. Alabama, 395 U.S. 238 (1969). In *Boykin*, the Supreme Court found that a trial court judge must proactively determine that a defendant who pleads guilty to a crime is fully aware of the constitutional rights that he or she is forfeiting. *Id.* at 243-44. A defendant's rights include the right to a jury trial, the right to confront one's accusers, and the right against self incrimination. *Id.* at 241, 243 (citing Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968); Pointer v. Texas, 380 U.S. 400, 403-06 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964)). The Court noted that a guilty plea is "more than a confession which admits that the accused did various acts; it is itself a conviction . . . ." 395 U.S. at 242 (citing Kercheval v. U.S., 274 U.S. 220, 223 (1927)). The Court reasoned that because a guilty plea is the practical equivalent of a conviction, the voluntariness of the plea must meet constitutional standards. *Id.* Accordingly, the Court explained that it was impermissible to presume a waiver from a silent record. *Id.* at 242. Rather, the Court pointed out that "[t]he record must show . . . that an accused was offered counsel but intelligently and understandingly rejected the offer." *Id.* (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)).

3. *In re* Tahl, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969), *cert. denied*, 398 U.S. 911 (1970). In *Tahl*, the California Supreme Court took the *Boykin* ruling a step further by concluding that in order to meet the constitutional standard of a voluntary and intelligent plea, the trial judge must show on the face of the record that the defendant was made aware of his constitutional rights as well as the nature of the charge and the consequences of his plea. *Id.* at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584; *see supra* note 2. Each right must be specifically enumerated and waived by the defendant. *Tahl*, 1 Cal. 3d at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584; *see supra* note 2. However, this strict mandate was later curbed in People v. Howard, 1 Cal. 4th 1132, 824 P.2d 1315, 5 Cal. Rptr. 2d 268, *cert. denied*, 113 S. Ct. 383 (1992). In *Howard*, the California Supreme Court re-examined its determination in *Tahl* and found that the Court could use a totality of the circumstances standard to determine whether a defendant did in fact voluntarily and intelligently enter a guilty plea, even absent a spe-

section 12022.1.[4] Under section 12022.1, a court can enhance a defendant's sentence by two years for committing a crime (secondary offense) while released on bail or released on one's own recognizance from a prior conviction (primary offense).[5] In *Adams*, the state charged the defendant with six felony counts, three of which the state alleged occurred while he was released on bail from a primary offense.[6] The defendant, Adams, for tactical reasons[7], chose to stipulate to the fact that he was out on bail at the time of the alleged secondary offenses.[8] The trial judge advised Adams such an admission would make the section 12022.1 charge easier to prove, but that the People still had to prove Adams committed the primary and secondary offenses.[9] After his conviction, Adams argued on appeal that the court failed to properly advise him of his constitutional rights as mandated by *Boykin-Tahl.*[10]

---

cific waiver of the three constitutional rights. Id. at 1178, 824 P.2d at 1341-42, 5 Cal. Rptr. 2d at 294-95; *see supra* note 2 for a listing of these three rights.

4. CAL. PENAL CODE § 12022.1 (West 1992). This sections states:

> Any person arrested for a secondary offense which was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court.

Id. § 12022.1(b).

5. *Adams*, 6 Cal. 4th at 572, 862 P.2d at 832, 24 Cal. Rptr. 2d at 832; *see* CAL. PENAL CODE § 12022.1(b) (West 1992).

6. *Id.* at 574, 862 P.2d at 833, 24 Cal. Rptr. 2d at 833.

7. *Id.* at 575 n.4, 862 P.2d at 834 n.4, 24 Cal. Rptr. 2d at 834 n.4. The court noted that evidentiary stipulations are standard trial tactics which do not come under the purview of *Boykin-Tahl. Id.* at 578, 862 P.2d at 836, 24 Cal. Rptr. 2d at 836 (citing Linsk v. Linsk, 70 Cal. d 272, 277, 449 P.2d 760, 762-63, 74 Cal. Rptr. 544, 546-47 (1969)); *see also* People v. Chasco, 276 Cal. App. 2d 271, 273-76, 80 Cal. Rptr. 667, 669-71 (1969) (stating that attorneys have the discretion to stipulate to certain facts and holding that an attorney's stipulation which led to the defendant's conviction did not constitute a denial of the defendant's constitutional rights), *cert. denied*, 397 U.S. 1052 (1970); People v. McCoy, 40 Cal. App. 3d 854, 857-58, 115 Cal. Rptr. 559, 560-61 (1974) (reasoning that counsel's stipulation to the fact that the defendant had drugs on his person, which resulted in a conviction on possession charges, was a tactical decision not subject to *Boykin-Tahl* standards).

8. *Adams*, 6 Cal. 4th at 574-75, 862 P.2d at 833-34, 24 Cal. Rptr. 2d at 833-34.

9. *Id.*

10. *Id.* at 575, 862 P.2d at 834, 24 Cal. Rptr. 2d at 834. The People relied largely on People v. Stuckey, 199 Cal. App. 3d 876, 245 Cal. Rptr. 225 (1988) which is closely analogous to *Adams*. The *Stuckey* court found the *Boykin-Tahl* requirements did not apply in a § 12022.1 case in which a defendant had stipulated to being out on bail from the primary offense when the alleged secondary offense occurred. *Id.* at 833, 245 Cal. Rptr. at 229. Because the *Stuckey* decision was in conflict with the appellate court's reasoning in *Adams*, the California Supreme Court granted the People's petition for review. *Adams*, 6 Cal. 4th at 573, 862 P.2d at 833, 24 Cal. Rptr. 2d at 833. *See generally* 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings*

The *Adams* court noted that *Boykin-Tahl* extends beyond guilty plea situations.[11] In its *In re* Yurko decision,[12] the California Supreme Court found that courts must give *Boykin-Tahl* constitutional warnings to any defendant who admits to prior convictions that the state introduced to adjudge him a habitual criminal.[13] The supreme court distinguished *Adams* from *Yurko*, however, explaining that the stipulation by Adams did not itself admit to anything that increased the defendant's penalty because the People still maintained the burden to prove the facts of the primary offense to a jury.[14] The court observed that the purpose of *Boykin* was to warn a defendant before he involuntarily relinquished his constitutional rights by admitting to facts that conceded his guilt.[15] Because the defendant in *Adams* merely admitted to evidentiary facts that alone could not convict him, the court held that the standards set forth in *Boykin-Tahl* did not apply.[16]

MARLEE ADAMS SNOWDON

Before Trial §§ 2149-52 (2d ed. 1989) (providing a general review of California law regarding *Boykin-Tahl* requirements); 21 CAL. JUR. 3D *Criminal Law* § 2816 (1984 & Supp. 1994) (same); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (discussing the guilty plea process).

11. *Adams*, 6 Cal. 4th at 576, 862 P.2d at 835, 24 Cal. Rptr. 2d at 835.

12. 10 Cal. 3d 857, 519 P.2d 561, 112 Cal. Rptr. 513 (1974).

13. *Adams*, 6 Cal. 4th at 576-77, 862 P.2d at 835, 24 Cal. Rptr. 2d at 835. The *Adams* court clearly distinguished *Yurko*, however, from cases involving a mere admissions to evidentiary elements that "did not admit every element necessary to conviction of an offense or to imposition of punishment on a charged enhancement . . . ." *Adams*, 6 Cal. 4th at 577, 862 P.2d at 835-36, 24 Cal. Rptr. 2d at 835-36; *see, e.g.*, People v. Ramirez, 50 Cal. 3d 1158, 1183-84, 791 P.2d 965, 981, 270 Cal. Rptr. 286, 302 (1990) (holding that a defendant who admitted to past convictions at the penalty phase was not protected by *Boykin-Tahl*), *cert. denied*, 498 U.S. 1110 (1991); People v. Hovey, 44 Cal. 3d 543, 567, 749 P.2d 776, 789, 244 Cal. Rptr. 121, 134 (finding *Boykin-Tahl* inapplicable in a case where the defendant admitted being the individual who kidnapped and committed the offense that killed the victim because the stipulation did not deprive the defendant of any affirmative defenses), *cert. denied*, 488 U.S. 871 (1988).

14. *Adams*, 6 Cal. 4th at 581, 862 P.2d at 838, 24 Cal. Rptr. 2d at 838. The court stated, "Unless [the defendant] stipulates both to the bail/own recognizance element of the enhancement *and* that he is guilty of or has been convicted of the primary offense, his stipulation to the former will not necessarily lead to imposition of the enhanced penalties . . . ." *Id.* (emphasis added).

15. *Id.* at 580-81, 862 P.2d at 838, 24 Cal Rptr. 2d at 838.

16. *Id.* at 573, 862 P.2d at 833, 24 Cal. Rptr. 2d at 833.

B. *Section 5463 of the Business and Professions Code, which authorizes the California Department of Transportation, on ten days' notice, to revoke any permit for off-premises billboards failing to comply with the California Outdoor Advertising Act, and to remove and destroy any such noncomplying billboards, affords billboard owners adequate procedural due process under both the state and federal constitutions:*
Traverso v. People ex rel. Department of Transportation.

I. INTRODUCTION

Section 5463 of the California Business and Professions Code[1] gives the California Department of Transportation (Caltrans) the authority to enforce the California Outdoor Advertising Act (the Act).[2] The first paragraph of section 5463 authorizes Caltrans, on ten days' notice, to revoke any permit for off-premises billboards failing to comply with the Act, and to physically remove or destroy any such billboards.[3] In *Traverso v. People ex rel. Department of Transportation*,[4] the California Supreme Court addressed whether the first paragraph of section 5463[5] comported with procedural due process as mandated by the California and United States Constitutions.[6] The court upheld the validity of section 5463 both on its face and as applied to the circumstances presented in *Traverso*.[7]

---

1. *See* CAL. BUS. & PROF. CODE § 5463 (West 1990). All statutory references are to the Business and Professions Code unless otherwise indicated.

2. CAL. BUS. & PROF. CODE §§ 5200-5499.30 (West 1990 & Supp. 1994).

3. The first paragraph of § 5463 reads in pertinent part:

> The director may revoke any license or permit for the failure to comply with the provisions of this chapter and may remove and destroy any advertising display placed or maintained in violation of this chapter after 10 days' written notice posted on such structure or sign and a copy forwarded by mail to the display owner at his last known address.

CAL. BUS. & PROF. CODE § 5463 (West 1990).

4. 6 Cal. 4th 1152, 864 P.2d 488, 26 Cal. Rptr. 2d 217 (1993). Chief Justice Lucas delivered the opinion for the court, in which Justices Mosk, Panelli, Arabian, Baxter, and George concurred. *Id.* at 1156, 864 P.2d at 489, 26 Cal. Rptr. 2d at 218. Justice Kennard wrote a separate dissenting opinion. *Id.* at 1168, 864 P.2d at 497, 26 Cal. Rptr. 2d at 226.

5. Hereinafter, the first paragraph of § 5463 will be referred to as "section 5463," even though the court did not address the validity of the section's remaining provisions. *Traverso*, 6 Cal. 4th at 1156, 864 P.2d at 489, 26 Cal. Rptr. 2d at 218.

6. *Id.*

7. *Id.* In 1959, Richard Traverso, licensed to do business as Adco Outdoor Advertising (Adco), received two permits to maintain a billboard along Highway 101 in Cotati, California. *Id.* at 1157, 864 P.2d at 490, 26 Cal. Rptr. 2d at 219. Although Adco's billboard was rendered "nonconforming" by virtue of the 1986 amendments to the Act,

Under both the California and United States Constitutions, an individual[8] may not be deprived of "life, liberty, or property, without due process of law."[9] This "procedural due process," which requires notice of the deprivation and the opportunity to be heard on the matter,[10] must be given prior to the deprivation of any protectible interest.[11] The right to use real or personal property is a protected interest[12] to which procedural due process must be afforded even if the property interest may ultimately be taken under the police power of the state.[13] Thus, proce-

---

Adco was allowed to maintain the billboard under the grandfather clause set forth in § 5360. *Id.*

Early in 1984, Adco's billboard fell down due to undetermined causes, and on February 10, 1984, Caltrans wrote a letter to Adco indicating its intention to revoke the permits unless Adco responded within 30 days. *Id.* at 1158, 864 P.2d at 490, 26 Cal. Rptr. 2d at 219. This letter also apprised Adco of its right to reconstruct the billboard and the procedure for doing so. *Id.* It was disputed whether Adco actually responded to this letter. *Id.* On April 30, 1984, Caltrans wrote another letter to Adco indicating the revocation of the permits. *Id.*

In June of 1986, Adco reconstructed the billboard without obtaining a permit. *Id.* On June 11, 1986, Caltrans posted a notice on Adco's billboard stating that the sign was in violation of the Act because, among other things, it was constructed without a valid permit. *Id.* Caltrans sent a copy of this notice to Adco. *Id.* at 1158, 864 P.2d at 490-91, 26 Cal. Rptr. 2d at 219-20. On August 31, 1987, Caltrans began removing the billboard. *Id.* at 1158, 864 P.2d at 491, 26 Cal. Rptr. 2d at 220. Adco subsequently filed suit challenging the constitutionality of § 5463 and the actions taken by Caltrans. *Id.* The trial court granted Caltrans' motion for summary judgment, upholding the constitutionality of § 5463. *Id.* The California Court of Appeal reversed the decision, and the California Supreme Court granted review. *Id.* at 1159, 864 P.2d at 491, 26 Cal. Rptr. 2d at 220.

8. For purposes of procedural due process, an "individual" includes both natural and unnatural persons. Thus, a corporation is also entitled to the protection afforded by procedural due process. *See* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 482(a) (9th ed. 1988 & Supp. 1994).

9. U.S. CONST. amends. V, XIV; *see* CAL. CONST. art. I, § 7.

10. For a discussion of the essential requirements of procedural due process, see 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 499-502 (9th ed. 1988 & Supp. 1994).

11. *See* Goss v. Lopez, 419 U.S. 565, 579 (1975); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914) (noting that "[t]he fundamental requisite of due process of law is the opportunity to be heard," which necessarily requires that an individual be "informed that the matter is pending and can choose for himself whether to . . . contest").

12. Board of Regents v. Roth, 408 U.S. 564, 571 (1972).

13. *See, e.g.*, Kash Enter. v. City of Los Angeles, 19 Cal. 3d 294, 562 P.2d 1302, 138 Cal. Rptr. 53 (1977) (requiring due process in connection with the seizure of newspaper racks violating city ordinance); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96

dural due process guards "against the arbitrary deprivation of property," and does not speak to the ability of government to deprive an individual of his property.[14]

II. TREATMENT

In *Traverso*, the California Supreme Court addressed whether section 5463 provided adequate protection against the arbitrary deprivation of permits and billboards used for off-premises advertising.[15] Chief Justice Lucas first examined whether the billboards governed by section 5463 constituted protectible property interests.[16] Acknowledging that the billboards possessed great advertising revenue generating capacity and that the physical structure of the billboards had inherent open-market or salvage value, the court found protectible property interests to subsist therein.[17]

The court next examined whether the permits issued to operate such billboards also constituted protectible property interests.[18] Caltrans argued that because billboard operators are required to renew their permits annually, an operator who failed to renew his permit had no protectible property interest in the expired permit.[19] The court rejected

---

Cal. Rptr. 42 (1971) (holding that due process must accompany the seizure of a refrigerator pursuant to the state's delivery statute); Bryte v. City of La Mesa, 207 Cal. App. 3d 687, 255 Cal. Rptr. 64 (1989) (requiring due process prior to confiscating a mental patient's firearms); Menefee & Son v. Department of Food & Agric., 199 Cal. App. 3d 372, 228 Cal. Rptr. 166 (1988) (mandating due process in connection with the seizure of crops treated with unauthorized pesticide); Phillips v. San Luis Obispo Dep't of Animal Reg., 183 Cal. App. 3d 372, 228 Cal. Rptr. 101 (1986) (requiring due process in connection with the destruction of a vicious dog); Hughes v. Neth, 80 Cal. App. 3d 952, 146 Cal. Rptr. 37 (1978) (requiring due process before destroying a motorcycle having an illegally altered serial number). *But see* Department of Transp. v. Durden, 471 So. 2d 1271 (Fla. 1985) (noting the absence of a property interest in a billboard constructed in knowing violation of state law).

14. *See* Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972) (stating that procedural due process "raises no impenetrable barrier to the taking of a person's possessions").

15. *Traverso*, 6 Cal. 4th at 1159, 864 P.2d at 491, 26 Cal. Rptr. 2d at 220.

16. *Id.*

17. *Id.* at 1160, 864 P.2d at 492, 26 Cal. Rptr. 2d at 221.

18. *Id.* at 1161, 864 P.2d at 493, 26 Cal. Rptr. 2d at 222.

19. *Id.* at 1162, 864 P.2d at 493, 26 Cal. Rptr. 2d at 222. Caltrans relied on two United States Supreme Court decisions which held that procedural due process concerns were not implicated where the property interest may have been terminated by a self-executing statutory condition. *See* Texaco, Inc. v. Short, 454 U.S. 516, 526 (1982) (upholding an Indiana statute which abolished all mineral interests unused for a period of twenty years); United States v. Locke, 471 U.S. 84, 104 (1985) (validating a federal statute which abolished all mining claims where the owner failed to register or file a notice of intent to hold the claim on a yearly basis). The court distinguished these decisions on the basis that, unlike § 5463, the statutes at issue in these decisions auto-

Caltrans' argument, stating that because the permit did not automatically expire upon the failure to renew, the revocation thereof required substantial state involvement.[20] Thus, Caltrans' discretionary power to revoke the permit amounted to government action necessitating compliance with procedural due process.[21] The court therefore held that the permits governed by section 5463 constituted protectible property interests entitled to due process protection.[22]

After concluding that both the permits and billboards constituted protectible property interests, the court next examined whether section 5463 offered billboard operators adequate protection under the California and United States Constitutions.[23] The court acknowledged that the statute's ten day notice period was "relatively short," but nevertheless found it to meet the notice requirement.[24] The court reasoned that most billboard operators were "sophisticated business entities" and could make an "adequate investigation" within the notice period.[25]

In addition, although the statute did not expressly provide for the right to a hearing, the court found such a right could be implied from the language of the statute.[26] The majority emphasized that statutes are to be construed in favor of their constitutionality, and when statutes require a "quasi-judicial" fact-finding determination, they are to be interpreted to require a hearing unless expressly indicated otherwise.[27] Thus, because section 5463 contemplated a fact-finding determination by Caltrans and did not expressly preclude a hearing, the court held that section 5463 contained an implied right to a hearing.[28] Therefore, the notice and hearing attributes of section 5463 complied with the dictates of procedural due process, thereby validating the statute on its face.[29]

Finally, the court considered whether section 5463, as applied to the

---

matically terminated the interests without any state involvement. *Traverso*, 6 Cal. 4th at 1163, 864 P.2d at 493, 26 Cal. Rptr. 2d at 222.

20. *Id.* at 1163, 864 P.2d at 493-94, 26 Cal. Rptr. 2d at 222-23.

21. *Id.* at 1163, 864 P.2d at 494, 26 Cal. Rptr. 2d at 223.

22. *Id.* at 1164, 864 P.2d at 494, 26 Cal. Rptr. 2d at 223.

23. *Id.*

24. *Id.* at 1164, 864 P.2d at 494-95, 26 Cal. Rptr. 2d at 223-24.

25. *Id.*

26. *Id.* at 1164, 864 P.2d at 495, 26 Cal. Rptr. 2d at 224.

27. *Id.* at 1165, 864 P.2d at 495, 26 Cal. Rptr. 2d at 224.

28. *Id.* at 1167, 864 P.2d at 497, 26 Cal. Rptr. 2d at 226. The court also noted that the notice period itself suggested that a hearing could be implied by the statute. *Id.*

29. *Id.*

circumstances presented in *Traverso*, complied with procedural due process.[30] The majority noted that procedural due process only requires that an individual be given the opportunity to be heard, but does not require that a hearing actually take place.[31] Thus, the court found that Adco's decision not to request a hearing was fatal to its constitutional challenge.[32] Therefore, the court held that section 5463, as applied to Adco, did not violate procedural due process.[33]

III. CONCLUSION

In light of *Traverso*, billboard owners may find comfort in the fact that both their billboards and permits constitute protectible property interests entitling them to due process protection. On the other hand, *Traverso* validated section 5463, which authorizes Caltrans to revoke any permit for off-premises billboards failing to comply with the Act, and to remove and destroy such billboards upon ten days' notice. Although the opportunity for a hearing must be provided, billboard operators should be warned that the notice need not expressly inform them of their right to be heard.

DOUGLAS J. DENNINGTON

30. *Id.* at 1168, 864 P.2d at 497, 26 Cal. Rptr. 2d at 226.

31. *Id.* In a dissenting opinion, Justice Kennard criticized the majority's finding that Caltrans' notice provided adequate due process. *Id.* at 1170, 864 P.2d at 498, 26 Cal. Rptr. 2d at 227 (Kennard, J., dissenting). Justice Kennard argued that the notice must inform the owner of his right to a hearing. *Id.* (Kennard, J., dissenting). She stated that the notice to Adco was not "reasonably calculated" to apprise it of "the availability of an administrative procedure," and therefore it did not comport with the mandates of procedural due process. *Id.* at 1170-71, 864 P.2d at 499, 26 Cal. Rptr. 2d at 228 (Kennard, J., dissenting) (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 22 (1978)).

32. *Id.* at 1168, 864 P.2d at 497, 26 Cal. Rptr. 2d at 226.

33. *Id.*

V. CRIMINAL LAW

A. *A criminal defendant cannot face conviction for more than one offense in furtherance of a single criminal act:* People v. Latimer.

I. INTRODUCTION

In *People v. Latimer*,[1] the California Supreme Court held that a criminal defendant cannot be punished for multiple offenses that were in furtherance of a single criminal offense.[2] The decision expressly upheld the interpretation of section 654 of the California Penal Code[3] set forth in *People v. Neal*.[4]

Justice Arabian, writing for the majority, sharply criticized the *Neal*

---

1. 5 Cal. 4th 1203, 858 P.2d 611, 23 Cal. Rptr. 2d 144 (1993). Justice Arabian wrote the majority opinion of the court, in which Chief Justice Lucas and Justices Panelli, Kennard, Baxter, and George joined. *Id.* at 1205, 858 P.2d at 612, 23 Cal. Rptr. 2d at 145. Justice Mosk filed a separate concurring opinion. *Id.* at 1217, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153 (Mosk, J., concurring).

2. The facts of the case showed that while the defendant and the victim were running errands, the defendant drove the victim into the desert where he hit and choked her, raped her, and forced oral copulation. *Id.* at 1206, 858 P.2d at 613, 23 Cal. Rptr. 2d at 146. Afterwards, the defendant drove the victim "about 50 to 75 yards" further into the desert and raped her again. *Id.* The victim, fearing for her life, jumped out of the car, and the defendant drove away. The victim suffered multiple injuries, including a broken jaw. *Id.* The defendant, Derek Latimer, plead nolo contendere to two counts of forcible rape and one count of kidnapping. *Id.* at 1206, 858 P.2d at 612-13, 23 Cal. Rptr. 2d at 145-46. The defendant was sentenced to a total of 18 years and eight months in prison, 20 months of which were for the kidnapping conviction. Id. at 1206, 858 P.2d at 613, 23 Cal. Rptr. 2d at 146. The defendant appealed his conviction. *Id.*

A divided court of appeal held that the defendant could face punishment for both rapes, but not for the kidnapping since the defendant perpetrated it in furtherance of the defendant's "intent and objective" to effect the rapes. *Id.* at 1206-07, 858 P.2d 613, 23 Cal. Rptr. 2d at 146.

3. Penal Code § 654 provides:

> An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

CAL. PENAL CODE § 654 (West 1988).

4. 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960), *cert. denied*, 365 U.S. 823 (1961).

holding.[5] However, the court upheld *Neal* on stare decisis grounds,[6] proclaiming that the legislative process was the only proper avenue for overruling *Neal*.[7] Justice Mosk issued a concurring opinion in which he supported the *Neal* holding.[8]

II. TREATMENT

The court began its discussion by analyzing section 654 of the California Penal Code which forbids multiple punishment for offenses "'made punishable in different ways by different provisions of . . . [the penal] code . . . .'"[9] In *Neal*, the court determined that "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor."[10] The *Neal* test superseded *In re Chapman*,[11] which held that section 654 applied only when "the two offenses are committed by the same act or when that act is essential to both . . . ."[12]

Members of the judiciary have continued to severely criticize the intent-based approach to section 654.[13] The court looked to one of the most vocal critics of the intent-based approach, Justice Schauer, for arguments against an intent-based application of section 654.[14] Justice

---

5. *Latimer*, 5 Cal. 4th at 1211-12, 858 P.2d at 616-17, 23 Cal. Rptr. 2d at 149-50. In *Neal*, a defendant threw gasoline in the bedroom of the victims and then ignited the gasoline. The defendant was convicted of two counts of attempted murder and one count of arson. *Neal*, 55 Cal. 2d at 15, 357 P.2d at 840, 9 Cal. Rptr. at 609. The Supreme Court of California held that under § 654, the defendant could not be punished for the arson. *Id.* at 21, 357 P.2d at 845, 9 Cal. Rptr. at 613. The court reasoned:

> [W]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.

Id. at 19, 357 P.2d at 843, 9 Cal. Rptr. at 611-12. *See generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3358-61 (1985); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, PUNISHMENT FOR CRIME § 1382 (2d ed. 1989); Luke McKissack, *Included Offense Doctrine in California*, 10 UCLA L. REV. 871, 883-93 (1963).

6. *Latimer*, 5 Cal. 4th at 1216, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152.

7. *Id.* at 1216, 858 P.3d at 619-20, 23 Cal. Rptr. 2d at 152-53.

8. *Id.* at 1217, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153 (Mosk, J., concurring).

9. *Id.* at 1207, 858 P.2d at 613, 23 Cal. Rptr. 2d at 146 (quoting CAL. PENAL CODE § 654 (West 1988)).

10. *Neal*, 55 Cal. 2d at 19, 357 P.2d at 843, 9 Cal. Rptr. at 611.

11. 43 Cal. 2d 385, 273 P.2d 817 (1954).

12. *Id.* at 390, 273 P.2d at 819.

13. *See* Phillip E. Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CAL. L. REV. 357 (1970); Gerald M. Schneider, *Penal Code Section 654: The Prosecutor's Dilemma*, 17 HASTINGS L.J. 53 (1965).

14. *Latimer*, 5 Cal. 4th at 1209-10, 858 P.2d at 615-16, 23 Cal. Rptr. 2d at 148-49.

Schauer hypothesized that a smart criminal could escape prosecution for a multitude of criminal acts simply by forming the intent that the criminal acts be in furtherance of a single criminal offense.[15]

The court also noted Justice Dabney's criticism of the *Neal* approach, which acknowledged that "*Neal* could direct a punishment which minimizes . . . culpability for a night of terrorization of the victim."[16] The court conceded that the criticisms of *Neal* by Justices Schauer and Dabney had "some merit."[17]

The court in *Latimer*, expressing its reservations about the *Neal* test, claimed that it did not comport with the purpose of section 654: "to insure that a defendant's punishment will be commensurate with his culpability."[18] Looking at the result of the *Neal* test in the case before it, the court determined that the defendant, who was convicted of both kidnapping and rape, was "clearly more culpable than a defendant who rapes without kidnapping" and therefore should be punished for both crimes.[19]

Having criticized the philosophical underpinnings of the *Neal* decision, the court turned to the issue of whether it should uphold *Neal* on stare decisis grounds.[20] The court described the issue as one of "statutory interpretation"[21] which placed a greater burden on the party seeking to overrule because "the legislative power is implicated."[22] Recognizing that the legislature can overrule the courts on matters of statutory interpretation,[23] the court maintained that legislative silence on an issue

15. *Id.* at 1210, 858 P.2d at 615, 23 Cal. Rptr. 2d at 148 (quoting Seiterle v. Superior Court, 57 Cal. 2d 397, 403, 369 P.2d 697, 701-02, 20 Cal. Rptr 1, 5 (1962) (Schauer, J., concurring in part and dissenting in part)). In *Seiterle*, Justice Schauer called the *Chapman* test "better law . . . [and] . . . better penology." *Seiterle*, 57 Cal. 2d at 404, 369 P.2d at 701, 20 Cal. Rptr. at 5 (Schauer, J., concurring in part and dissenting in part).

16. *Latimer*, 5 Cal. 4th at 1211, 858 P.3d at 616, 23 Cal. Rptr. 2d at 149 (quoting People v. Latimer, 8 Cal. Rptr. 2d 883 (Ct. App.) (Dabney, J., dissenting), *vacated*, 5 Cal. 4th 1203, 858 P.2d 611, 23 Cal. Rptr. 2d 144 (1993)).

17. *Id.* at 1211, 858 P.2d at 616, 23 Cal. Rptr. 2d at 149.

18. *Id.* (quoting People v. Perez, 23 Cal. 3d 545, 550-51, 591 P.2d 63, 66-67, 153 Cal. Rptr. 40, 43 (1979)).

19. *Id.* at 1211, 858 P.2d at 616, 23 Cal. Rptr. 2d at 149.

20. *Id.* at 1212, 858 P.2d at 617, 23 Cal. Rptr. 2d at 150.

21. *Id.* at 1213, 858 P.2d at 617, 23 Cal. Rptr. 2d at 150.

22. *Id.* (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)).

23. *Id.*

does not necessarily suggest approval.[24]

The court stated that one key factor in guiding stare decisis questions is reliance.[25] The court observed that while the legislature had not expressly approved the *Neal* holding, it had relied upon the holding in enacting subsequent legislation.[26] The California Legislature has enacted legislation demonstrating its acknowledgment of the *Neal* holding.[27] Since the *Neal* decision, the legislature has enacted the Determinate Sentencing Act,[28] developed sentence enhancements,[29] and generally increased the length of sentences.[30] Noting that the legislature had enacted a statute which enhanced sentences for rapes involving kidnapping, the court held that under the principle of stare decisis, such legislation effectively prevented the overrule of *Neal* because the legislature had developed its own remedy for the limitations imposed by *Neal.*[31]

Applying *Neal* to the present case, the court found no evidence to suggest that the kidnapping was for any purpose other than to effect the rape.[32] The court held that the defendant could not be prosecuted for both rape and kidnapping,[33] and thus affirmed the judgment of the court of appeal.[34]

Justice Mosk, in a concurring opinion, wrote to defend the *Neal* decision, which he claimed "does not merit an additional critique at this late date."[35]

---

24. *Id.* at 1213, 858 P.2d at 618, 23 Cal. Rptr. 2d at 151.

25. *Latimer*, 5 Cal. 4th at 1213-14, 858 P.2d at 618, 23 Cal. Rptr. 2d at 151.

26. *Id.* at 1214-15, 858 P.2d at 618-19, 23 Cal. Rptr. 2d at 151-52.

27. *Id.*

28. *Id.* at 1214-16, 858 P.2d at 618-19, 23 Cal. Rptr. 2d at 151-52.

29. *Id.* at 1215-16, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152.

30. *Id.* at 1214-15, 858 P.2d at 618-19, 23 Cal. Rptr. 2d at 151-52.

31. *Id.* at 1215, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152. The court recognized that the enactment of Penal Code § 667.8 "was originally designed to eliminate the partial sentence reduction that might be gained by application of . . . the prohibition against multiple punishment contained in section 654." *Id.* (quoting People v. Hernandez, 46 Cal. 3d 194, 203, 757 P.2d 1013, 1017, 249 Cal. Rptr. 850, 854 (1988)).

Penal code § 667.8(a) provides in pertinent part: "[A]ny person convicted of a felony violation of Section 261, 264.1, 286, 288a, or 289 who, for the purpose of committing that sexual offense, kidnapped the victim in violation of section 207, shall be punished by an additional term of three years." CAL. PENAL CODE § 667.8 (West 1988).

32. *Latimer*, 5 Cal. 4th at 1216, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153.

33. *Id.*

34. *Id.* at 1217, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153; *see supra* note 2.

35. *Latimer*, 5 Cal. 4th at 1217, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153 (Mosk, J., concurring).

III. CONCLUSION

Although the California Supreme Court upheld *People v. Neal* on stare decisis grounds,[36] the court in *Latimer* made clear that it did not agree with the *Neal* holding.[37] Noting over thirty years of legislative reliance on *Neal*, the court recognized that the responsibility of overturning *Neal* rested with the legislature.[38] Thus, the court held that a defendant cannot be tried for multiple criminal offenses in furtherance of a single criminal activity.[39]

Because overruling *Neal* would upset the sentencing scheme enacted by the legislature, the court exercised judicial restraint, but made it clear that the legislative overrule of *Neal* would be welcome.[40]

SANFORD A. TOYEN

36. *Id.* at 1215, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152.
37. *Id.* at 1211, 858 P.2d at 616, 23 Cal. Rptr. 2d at 149.
38. *Id.* at 1215, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152.
39. *Id.*
40. *Id.* at 1211, 858 P.2d at 616, 23 Cal. Rptr. 2d at 14.

B. *Evidence of excessive intoxication, prior drunk driving convictions, unsafe driving speed, and other facts are admissible to support a finding of gross negligence in a vehicular manslaughter case:* **People v. Ochoa.**

I. INTRODUCTION

In *People v. Ochoa*,[1] the California Supreme Court addressed the issue of whether evidence presented in the prosecution of Albert Ochoa for gross vehicular manslaughter was sufficient to sustain a conviction.[2] The court of appeal ruled that the evidence presented at trial was insufficient to support a finding of gross negligence, and set aside the verdict.[3] The supreme court then granted review.[4]

II. TREATMENT

A. *Majority Opinion*

The majority overruled the court of appeal's evidentiary ruling, which excluded evidence of the defendant's prior drunk driving conviction and subsequent education on that subject.[5] The court of appeal stated that the gross negligence standard is an objective one[6] because "evi-

---

1. 6 Cal. 4th 1199, 864 P.2d 103, 26 Cal. Rptr. 2d 23 (1993). Chief Justice Lucas authored the majority opinion, in which Justices Kennard, Arabian, Baxter, and George concurred. *Id.* at 1202, 864 P.2d at 104, 26 Cal. Rptr. 2d at 24. Justice Panelli filed a separate concurring and dissenting opinion. *Id.* at 1208, 864 P.2d at 108, 26 Cal. Rptr. 2d at 28.

2. *Id.* at 1202, 864 P.2d at 104, 26 Cal. Rptr. 2d at 24. Ochoa was arrested following an accident in which he collided with another car, causing it to hit a tree, and killing two people. His blood alcohol level two hours after the accident was measured at .128 percent, and a criminologist estimated that it may have been as high as .15 at the time of the accident—close to twice the legal limit. It was also alleged that Ochoa was driving approximately 15 miles per hour over the posted speed limit of 55 miles per hour at the time of the accident.

In 1988, Ochoa had been convicted of driving under the influence of alcohol (DUI), and had attended an extensive "alcohol awareness class, which included discussion of the dangers of drinking and driving." *Id.* at 1203, 864 P.2d at 104-05, 26 Cal. Rptr. 2d at 25. At the time of his arrest, Ochoa admitted knowing he was on probation and also that he was not supposed to be driving.

3. *Id.* at 1203, 864 P.2d at 105, 26 Cal. Rptr. 2d at 25. "In the majority's view, the evidence showed at most that defendant drove at high speeds while intoxicated, conduct amounting to simple negligence." *Id.* The court of appeal also held that the evidence relating to Ochoa's prior DUI conviction and subsequent treatment was inadmissible. *Id.* at 1204, 864 P.2d at 105, 26 Cal. Rptr. 2d at 25.

4. *Id.* at 1202, 864 P.2d at 104, 26 Cal. Rptr. 2d at 24.

5. *Id.* at 1205-06, 864 P.2d at 106, 26 Cal. Rptr. 2d at 26-27.

6. "Gross negligence is the exercise of so slight a degree of care as to raise a pre-

dence of . . . [the defendant's] state of mind was irrelevant and unduly prejudicial."[7] The supreme court disagreed, and insisted that the jury should have been given all "relevant facts as to what [the] defendant knew, including his actual awareness of those risks."[8]

After concluding that this evidence was properly admitted by the trial court, the court addressed the issue of whether the evidence presented was sufficient to support a finding of gross negligence.[9] The court considered two persuasive factors supporting the conviction; the blood alcohol level of the defendant, which was nearly twice the legal limit, as well as the high rate of speed at which the defendant was driving.[10] The majority also noted that the court of appeal's determination that defendant was driving prudently was "entirely speculative and inappropriate, drawing an inference favorable to defendant rather than in support of the judgment of conviction."[11] Finally, the majority dismissed the defendant's claim that he slept for two hours after drinking and before driving, largely because the evidence tended to rebut such a claim.[12]

After reviewing these facts, the supreme court was convinced that the defendant "exercised so slight a degree of care as to exhibit a conscious indifference or 'I don't care attitude' concerning the ultimate consequences of his actions."[13] Based on the weight of the evidence,[14] the

---

sumption of conscious indifference to the consequences." *Id.* at 1204, 864 P.2d at 105, 26 Cal. Rptr. 2d at 25. "The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved." *Id.* (quoting People v. Bennett, 54 Cal. 3d 1032, 1036, 819 P.2d 849, 852, 2 Cal. Rptr. 2d 8, 11 (1991)); *see* 17 CAL. JUR. 3D *Criminal Law* § 277 (1984 & Supp. 1993) (discussing gross negligence and vehicular manslaughter); 46 CAL. JUR. 3D *Negligence* § 88 (1978) (discussing gross negligence in general).

7. *Ochoa*, 6 Cal. 4th at 1205, 864 P.2d at 106, 26 Cal. Rptr. 2d at 26.

8. *Id.*; *see Bennett*, 54 Cal. 3d at 1038, 819 P.2d at 853, 2 Cal. Rptr. 2d at 12 (stating that "the jury should . . . consider all relevant circumstances . . . to determine if the defendant acted with a conscious disregard of the consequences rather than with mere inadvertence"); *see also* People v. Costa, 40 Cal. 2d 160, 166, 252 P.2d 1, 5 (1953) (finding relevant a warning as to danger of high speed driving given by a police officer shortly before accident).

9. *Ochoa*, 6 Cal. 4th at 1206, 864 P.2d at 106, 26 Cal. Rptr. 2d at 27.

10. *Id.* at 1206-07, 864 P.2d at 107, 26 Cal. Rptr. 2d at 27.

11. *Id.* at 1207, 864 P.2d at 107, 26 Cal. Rptr. 2d at 27. The supreme court emphasized that it was required to "view the evidence in the light most favorable to the People." *Id.* at 1206, 864 P.2d at 107, 26 Cal. Rptr. 2d at 27.

12. *Id.* at 1207, 864 P.2d at 107, 26 Cal. Rptr. 2d at 27.

13. *Id.* at 1208, 864 P.2d at 108, 26 Cal. Rptr. 2d at 28.

14. In *Bennett*, the court states that "the finding of gross negligence . . . may be

supreme court ruled that the court of appeal erred in reaching the conclusion that the conviction was not supported by the evidence, and remanded the case to determine the remaining issues.[15]

B. Justice Panelli's Concurring and Dissenting Opinion

Justice Panelli concurred with the majority, but believed that the evidence of the defendant's subjective awareness of the risk should have been excluded.[16] Justice Panelli maintained that the majority misinterpreted the "conscious indifference" portion of the gross negligence test, and replaced it with a subjective test.[17] According to Justice Panelli, this test was not supported by the cases cited by the majority.[18] Finally, Justice Panelli argued that if the evidence were admitted, the defendant should have been allowed to introduce evidence to show that he was not subjectively aware of the risk.[19]

III. CONCLUSION

In its holding in *Ochoa*, the supreme court has gone from a purely objective standard to a more subjective standard when determining what constitutes gross negligence. In its application to drunk driving prosecutions, this standard will make it more difficult for defendants with previous drunk driving convictions to escape prosecution for subsequent drunk driving incidents. While this departure will likely result in a greater number of convictions, the threat it imposes may deter persons with DUI convictions from driving while intoxicated in the future. It will certainly

---

based on the overall circumstances surrounding the fatality. Intoxication is one of those circumstances and its effect on the defendant's driving may show gross negligence." People v. Bennett, 54 Cal. 3d 1032, 1040, 819 P.2d 849, 854, 2 Cal. Rptr. 2d 8, 13 (1991).

15. *Ochoa*, 6 Cal. 4th at 1208, 864 P.2d at 108, 26 Cal. Rptr. 2d at 28.

16. *Id.* at 1208-09, 864 P.2d at 108, 26 Cal. Rptr. 2d at 28 (Panelli, J., concurring and dissenting).

17. *Id.* at 1209-10, 864 P.2d at 108-09, 26 Cal. Rptr. 2d at 29 (Panelli, J., concurring and dissenting). Justice Panelli stated that the new test is whether "'a reasonable person in the defendant's position would have been aware of the risk involved.' The end result is a test that is no longer truly objective." *Id.* at 1209, 864 P.2d at 108-09, 26 Cal. Rptr. 2d at 29 (Panelli, J., concurring and dissenting) (quoting *Bennett*, 54 Cal. 3d 1032, 1036, 819 P.2d 849, 852, 2 Cal. Rptr. 2d 8, 11 (1991)).

18. *Id.* at 1210-11, 864 P.2d at 109-10, 26 Cal. Rptr. 2d at 29-30 (Panelli, J., concurring and dissenting). In Justice Panelli's opinion, none of the cases relied on by the majority "authorize the admission of such evidence." *Ochoa*, 6 Cal. 4th at 1211, 864 P.2d at 110, 26 Cal. Rptr. 2d at 30 (Panelli, J., concurring and dissenting).

19. *Id.* (Panelli, J., concurring and dissenting). "To deny the defendant the right to present relevant evidence would create serious problems under the due process clause." *Id.* (Panelli, J., concurring and dissenting).

make it harder for these defendants to escape a harsher sentence the second time around.

ERIC WEITZ

C. *Proceedings to determine the truth of prior conviction allegations held after a jury returns its verdict and has been discharged are permissible when the defendant fails to object before the court determines the truth of the prior conviction allegations or gives a jury waiver as to those allegations:* **People v. Saunders.**

I. INTRODUCTION

In *People v. Saunders*,[1] the California Supreme Court considered whether there is a statutory or constitutional double jeopardy prohibition of proceedings held to determine the truth of alleged prior convictions, held after the jury returned a guilty verdict in a bifurcated hearing, the results of which the defendant released without objection.[2]

In *Saunders*, the prosecution charged the defendant with attempted murder, burglary, and assault with a firearm. The prosecution further alleged that the defendant had been convicted of various prior offenses.[3] The defendant's first trial resulted in a mistrial. Prior to the second trial, the trial court granted the defendant's motion to bifurcate the determination of truth of the alleged prior convictions. However, the court stated that if the defendant testified, the prosecution could use his prior convictions for impeachment purposes.

At the second trial, the jury found the defendant guilty of burglary, but not guilty of attempted murder or assault.[4] After the trial court dismissed the jury and scheduled further hearings for the next day, the defendant waived his right to a jury determination regarding the truthfulness of his alleged prior convictions. On the following day, however, the defendant's attorney withdrew the waiver, claiming that she had been unaware that the court had dismissed the jury at the time she had waived the defendant's right.

Upon withdrawal, the defendant moved for dismissal of the alleged prior convictions based on a "once in jeopardy" claim the trial court

---

1. 5 Cal. 4th 580, 853 P.2d 1093, 20 Cal. Rptr. 2d 638 (1993). Justice George wrote the majority opinion, with Chief Justice Lucas, and Justices Panelli, Arabian, and Baxter concurring. *Id.* at 585, 853 P.2d at 1094, 20 Cal. Rptr. 2d at 639. Justices Mosk and Kennard wrote separate dissenting opinions. *Id.* at 597, 601, 853 P.2d at 1103, 1105, 20 Cal. Rptr. 2d at 648, 650.

2. *Id.* at 585, 853 P.2d at 1094, 20 Cal. Rptr. 2d at 639.

3. These charges included the following: that the defendant had been convicted and served prison time on three separate occasions for possession of stolen mail, two counts of rape, two counts of oral copulation, assault with a deadly weapon, three counts of burglary, six counts of robbery, and attempted robbery. *Id.* at 585-86, 853 P.2d at 1094, 20 Cal. Rptr. 2d at 639.

4. *Saunders*, 5 Cal. 4th at 586, 853 P.2d at 1095, 20 Cal. Rptr. 2d at 640.

denied.[5] A second jury found the allegations regarding the defendant's alleged prior convictions to be true. The defendant received a three year prison sentence for the burglary charge, in addition to one year for each of the three prior prison terms. The defendant appealed, claiming that the second jury trial placed him twice in jeopardy. The court of appeal affirmed the lower court's decision[6] and the supreme court granted the defendant's petition for review.[7]

II. TREATMENT

A. *Majority Opinion*

The supreme court began by analyzing sections 1025[8] and 1164[9] of the California Penal Code. The court determined that the trial court violated the provisions of both statutes by dismissing the jury before deciding the truth of the defendant's alleged prior convictions.[10] However, because the defendant did not contest this issue before the trial court in a timely manner, the supreme court ruled that he was "precluded . . . from arguing on appeal that reversal of the judgment is required"[11]

---

5. *Id.* at 587, 853 P.2d at 1095, 20 Cal. Rptr. 2d at 640.
6. 15 Cal. App. 4th 518, 285 Cal. Rptr. 485 (1991).
7. 818 P.2d 1152, 1 Cal. Rptr. 2d 391 (1991).
8. Section 1025 provides in pertinent part:

> When a defendant who is charged in the accusatory pleading with having suffered a previous conviction pleads either guilty or not guilty of the offense charged against him, he must be asked whether he has suffered such previous conviction . . . . If he answers that he has not . . . the question whether or not he has suffered such previous conviction must be tried by the jury which tries the issue upon the plea of not guilty . . . . In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to in the trial.

CAL. PENAL CODE § 1025 (West 1985). *See generally* 22 CAL. JUR. 3D *Criminal Law* §§ 3384-87, 3390 (1985 & Supp. 1993) (discussing prior convictions and procedures).

9. Section 1164(b) provides in pertinent part:

> No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding.

CAL. PENAL CODE § 1164 (West Supp. 1994).

10. *Saunders*, 5 Cal. 4th at 589, 853 P.2d at 1097, 20 Cal. Rptr. 2d at 642.
11. *Id.* at 591, 853 P.2d at 1098, 20 Cal. Rptr. 2d at 643. The court relied on the

Although the court found the defendant's failure to properly object in the trial court constituted a forfeiture of his right to object on appeal, the majority maintained the defendant was not prohibited from arguing he had been placed twice in jeopardy because the trial court choose a new jury to determine the truth of the defendant's alleged prior convictions.[12]

The court first noted that the policy behind the prohibition of double jeopardy was to protect individuals from being punished more than once for the same crime.[13] The majority also commented that the "standards for determining when a double jeopardy violation has occurred should not be applied mechanically."[14]

The court then looked to other cases for guidance on this issue.[15]

---

rule that states, "'[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method.'" *Id.* at 589-90, 853 P.2d at 1097, 20 Cal. Rptr. 2d at 642 (quoting Doers v. Golden Gate Bridge Dist., 23 Cal. 3d 180, 184-85 n.1, 588 P.2d 1261, 1262-63 n.1, 151 Cal. Rptr. 837, 838-39 n.1 (1979)). *See generally* 20 CAL. JUR. 3D *Criminal Law* § 2333 (1985 & Supp. 1993) (discussing waiver of claims by a defendant).

12. *Saunders*, 5 Cal 4th at 592, 853 P.2d at 1099, 20 Cal. Rptr. 2d at 644; *see* Curry v. Superior Court, 2 Cal. 3d 707, 713, 470 P.2d 345, 348, 87 Cal. Rptr. 361, 364 (1970) (commenting that requesting an admonition on an evidentiary matter is not a waiver of constitutional protection against double jeopardy).

The Fifth Amendment to the United States Constitution states that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." *Saunders*, 5 Cal. 4th at 592, 853 P.2d at 1099, 20 Cal. Rptr. 2d at 644 (citing U.S. CONST. amend. V); *see also* 19 CAL. JUR. 3D *Criminal Law* § 2063 (1984) (discussing the rights of persons accused); 20 CAL. JUR. 3D *Criminal Law* § 2313 (1985 & Supp. 1993) (discussing the constitutional guarantees against double jeopardy); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 271 (2d ed. 1988) (discussing generally the principal of former jeopardy). "This guarantee is applicable to the states through the Fourteenth Amendment." *Saunders*, 5 Cal. 4th at 592-93, 853 P.2d at 1099, 20 Cal. Rptr. 2d at 644; *see also* Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that the Fifth Amendment applies to states through the Fourteenth Amendment); 13 CAL. JUR. 3D *Constitutional Law* § 234 (Rev. ed. 1989) (discussing the Fourteenth Amendment and the applicability of the Bill of Rights to states). Furthermore, the California Constitution provides that "[p]ersons may not twice be put in jeopardy for the same offense." CAL. CONST. art. I, § 15.

13. *Saunders*, 5 Cal. 4th at 593, 853 P.2d at 1099, 20 Cal. Rptr. 2d at 644 (citing Serfass v. United States, 420 U.S. 377, 387 (1975); *see* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 272 (2d ed. 1988 & Supp. 1993) (discussing nature and elements of the double jeopardy defense); 21 AM. JUR. 2D *Criminal Law* §§ 243, 244 (1981 & Supp. 1993) (discussing historical background and scope of double jeopardy defense).

14. *Saunders*, 5 Cal. 4th at 593, 853 P.2d at 1100, 20 Cal. Rptr. 2d at 645; *see* Arizona v. Washington, 434 U.S. 497 (1978) (holding that the double jeopardy standard should not be applied mechanically).

15. *Saunders*, 5 Cal. 4th at 593, 853 P.2d at 1100, 20 Cal. Rptr. 2d at 645.

In *Ohio v. Johnson*,[16] the Supreme Court held that trying a defendant on two charges after he had already plead guilty and had been sentenced on two related charges did not place him in double jeopardy.[17]

In *Swisher v. Brady*,[18] the Supreme Court held that a rule of procedure in juvenile proceedings, that permits a master to hear a case, followed by a judge, did not violate the double jeopardy clause.[19] The court explained that the rule prohibited the prosecution from offering new evidence, and "precludes the prosecutor from 'enhancing the risk that an innocent person would be convicted' by taking the question of guilt to a series of persons or groups empowered to make binding determinations."[20] Additionally, the court noted that the rule did not unfairly subject "the defendant to the expense, and ordeal of a second trial"[21] Based on *Johnson* and *Swisher*, the court held that in *Saunders*, the defendant was not placed twice in jeopardy.[22] The court maintained that the defendant incorrectly relied on *Stone v. Superior Court*.[23] The court explained that the Constitution's double jeopardy clause did not prohibit a state

16. 467 U.S. 493 (1984). In *Johnson*, the state indicted the defendant for murder, involuntary manslaughter, aggravated robbery, and grand theft. At the defendant's arraignment, he plead guilty to two of the charges. The trial court then dismissed the two other counts, erroneously holding that any further prosecution of the claims would be in violation of the double jeopardy clause.

17. *Id.* at 501-02. The Court stated:

> "[T]he acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, . . . has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses.

Id. See generally 20 CAL. JUR. 3D *Criminal Law* § 2322 (1985 & Supp. 1993) (discussing double jeopardy and lesser included offenses); 21 AM. JUR. 2D *Criminal Law* § 265 (1981) (discussing stopping trial for lower offenses to permit prosecution for higher offenses); 22 C.J.S. *Criminal Law* § 251 (1989 & Supp. 1993) (discussing doctrine of included offenses).

18. 438 U.S. 204 (1978).

19. *Swisher*, 438 U.S. at 215-16.

20. *Id.* (citing Arizona v. Washington, 434 U.S. 497, 504 (1978)).

21. *Id.* at 216-17 (citing Green v. United States, 355 U.S. 184 (1957)).

22. *Id.* at 594-95, 853 P.2d at 1100-01, 20 Cal. Rptr. 2d at 645-46. In concluding that none of the interests meant to be protected by the double jeopardy clause were violated, the majority reasoned that the defendant "was not at risk during the trial . . . that the jury would find true the prior conviction allegations, because at the defendant's request the truth of the allegations had been bifurcated from the trial of the current charges." *Id.* at 594, 853 P.2d at 1100, 20 Cal. Rptr. 2d at 645.

23. 31 Cal. 3d 503, 646 P.2d 809, 183 Cal. Rptr. 647 (1982).

statute that required a second jury in a bifurcated hearing, to determine the truthfulness of alleged prior convictions, after the trial court found the defendant guilty of the charged offense.[24] Finally, the court explained that it found no evidence indicating that they should interpret the double jeopardy clause of the California Constitution any differently than its federal counterpart, and therefore, concluded that the trial court's procedure was not in violation of article I, section 15 of the California Constitution.[25]

B. Justice Mosk's Dissenting Opinion

Justice Mosk began his discussion by noting that the California Supreme Court has previously held that "jeopardy attaches to trial enhancement allegations when the jury is sworn to try the underlying offenses."[26] Furthermore, Justice Mosk commented that, in accord with the holding in *People v. Wojahn*,[27] although bifurcation separates issues at trial, it does not create two separate trials. Justice Mosk therefore argued that the majority erred in determining the defendant was not placed in double jeopardy.[28]

In support of his position, Justice Mosk criticized the majority's reliance on *Ohio v. Johnson*, and *Swisher v. Brady*.[29] Moreover, Justice Mosk attacked the majority's claim that "no interest of [the] defendant's

---

24. *Saunders*, 5 Cal. 4th at 595, 853 P.2d at 1101, 20 Cal. Rptr. 2d at 646. In *Stone*, the supreme court referred to "the defendants' right to have his trial completed by a particular tribunal." *Stone*, 31 Cal. 3d at 516 n.7, 646 P.2d at 818 n.7, 183 Cal. Rptr. at 656 n.7. However, the *Saunders* court pointed out that nothing in *Stone* "suggests that, in a bifurcated trial, the double jeopardy clause guarantees the defendant the right to have the truth of prior conviction allegations determined by the same jury that considers the current offenses." *Saunders*, 5 Cal. 4th at 595, 853 P.2d at 1101, 20 Cal. Rptr. 2d at 646.

25. *Id.* at 596, 853 P.2d at 1102, 20 Cal. Rptr. 2d at 647. *Saunders* undermines the contrary holdings in People v. Wojahn, 150 Cal. App. 3d 1024, 198 Cal. Rptr. 277 (1984); People v. Hockersmith, 217 Cal. App. 3d 968, 266 Cal. Rptr. 380 (1990); People v. Dee, 222 Cal. App. 3d 760, 272 Cal. Rptr. 208 (1990); and People v. West, 224 Cal. App. 3d 1283, 274 Cal. Rptr. 524 (1990). *Id.* at 597 n.9, 853 P.2d at 1102 n.9, 20 Cal. Rptr. 2d at 647 n.9.

26. *Saunders*, 5 Cal. 4th at 598, 853 P.2d at 1103, 20 Cal. Rptr. 2d at 648 (Mosk, J., dissenting). *See generally* 20 CAL. JUR. 3D *Criminal Law* §§ 2325, 2336 (1985 & Supp. 1993) (discussing when jeopardy attaches in jury trial); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Defenses* § 279 (1988) (stating that jeopardy attaches when the court selects and swears in the jury); 21 AM. JUR. 2D *Criminal Law* § 260 (1981 & Supp. 1993) (discussing attachment of jeopardy in jury trial).

27. 150 Cal. App. 3d 1024, 198 Cal. Rptr. 277 (1984).

28. *Saunders*, 5 Cal. 4th at 598-99, 853 P.2d at 1103, 20 Cal. Rptr. 2d at 648 (Mosk, J., dissenting)

29. *Id.* at 599-600, 853 P.2d at 1103-04, 20 Cal. Rptr. 2d at 648-49 (Mosk, J., dissenting).

that is protected by the double jeopardy clause is injured by the proceedings that occurred in this case."[30] Lastly, Justice Mosk argued that it was the duty of the prosecutor and the court, not the defendant, to assure "that the jury was not dismissed before trial of the prior conviction allegations."[31] Thus, according to Justice Mosk, the defendant's failure to object to the dismissal of the jury did not result in a forfeiture of his error claim under section 1025.[32]

C. Justice Kennard's Dissenting Opinion

Justice Kennard began her opinion by attacking the majority's assertion that the defendant's failure to object in the trial court automatically resulted in a forfeiture of the right to appeal.[33] She argued that, "a defendant's failure to act results in a forfeiture only if the law imposes on the defendant an obligation to act," and that, here, the defendant had no such obligation.[34] Justice Kennard denounced the majority's decision, claiming that it "circumvented" the statutory language of section 1164(b)[35] and "confuse[d] the roles of the respective parties in a judicial proceeding," by holding that "defense counsel must interpose an objection that could result in substantial detriment to the client."[36]

Justice Kennard then discussed the retroactivity of the majority's

---

30. *Id.* at 600, 853 P.2d at 1104, 20 Cal. Rptr. 2d at 649 (Mosk, J., dissenting). Justice Mosk claimed that the right to have an entire case heard by one jury is a fundamental right protected by the double jeopardy clause. *Id.* (Mosk, J., dissenting); *see* United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Crist v. Bretz, 437 U.S. 28, 35 (1978).

31. *Saunders*, 5 Cal. 4th at 600, 853 P.2d at 1104, 20 Cal. Rptr. 2d at 649 (Mosk, J., dissenting).

32. *Id.* (Mosk, J., dissenting).

33. *Id.* at 601, 853 P.2d at 1105, 20 Cal. Rptr. 2d at 650 (Kennard, J., dissenting).

34. *Id.* at 603, 853 P.2d at 1106, 20 Cal. Rptr. 2d at 651 (Kennard, J., dissenting). "'The defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver.'" *Id.* (citing Curry v. Superior Court, 2 Cal. 3d 707, 713, 470 P.2d 345, 348, 87 Cal. Rptr. 361, 364 (1970)) (Kennard, J., dissenting).

35. *Saunders*, 5 Cal. 4th at 603-04, 853 P.2d at 1106-07, 20 Cal. Rptr. 2d at 651-52 (Kennard, J., dissenting).

36. *Id.* at 605-06, 853 P.2d at 1108, 20 Cal. Rptr. 2d at 653 (Kennard, J., dissenting). This holding, according to Justice Kennard, "is an anathema to our adversarial system, and is contrary to the allocation of the duties and obligations of the participants in our judicial system." *Id.* at 606, 853 P.2d at 1108, 20 Cal. Rptr. 2d at 653 (Kennard, J., dissenting).

decision.[37] She pointed out that, "reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence."[38] In Justice Kennard's opinion, the rule handed down in this case clearly fits within this category, and thus, should not be applied retroactively.[39] In conclusion, Justice Kennard criticized the majority's decision, calling it "contrary to both statutory and decisional law" as well as "fundamentally unfair."[40]

III. CONCLUSION

In holding that the defendant forfeited his right to appeal, the California Supreme Court observed and supported the rule that "'a constitutional right' or a right of any other sort, 'may be forfeited in criminal . . . cases by the failure to make timely assertion of the right before a tribunal [that has] jurisdiction to determine it.'"[41] Moreover, the court's holding that the defendant was *not* placed twice in jeopardy appears to be consistent with the decisions of the United States Supreme Court. In arriving at this decision, the court placed the burden on defendants by requiring them to bring this type of procedural irregularity to the attention of the trial court in a timely manner or forfeit their right to appeal such irregularities in later proceedings.

ERIC WEITZ

37. *Id.* at 606, 853 P.2d at 1108, 20 Cal. Rptr. 2d at 654 (Kennard, J., dissenting).

38. *Id.* (Kennard, J., dissenting); *see* People v. Turner, 50 Cal. 3d 668, 703, 789 P.2d 887, 905, 268 Cal. Rptr. 706, 724 (1990) (holding that there is no waiver when change in law is too unforeseeable).

39. *Saunders*, 5 Cal. 4th at 607, 853 P.2d at 1109, 20 Cal. Rptr. 2d at 654 (Kennard, J., dissenting).

40. *Id.* at 609, 853 P.2d at 1100, 20 Cal. Rptr. 2d at 655 (Kennard, J., dissenting).

41. *Id.* at 590, 853 P.2d at 1097, 20 Cal. Rptr. 2d at 642 (quoting U.S. v. Olano, 113 S. Ct. 1770, 1776 (1993)).

VI. FAMILY LAW

Under section 361.5 of the California Welfare and Institutions Code, a biological father is not entitled to receive state reunification services with a child in court custody unless the father can also establish that he is the presumed father of the child, and the request is made within of the eighteen-month statutory limit; under section 361.2 of the code, a noncustodial parent may obtain custody of a dependent child only at a time immediately following the child's first removal from the home of the custodial parent, and only if the noncustodial parent qualifies as a presumed parent: **In re Zacharia D.**

I. INTRODUCTION

In re Zacharia D.[1] enabled the California Supreme Court to clarify certain ambiguities in the California Welfare and Institutions Code sections governing juvenile dependency proceedings.[2] The uncertainties arose when a court took custody of a minor as a result of the custodial parents' alleged drug abuse.[3] Several months later, the minor's biological

1. 6 Cal. 4th 435, 862 P.2d 751, 24 Cal. Rptr. 2d 751 (1993).

2. *See* CAL. WELF. & INST. CODE §§ 361.2, 361.5 (West Supp. 1994).

3. *Zacharia D.*, 6 Cal. 4th at 439-40, 862 P.2d at 753-54, 24 Cal. Rptr. 2d at 753-54. Justice Arabian authored the unanimous opinion, joined by Chief Justice Lucas, and Justices Mosk, Panelli, Kennard, Baxter, and George. Zacharia D. was born with traces of an illicit drug in his body. As a result of this finding, the child was taken from the home of his custodial parents into protective custody by the court. The two custodial parents at the time of the child's birth, Wendy and Lee, received state-sponsored reunification services, giving them time to establish that they were fit to retake custody of their child. Despite the services, continuing drug problems and a failure to comply with the reunification plan led to the termination of Wendy and Lee's parental rights. Zacharia D.'s natural father, Javan, came forward to establish custodial rights in the aftermath of Wendy's failure to regain custody. His claim to custody, however, postdated the statutory maximum of 18 months allotted for the reunification procedure. Javan defended his position by asserting that, as a natural parent, he was entitled to state reunification services under § 361.5. He also claimed that he was not barred by the 18 month time limit because he did not know that he was Zacharia's natural father until nearly 18 months after Zacharia was declared a dependent of the court. Javan argued that rejecting his claim would deny him the opportunity to establish his fitness as a parent. In addition, he contended that § 361.2 entitled him to immediate custody of Zacharia D. The trial court found that a grant of custody to Javan, a known drug user, would be detrimental to Zacharia's welfare, and accordingly terminated Javan's

father stepped forward to claim custody under the applicable provisions of the Welfare and Institutions Code.[4] The first question was whether a biological father with no prior custody of the child can rely on the relevant code provisions to support a determination of custody in his favor.[5] The second question was whether a parent can defeat certain statutorily prescribed time limits for custody claims by asserting ignorance of the child's birth.[6]

Section 361.5 of the code requires that the state offer reunification services to a "parent" of the minor, but leaves unclear the definition of "parent."[7] That same section also limits a parent's entitlement to those services for a maximum of eighteen months.[8]

Section 361.2 of the code requires that upon removal of the minor from the custodial parents for any reason, the court must place the child in the custody of a noncustodial parent if the court determines that (1)

---

parental rights. *Id.* at 439-44, 862 P.2d at 753-57, 24 Cal. Rptr. 2d at 753-57. On appeal, Javan argued that the court erred on several grounds in denying him custody. Finding some validity to Javan's claims, the court of appeal held that under § 361.5, his status as biological father was sufficient to award him the right to receive reunification services, and that the statutory time limit did not bar his entitlement because the delay was "not so egregious as a matter of law as to obviate the statutory requirement that he be offered reunification services." *Id.* at 444, 862 P.2d at 757, 24 Cal. Rptr. 2d at 757. The court of appeal also held that § 361.2 applied and entitled Javan, as the biological father, to immediate custody of Zacharia. This statute grants a non-custodial parent custody of the minor under the facts presented. Further, there was insufficient evidence showing that Javan's custody would detrimentally impact Zacharia D. *Id.* at 444-45, 862 P.2d at 757, 24 Cal. Rptr. 2d at 757. The California Supreme Court granted review. *Id.* at 439-45, 862 P.2d at 753-58, 24 Cal. Rptr. 2d at 753-58.

4. *Id.* at 442, 862 P.2d at 755, 24 Cal. Rptr. 2d at 755.

5. *Id.* at 447-52, 862 P.2d at 759-62, 24 Cal. Rptr. 2d at 759-62. One apparent motive for Javan's pursuit of custody was that the natural mother, Wendy, had begun living with Javan after the displacement of Zacharia D. into court custody. *Id.* at 443, 862 P.2d at 756, 24 Cal. Rptr. 2d at 756. The record indicated that the two had planned to marry. *Id.*

6. *Id.* at 452-53, 862 P.2d at 762-63, 24 Cal. Rptr. 2d at 762-63.

7. Section 361.5 of the California Welfare and Institutions Code, subdivision (a) reads in relevant part:

> Except as provided in subdivision (b), whenever a minor is removed from a parent's . . . custody, the juvenile court shall order the probation officer to provide child welfare services to the minor and the minor's parents . . . for the purpose of facilitating reunification of the family within a maximum time period not to exceed 12 months . . . . Services may be extended up to an additional six months if it can be shown that the objectives of the service plan can be achieved within the extended time period. Physical custody of the minor by the parents or guardian during the 18-month period shall not serve to interrupt the running of the period.

CAL. WELF. & INST. CODE § 361.5(a) (West Supp. 1994).

8. *Id.* The normal statutory period for reunification is 12 months, but the court can extend it for another six, for a total period of 18 months. *See supra* note 7.

there is such a parent, and (2) placement of the child in such a setting will not detrimentally impact the child's welfare.[9]

The California Supreme Court determined that under section 361.5 only a presumed father, not merely a biological father, may demand reunification services from the state. This demand may be made only if the statutory limit of eighteen months has not expired.[10] The court further held that under section 361.2, only a presumed parent may claim entitlement to custody of a minor as mandated by that section, and that the parent must make any claim at the time the court removes the child from the home of the custodial parents.[11]

II. TREATMENT

A. Section 361.5

The reunification scheme, according to the court, is an attempt to balance the goals of parental recognition by "assist[ing] the parent in overcoming the problems that led to removal," with the goals of child protection by "prevent[ing] children from spending their lives in the uncertainty of foster care."[12] Although the purpose of the section was clear, the legislature did not elaborate on the applicable definition of "parent", and no prior decisions had defined it.[13]

In attempting to define "parent", the supreme court referred to a set of statutes in the California Civil Code that addressed the distinction between natural and presumed fathers.[14] Those statutes, the court not-

---

9. Section 361.2, subdivision (a) of the Welfare and Institutions Code reads:

> When a court orders removal of a minor pursuant to Section 361, the court shall first determine whether there is a parent of the minor, with whom the minor was not residing at the time that the events or conditions arose . . . who desires to assume custody of the minor. If such a parent requests custody the court shall place the minor with the parent unless it finds that placement with that parent would be detrimental to the minor.

CAL. WELF. AND INST. CODE § 361.2(a) (West 1984 and Supp. 1994).

10. *Zacharia D.*, 6 Cal. 4th at 452-53, 862 P.2d at 762-63, 24 Cal. Rptr. 2d at 762-63.

11. *Id.* at 453-54, 862 P.2d at 763-64, 24 Cal. Rptr. 2d at 763-64. Javan's request under § 361.2(a) came after 20 months had passed since the initial removal of Zacharia D. from the home of his custodial parents. *Id.*

12. *Id.* at 446, 862 P.2d at 758, 24 Cal. Rptr. 2d at 758 (quoting *In re* Marilyn H., 5 Cal. 4th 295, 308, 851 P.2d 826, 834, 19 Cal. Rptr. 2d 544, 552 (1993) (holding that courts should not consider the reunification of a dependent child with a biological parent at a permanency planning hearing)).

13. *Id.* at 448, 862 P.2d at 759-60, 24 Cal. Rptr. 2d at 759-60.

14. CAL. CIV. CODE §§ 7000-21 (West 1983) (repealed and replaced by CAL. FAM.

ed, consistently favored presumed fathers over natural fathers in the area of parental rights.[15] The court next observed that the terms "presumed" and "natural" had been incorporated into other provisions of the California Code.[16] One of these was a Civil Code provision[17] whereby presumed fathers achieved a similar status. The supreme court accordingly inferred from these observations that the legislature must have intended to limit section 361.5 to presumed fathers.[18]

Addressing the eighteen-month limit on reunification services under section 361.5, the court reiterated the strong policy in favor of certainty in the child's parental status, and asserted that strict compliance with the eighteen-month statutory bar furthers this goal.[19] Thus, the parent's own failure to "ascertain the existence of his child" or his "decision to wait until the 18-month hearing to assert his paternity claim" barred him from

---

CODE §§ 7600-7730. This set of statutes, known as the Uniform Parentage Act, has been interpreted by courts to favor presumed parents over biological ones. *See, e.g., In re* Sarah C., 8 Cal. App. 4th 964, 974, 11 Cal. Rptr. 2d 414, 419 (1992) (denying parental rights to father who did not qualify as presumed father); *In re* Shereece B., 231 Cal. App. 3d 613, 622, 282 Cal. Rptr. 430, 436 (1991) (holding that the difference in treatment of presumed and biological fathers differently does not violate equal protection guarantees); Michael U. v. Jamie B., 39 Cal. 3d 787, 790, 705 P.2d 362, 364, 218 Cal. Rptr. 39, 40-41 (1985) (holding that granting natural parent custody of child to enable the parent to qualify as presumed father was abuse of discretion). Although the Uniform Parentage Act was repealed effective January 1, 1994, its provisions may now be found in the California Family Code. *See* CAL. FAM. CODE §§ 7600-7730 (West Supp. 1994).

15. *Zacharia D.*, 6 Cal. 4th at 447-50, 862 P.2d at 759-61, 24 Cal. Rptr. 2d at 759-61. (citing CAL. CIV. CODE §§ 7000-7021 (West 1983) (repealed and replaced by CAL. FAMILY CODE §§ 7600-7730 (West Supp. 1994))); *see supra* note 14. Under § 7004(a)(4) of the Uniform Parentage Act, a natural father may become a presumed father, if, among other things, "[h]e receives the child into his home and openly holds out the child as his natural child." *Zacharia D.*, 6 Cal. 4th at 449, 862 P.2d at 760, 24 Cal. Rptr. 2d at 760 (quoting CAL. CIV. CODE § 7004(a)(4) (West 1983) (repealed and replaced by CAL. FAM. CODE § 7611(d) (West 1994))). For a synopsis of the parent's right to custody and the entitlement of a presumed father to custody of a minor, see generally 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 91 (9th ed. 1989).

16. *See also* CAL. WELF. & INST. CODE § 366.23 (West Supp. 1994) (providing that notice shall be given to both biological and presumed parents when a juvenile dependency hearing is held).

17. *See* CAL. CIV. CODE § 197 (West 1982 & Supp. 1991) (establishing that only a presumed father is entitled to custody of a minor child). *See generally* 32 CAL. JUR. 3D *Family Law* § 168 (1977 & Supp. 1994) (stating that a man is presumed to be the natural father if he receives the child in his home and holds the child out as his own); 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 409-10, 413 (9th ed. 1989) (discussing the Uniform Parentage Act, the definition of the parent-child relationship therein, and how the parent-child relationship may be established between a child and his natural father).

18. *Zacharia D.*, 6 Cal. 4th at 448-51, 862 P.2d at 760-62, 24 Cal. Rptr. 2d at 760-62.

19. *Id.* at 452, 862 P.2d at 762, 24 Cal. Rptr. 2d at 762.

claiming the benefit of reunification services.[20]

B. Section 361.2

The court next decided whether a biological father may use section 361.2 of the Welfare and Institutions Code to obtain custody of a child removed from the home of his custodial parents.[21] The court determined that such a parent may not rely on this section.[22] The court reasoned that: (1) the language of the statute suggests that a parent can apply it only upon the *first removal* of the child from the custodial parent's home;[23] (2) for the same reasons as in section 361.5, a mere biological father is not entitled to assume custody of his child under section 361.2;[24] and (3) in any event, the biological parent in the present case did not produce sufficient evidence showing his competency as a father.[25]

---

20. *Id.* The court was not sympathetic to Javan's claim that he was unable to ascertain the birth of his child so that he could file a claim for reunification services in a timely fashion. Addressing this point, the court noted that Javan had "engaged in at least a dozen acts of sexual intercourse with Wendy over a two-week period." *Id.* at 452, 862 P.2d at 762, 24 Cal. Rptr. 2d at 762. The court said, "[t]here is no evidence that he had any reason to expect that this sexual relationship had not resulted in pregnancy." *Id.* In this respect, the court pronounced that any delay in the filing for reunification was, in reality, the fault of the biological father himself. *Id.* at 452, 862 P.2d at 763, 24 Cal. Rptr. 2d at 763.

21. *Id.* at 453, 862 P.2d at 763, 24 Cal. Rptr. 2d at 763.

22. *Id.* at 454, 862 P.2d at 764, 24 Cal. Rptr. 2d at 764.

23. *Id.* at 453-54, 862 P.2d at 763-64, 24 Cal. Rptr. 2d at 763-64. The court also expressed that "[n]othing in this statute suggests that custody must be immediately awarded to a noncustodial parent regardless of when in the dependency process the parent comes forward." *Id.* at 453, 862 P.2d at 763, 24 Cal. Rptr. 2d at 763.

24. *Id.* at 454, 862 P.2d at 764, 24 Cal. Rptr. 2d at 764. For a discussion of presumed and biological fathers, and reunification and custody procedures in California, *see generally* Christian Reichel Van Deuses, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417 (1991); Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705 (1986) (discussing the constitutionality of denying biological fathers custody in favor of third parties).

25. *Zacharia D.*, 6 Cal. 4th at 454, 862 P.2d at 764, 24 Cal. Rptr. 2d at 764. The court pointed out that at the time Javan made a custody claim, he had been "incarcerated for drug use." *Id.* Furthermore, a social worker had testified that "Javan required at least six months of services before he could even attain the parental competence to be able to visit Zacharia, let alone have custody of him." *Id. See generally* 67A C.J.S *Parent and Child* § 46 (1978 & Supp. 1993) (discussing the relevant evidence in ascertaining fitness of a parent and potential detriment to the child if custody is

III. CONCLUSION

As a result of the court's decision in *Zacharia D.*, biological fathers who are unable to qualify as presumed fathers before the expiration of the statutory eighteen-month limit are precluded from obtaining reunification services in California.[26] Moreover, a biological father who is not deemed by the court to be a presumed father may not rely on the statute granting custody of displaced children to non-custodial parents.[27] Finally, even a presumed father must make a reunification request within a reasonable time after displacement of the child into court custody, or the eighteen-month statutory bar will jeopardize his claim for reunification.[28]

The *Zacharia D.* court was particularly concerned with maintaining the legislature's balance between the rights of parents to raise their own children, and the interest of the child in having the certainty and harmony of a secure, well-adjusted home life.[29] Because it is the presumed father, and not necessarily the biological father, who acknowledges the child and contributes to the child's care and support, the court's grant of greater parental rights to presumed parents furthers an important social policy. It will encourage parents to support and acknowledge their children, while discouraging those who contribute to their children's feelings of displacement and uncertainty by unduly delaying custodial requests.

MICHAEL G. OLEINIK

---

awarded).

26. *Zacharia D.*, 6 Cal. 4th at 451, 862 P.2d at 762, 24 Cal. Rptr. 2d at 762. Even the 18 month period is technically at the discretion of the court. The normal period for reunification is 12 months. *See supra* note 8.

27. *Zacharia D.*, 6 Cal. 4th at 454, 862 P.2d at 764, 24 Cal. Rptr. 2d at 764. For a general overview on child custody and the rights of parents, see 59 AM JUR. 2D *Parent and Child* §§ 23-36 (1987 & Supp. 1994).

28. *Zacharia D.*, 6 Cal. 4th at 453, 862 P.2d at 763, 24 Cal. Rptr. 2d at 763. Even presumed parents must make a timely request for reunification services. The fact that one has achieved presumed parent status does not justify extending the normal statutory period for longer than 18 months.

29. *Id.* at 446-47, 862 P.2d at 758-59, 24 Cal. Rptr. 2d at 758-59. *See In re* Marilyn H., 5 Cal. 4th at 308, 851 P.2d at 834, 19 Cal Rptr. 2d at 552 (discussing the balance that the legislature sought to achieve by the preceding provisions of the Welfare and Institutions Code).

VII. INSURANCE LAW

A. *When an attorney's commission of separate acts of negligence occurs within the same matter, thereby resulting in his client's inability to recover, the attorney's malpractice insurer is liable for only one claim under the policy:* **Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.**

I. INTRODUCTION

In *Bay Cities Paving & Grading, Inc. v. Lawyer's Mutual Insurance Co.*,[1] the California Supreme Court determined whether a claim limit on a malpractice insurance policy[2] rendered the contractor's lawsuit against its former attorney a single claim, or whether each act of negligence, and its concomitant cause of action, were entitled to the full claim limit.[3] The court first examined the language of the policy and applied the "'primary rights'" theory in finding that there was only one claim because there was only one injury.[4] The insurance policy stated that multiple incidents could be considered a single claim if they arose out of a series of related acts, errors, or omissions.[5] The court consid-

1. 5 Cal. 4th 854, 855 P.2d 1263, 21 Cal. Rptr. 2d 691 (1993). Justice Baxter wrote the majority opinion, joined by Chief Justice Lucas and Justices Panelli, Mosk, Arabian, and George. *Id.* at 857, 855 P.2d at 1264, 21 Cal. Rptr. 2d at 692. Justice Kennard wrote a separate concurring opinion. *Id.* at 873, 855 P.2d at 1275, 21 Cal. Rptr. 2d at 703 (Kennard, J., concurring).

2. While lawyers' professional liability insurance was virtually unheard of prior to World War II, today attorneys are aware of their need for malpractice insurance coverage. *See* John C. Williams, Annotation, *Lawyers' Professional Liability Insurance*, 84 A.L.R. 3d 187 (1978). One commentator has described the current crisis regarding lawyers' professional liability insurance "as a three-fold problem based on a significant increase in the frequency of malpractice claims, soaring rates for liability coverage, and an accompanying decrease in the number of companies offering such coverage, as well as the scope of that coverage." *Id.* at 190. Professional liability policies generally insure against error, mistake, omission, or malpractice. 39 CAL. JUR. 3D *Insurance Contracts* § 322 (1977).

3. *Bay Cities*, 5 Cal. 4th at 857-58, 855 P.2d at 1264, 21 Cal. Rptr. 2d at 692. The court noted that this was an issue of first impression. *Id.* at 857, 855 P.2d at 1264, 21 Cal. Rptr. 2d at 692.

4. *Id.* at 860, 855 P.2d at 1265, 21 Cal. Rptr. 2d at 693 (quoting Slater v. Blackwood, 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1976)).

5. *Id.* at 859, 855 P.2d at 1265, 21 Cal. Rptr. 2d at 693. The "Limits of Liability"

ered whether the two claims presented by the plaintiff were "related" under the policy's language. Ultimately, the court concluded that the two incidents would be considered a single claim under the applicable insurance policy.[6]

II. STATEMENT OF THE CASE

Bay Cities Paving and Grading, Inc. (Bay Cities), a licensed general contractor, completed work on a project but was unable to collect a considerable portion of the total amount due. Bay Cities retained attorney Robert Curotto in an attempt to collect payment. Unfortunately, Curotto failed to serve a stop notice on the project's construction lender after filing a mechanic's lien for Bay Cities. Additionally, he failed to seek timely foreclosure on the mechanic's lien. Consequently, Bay Cities sued Curotto for legal malpractice alleging negligence in the two omissions.[7] Curotto's professional liability insurance carrier, Lawyers' Mutual Insurance Company (Lawyers' Mutual), undertook responsibility for his defense.[8]

The trial court determined that the two omissions qualified as two unrelated acts of legal malpractice under the terms of the policy.[9] Lawyers' Mutual appealed and the appellate court affirmed, finding that "(1) each of Curotto's two errors gave rise to a separate claim under the policy, and (2) the two claims [were] not 'related' within the meaning of the policy."[10] The California Supreme Court granted review and reversed the judgment.[11]

---

section of the policy stated that "'*[t]wo or more claims arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as a single claim.*'" *Id.* (emphasis in original).

6. *Id.* at 873, 855 P.2d at 1275, 21 Cal. Rptr. 2d at 703.

7. *Id.* at 858, 855 P.2d at 1264, 21 Cal. Rptr. 2d at 692.

8. Several aspects of the policy were stipulated to by all parties. The policy limited coverage to $250,000 per claim with an annual aggregate of $750,000. Curotto was dismissed from the action and Lawyers' Mutual was designated as the defendant. *Id.* at 858, 855 P.2d at 1264-65, 21 Cal. Rptr. 2d at 692-93.

9. *Id.* at 858, 855 P.2d at 1265, 21 Cal. Rptr. 2d at 693.

10. *Id.* at 858-59, 855 P.2d at 1265, 21 Cal. Rptr. 2d at 693.

11. *Id.* at 873, 855 P.2d at 1275, 21 Cal. Rptr. 2d at 703. Review was granted on December 12, 1991. Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 2 Cal. Rptr. 2d 490, 820 P.2d 1000 (1991).

III. TREATMENT

A. Majority Opinion

1. The Meaning of "Claim" Under the Policy

The court began its discussion by determining that the meaning of "claim"[12] under the attorney's malpractice liability policy was not dependent on the number of negligent acts committed by the attorney.[13] The court determined that an inability to collect on one construction project constituted a single injury thereby giving rise to a single cause of action against the attorney.[14] In other words, "Bay Cities had one primary right—the right to be free of negligence by its attorney in connection with the particular debt collection for which he was retained," regardless of the number of means by which he may have breached that right.[15]

Accordingly, the court found that the availability of multiple forms of relief did not give rise to multiple claims when these claims arose out of the same transaction.[16] The availability of two procedures for collection, namely foreclosure of the mechanics' lien and serving a timely stop notice on the project's construction lenders, did not belie the fact that they were merely two remedies for the non-payment of a single amount owed to Bay Cities.[17] Hence, Bay Cities was held to have the right to

---

12. The liability policy stated: "'"Claim" whenever used in this policy means a *demand*, including service of suit or institution of arbitration proceedings, *for money against the insured.*'" *Bay Cities*, 5 Cal. 4th at 859, 855 P.2d at 1265, 21 Cal. Rptr. 2d at 693 (emphasis in original).

13. *Id.* at 860, 855 P.2d at 1266, 21 Cal. Rptr. 2d at 694.

14. *Id.* at 860, 855 P.2d at 1265, 21 Cal. Rptr. 2d at 693; *see* Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 135 (1992) (discussing whether a series of demands or lawsuits constitutes one claim or separate claim).

15. *Bay Cities*, 5 Cal. 4th at 860, 855 P.2d at 1266, 21 Cal. Rptr. 2d at 694. "'California has consistently applied the 'primary rights' theory, under which the invasion of one primary right gives rise to a single cause of action.'" *Id.* at 860, 855 P.2d 1265, 21 Cal. Rptr. 2d at 693-94 (quoting Slater v. Blackwood, 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975)). *See generally* 4 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 29 (3d ed. 1985) (distinguishing the primary right, or cause of action, from the remedy or relief sought).

16. *Bay Cities*, 5 Cal. 4th at 860, 855 P.2d at 1266, 21 Cal. Rptr. 2d at 694; *see* Big Boy Drilling Corp. v. Rankin, 213 Cal. 646, 649, 3 P.2d 13, 14 (1931) (seeking several kinds of relief for the enforcement of a single right does not establish different causes of action in a contractor's attempt to recover money owed for work already completed).

17. *Bay Cities*, 5 Cal. 4th at 860-61, 855 P.2d at 1266, 21 Cal. Rptr. 2d at 694.

receive payment for the project.[18]

The court identified several policy reasons for rejecting Bay Cities' argument that each omission constituted a separate injury. First, an attorney committing one act of negligence would be inclined to make as many additional errors as possible, so as to increase the coverage provided under his policy.[19] In addition, an attorney and possibly other clients may be prejudiced when a single client consumes the aggregate policy limit by counting multiple errors as claims, despite the existence of only a single injury.[20] By allowing multiple claims, there would be little or no coverage for other clients, thus placing the attorney's personal assets at risk to satisfy those clients' claims.[21]

The court rejected Bay Cities' contention that multiple causes of a single injury should prevail when attempting to determine the number of insurance claims.[22] The court reasoned that two clients, each with a single injury, should not receive different recoveries based exclusively on the serendipity of the number of errors committed by the attorney.[23]

Finally, the court distinguished the cases cited by Bay Cities as each contained different policy language or different factual situations.[24] The court pointed out, for example, that occurrence policies differ from the "claims-made" policy at issue in this case.[25] Under an "occurrence" poli-

---

18. *Id.* at 860, 855 P.2d at 1266, 21 Cal. Rptr. 2d at 694. The court believed that the appellate court mistakenly determined the existence of two causes of action from the fact that there were two pleading counts, as pleading counts can be merely different ways of stating the same cause of action. *Id.* at 860 n.1, 855 P.2d at 1266 n.1, 21 Cal. Rptr. 2d at 694, n.1 (citing *Slater*, 15 Cal. 3d at 796, 543 P.2d at 594, 126 Cal. Rptr. at 226).

19. *Id.* at 861, 855 P.2d at 1266-67, 21 Cal. Rptr. 2d at 694-95.

20. *Id.* at 861, 855 P.2d at 1267, 21 Cal. Rptr. 2d at 695.

21. *Id.* at 861-62, 855 P.2d at 1267, 21 Cal. Rptr. 2d at 695. Moreover, the attorney would be liable for the satisfaction of each and every deductible on a particular claim. In the past, insurers have asserted multiple claims to mitigate their liability by increasing the overall amount paid by the insured's deductible. *Id.* at 862, 855 P.2d at 1267, 21 Cal. Rptr. 2d at 695.

22. *Id.* at 862-63, 855 P.2d at 1267-68, 21 Cal. Rptr. 2d at 695-96.

23. *Id.* at 863, 855 P.2d at 1268, 21 Cal. Rptr. 2d at 696.

24. The court in *Bay Cities* relied on Michigan Chemical Corp. v. American Home Assur. Co. to assert that multiple causes with a single injury should result in multiple claims. *Bay Cities*, 5 Cal. 4th at 862-63, 855 P.2d at 1267-68, 21 Cal. Rptr. 2d at 695-96; see Michigan Chem. Corp. v. American Home Assur. Co., 728 F.2d 374 (6th Cir. 1984) (noting that a single cause resulting in multiple injuries constituted a single occurrence under applicable insurance policy); *see also* Home Indem. Co. v. City of Mobile, 749 F.2d 659 (11th Cir. 1984) (determining that multiple suits by homeowners against the city's planning and operation of its water drainage system after three rainstorms had three separate causes of damage, and thus, separate occurrences under the policy).

25. While the court acknowledged that whether an insurance policy is claims-made or occurrence may not be significant in some contexts, it found that such cannot be

cy, coverage is determined by occurrences, which are identified by the number of causes, rather than by the number of injuries.[26] A claims-made policy, on the other hand, identifies claims by the number of injuries.[27]

2. Construing "Related" Acts, Errors, and Omissions

The supreme court next considered the meaning of "related" as a policy term.[28] The court of appeal's decision had rested heavily on its supposition that the lack of definition for related in the policy rendered the term ambiguous.[29] Finding some ambiguity, the court of appeal construed related to mean errors which were solely related to each other causally.[30]

Disagreeing with the court of appeal, the supreme court declined to find that the absence of definition in a policy necessarily created ambiguity, and further reasoned that it would be too burdensome to require a policy to include multitudinous definitions.[31] Consequently, the supreme court applied a "plain meaning" interpretive approach, in which the definition of a term is derived from the intent of the parties and the provisions of the contract are interpreted in their "'ordinary and popular sense.'"[32] The court commented that "'[a]n insurance policy provision is ambiguous when it is capable of two or more constructions both of which are reasonable.'"[33] It was further noted that a court will avoid

---

true in all contexts. The court denounced the statement in Beaumont-Gribin-Von Dyl Management Co. v. California Union Insurance Co., 63 Cal. App. 3d 617, 624, 134 Cal. Rptr. 25, 28 (1976) suggesting that whether an insurance policy is labeled claims-made or occurrence is insignificant to a policy's interpretation. *Bay Cities*, 5 Cal. 4th at 865 n.5, 855 P.2d at 1269 n.5, 21 Cal. Rptr. 2d at 697 n.5.

26. *Id.* at 864-65, 855 P.2d at 1269, 21 Cal. Rptr. 2d at 697.

27. *Id.*

28. The policy term stated: "Two or more claims arising out of a single act, error or omission or a series of related acts, errors or omissions shall be treated as a single claim." *Id.* at 866, 855 P.2d at 1270, 21 Cal. Rptr. 2d at 698.

29. 15 Cal. App. 4th 1474, 1480, 285 Cal. Rptr. 174, 178 (1991).

30. *Bay Cities*, 5 Cal. 4th at 866, 855 P.2d at 1270, 21 Cal. Rptr. 2d at 698.

31. *Id.* (citing Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264-65, 833 P.2d 545, 551-52, 10 Cal. Rptr. 2d 538, 544-45 (1992)).

32. *Id.* at 867, 855 P.2d at 1270, 21 Cal. Rptr. 2d at 698. *See generally* CAL. CIV. CODE § 1644 (West 1985) (stating that "[t]he words of a contract are to be understood in their ordinary and popular sense").

33. *Bay Cities*, 5 Cal. 4th at 867, 855 P.2d at 1271, 21 Cal. Rptr. 2d at 699 (quoting Suarez v. Life Ins. Co. of North America, 206 Cal. App. 3d 1396, 1402, 254 Cal. Rptr.

reaching a theoretical interpretation[34] because the "'language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.'"[35]

The court then examined whether the term related was ambiguous as it pertained to the applicability of per-claim limitation.[36] Determining that because the term related can include a broad assortment of relationships, the court found that this did not make the term ambiguous in the context of the applicable policy and facts of this case.[37] Nevertheless, Bay Cities contended that the term related was ambiguous.[38] Bay Cities asserted that related could mean that the totality of services rendered by the attorney, in relation to collection on the contract for Bay Cities, were related.[39] Alternatively, Bay Cities noted that related could also indicate, as the court of appeal determined, only causally related acts by the attorney.[40] The supreme court, however, found no ambiguity since causally related acts yield "a chain of causation that leads to an injury, that is, a single claim," subject to the policy's per-claim limitation.[41]

Bay Cities asserted that unless errors are causally related, they constitute independent claims.[42] The court dismissed this argument on the basis that independent errors may potentially result in a single injury, explaining that "when two or more errors lead to the same injury, they are—for that very reason—'related' under any fair and reasonable meaning of the word."[43]

377, 380 (1988)).

34. *Id.*; *see* Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800, 807, 640 P.2d 764, 767-68, 180 Cal. Rptr. 628, 631-32 (1982).

35. *Bay Cities*, 5 Cal. 4th at 867, 855 P.2d at 1271, 21 Cal. Rptr. 2d at 699 (quoting *Bank of the West*, 2 Cal. 4th 1254, 1265, 833 P.2d 545, 552, 10 Cal. Rptr. 2d at 545 (italics omitted)); *see also* Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal. 3d 903, 916 n.7, 718 P.2d 920, 927 n.7, 226 Cal. Rptr. 558, 565 n.7 (1986) ("[l]anguage is to be interpreted in context with regard to its intended function in the policy."). "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." CAL. CIV. CODE § 1641 (West 1985).

36. *Bay Cities*, 5 Cal. 4th at 867-68, 855 P.2d at 1271, 21 Cal. Rptr. 2d at 699.

37. *Id.*

38. *Id.* at 868, 855 P.2d at 1271, 21 Cal. Rptr. 2d at 699.

39. *Id.*

40. *Id.*

41. *Id.* at 867-68, 855 P.2d at 1271, 21 Cal. Rptr. 2d at 699; *see* Arizona Prop. & Cas. Ins. Guar. Fund v. Helme, 153 Ariz. 129, 136, 735 P.2d 451, 457-58 (1987) (finding that several negligent acts of physicians had a causal relationship to one injury, thereby yielding one occurrence under an "occurrence" policy).

42. *Bay Cities*, 5 Cal. 4th at 869, 855 P.2d at 1272, 21 Cal. Rptr. 2d at 700.

43. *Id.*

Having rejected a definition of related as meaning only occurrences with a causal connection, the court adopted the interpretation adopted in *Gregory v. Home Insurance Co.*[44] The court in *Gregory* found that the "term 'related' as it is commonly understood and used encompasses both logical and causal connections."[45] The *Bay Cities* court noted that this does not embrace every possible logical relationship.[46] For instance, tenuous relationships which a reasonable insured could not have anticipated as being considered a single claim under the policy should not result in hardship or surprise. Such could be averted by the "rule of restrictive reading of broad language."[47] Reasoning that the two errors by Curotto were related because they arose out of the same transaction, concerned the same client, and resulted in the same injury, the court held that "[no] objectively reasonable insured under this policy could have expected that he would be entitled to coverage for two claims under the policy."[48]

B. Concurring Opinion

Justice Kennard concurred with the majority's holding but arrived at the decision by focussing on principles of contract interpretation.[49] Justice Kennard characterized the case as an insurance dispute, believing that the majority's introduction of the "primary rights" civil pleading doctrine, into an insurance dispute was misplaced.[50] Furthermore, she found that the majority's determination of the scope of related acts or omissions under the insurance contract went beyond finding whether there was a single claim under the policy's language.[51] Accordingly, Kennard concluded that the majority decided the issue with unnecessarily broad terms.[52]

The primary rights doctrine, as explained by Justice Kennard, con-

---

44. 876 F.2d 602 (7th Cir. 1989) (holding that lawsuits by multiple investors and others arising out of erroneous information provided by an attorney resulted in a single claim under a policy with an identical claims related provision).

45. *Bay Cities*, 5 Cal. 4th at 873, 855 P.2d at 1274, 21 Cal. Rptr. 2d at 702.

46. *Id.* at 872, 855 P.2d at 1274, 21 Cal. Rptr. 2d at 703.

47. *Id.* at 872-73, 855 P.2d at 1274, 21 Cal. Rptr. 2d at 702 (citing *Gregory*, 876 F.2d at 606).

48. *Id.* at 873, 855 P.2d at 1275, 21 Cal. Rptr. 2d at 703.

49. *Id.* at 874, 855 P.2d at 1275, 21 Cal. Rptr. at 703 (Kennard, J., concurring).

50. *Id.* at 874, 855 P.2d at 1275, 21 Cal. Rptr. at 703 (Kennard, J., concurring).

51. *Id.* at 873-74, 855 P.2d at 1275, 21 Cal. Rptr. 2d at 703 (Kennard, J., concurring).

52. *Id.* (Kennard, J., concurring).

cerns pleadings filed in court, while the determination of rights under an insurance policy is a question of contract law.[53] Parties to a contract may define claim independent of any rules of civil pleading in their bargain making. In this case, the parties defined "claim" as "'a demand . . . for money against the [i]nsured.'"[54] Bay Cities sent Curotto a demand letter which sought payment for a single amount that was owed to Bay Cities for the completed construction. Thus, in asserting two claims based on two acts of negligence within one demand letter, Bay Cities made a single demand for money against the insured.[55]

Justice Kennard disapproved of the majority's decision to consider whether, assuming Bay Cities had in fact made two claims, the claims were related within the meaning of the policy. According to Justice Kennard, review was granted to resolve whether Bay Cities made a single claim and not to consider the separate issue of whether the claims would be related, an issue which she believed was an unnecessary and misleading consideration.[56]

Because the term related was undefined in Curotto's malpractice insurance policy, Justice Kennard disagreed with the majority's finding that the policy language was unambiguous.[57] She believed that a limiting construction should have been imposed on the term "related acts or omissions."[58] Justice Kennard explained, "[w]hen the language of an insurance policy is ambiguous the courts look to the expectations of a reasonable insured."[59] In this case, according to Kennard, a reasonable insured would have thought that the two claims would be categorized as "related, but only because the element of damages from each was identical."[60] Therefore, Justice Kennard explained that because there are several ways in which two acts resulting in claims under a malpractice insurance policy could be related, the term required a limiting construction.[61]

---

53. *Id.* at 874, 855 P.2d at 1275, 21 Cal. Rptr. 2d at 703 (Kennard, J., concurring).

54. *Id.* (Kennard, J., concurring).

55. *Id.* (Kennard, J., concurring).

56. *Id.* at 875, 855 P.2d at 1276, 21 Cal. Rptr. 2d at 704 (Kennard, J., concurring).

57. *Id.* at 876, 855 P.2d at 1276, 21 Cal. Rptr. 2d at 704 (Kennard, J., concurring).

58. *Id.* at 875, 855 P.2d at 1276, 21 Cal. Rptr. 2d at 704 (Kennard, J., concurring).

59. *Id.* at 876, 855 P.2d at 1276, 21 Cal. Rptr. 2d at 704 (Kennard, J., concurring) (citing American Star Ins., Co. v. Insurance Co. of the West, 232 Cal. App. 3d 1320, 1331, 284 Cal. Rptr. 45, 51 (1991).

60. *Id.* at 876, 855 P.2d at 1276, 21 Cal. Rptr. 2d at 704 (Kennard, J., concurring).

61. *Id.* at 875-76, 855 P.2d at 1276, 21 Cal. Rptr. 2d at 704 (Kennard, J., concurring).

IV. CONCLUSION

In *Bay Cities*, the California Supreme Court concluded that multiple errors leading to a single injury constitute one claim for purposes of a malpractice insurance policy's "per claim" maximum coverage.[62] The decision promoted an efficient use of resources because it precludes a client from multiplying claims in order to reap a windfall when a lawyer's multiple errors result in a single injury to the client. The holding also diminishes the risk of insufficient coverage for the attorney and other clients when the attorney's policy has an aggregate limit.

Further, the court's judgment that the term related applies to logically related acts, as well as causally related acts, reduces the potential number of claims an insurance provider will be liable for. Ultimately, under *Bay Cities*, unless a client can demonstrate that multiple injuries resulted from a lawyer's multiple acts of negligence, a claims-made insurance policy will restrict the insurance provider's potential liability to the maximum coverage offered for a single claim.

LORI ELLEN AUSTEIN

62. *Id.* at 873, 855 P.2d at 1275, 21 Cal. Rptr. 2d at 703.

B. *Extrinsic evidence to the underlying complaint is admissible to defeat an insurer's duty to defend. The duty to defend, however, arises upon a showing of the "possibility" or "potential" that the underlying suit falls within the policy coverage, and is not confined to a "reasonable" possibility standard:*
Montrose Chemical Corp. v. Superior Court.

In *Montrose Chemical Corp. v. Superior Court*,[1] the California Supreme Court addressed the scope of a liability insurer's duty to defend the claims brought against the insured,[2] and decided, in an unanimous decision,[3] that extrinsic evidence can be admitted to determine whether

---

1. 6 Cal. 4th 287, 861 P.2d 1153, 24 Cal. Rptr. 2d 467 (1993). The dispute sought to determine whether various liability insurance carriers of Montrose Chemical Corp., a former manufacturer of DDT, had a duty to defend Montrose in numerous suits arising out of alleged liability for environmental contamination. *Id.* at 292-93, 861 P.2d at 1155, 24 Cal. Rptr. 2d at 469. Montrose was accused of dumping DDT into the Santa Monica Bay. *Id.* at 292, 861 P.2d at 1155, 24 Cal. Rptr. 2d at 469; *see also Insurance: Industry Suffers Major Setback in CA Case*, GREENWIRE, Nov. 24, 1993. Although Montrose was insured by seven different insurance carriers, all seven of the insurance companies refused to defend the claim against Montrose. *Montrose*, 6 Cal. 4th at 293 n.1, 86 P.2d at 1155 n.1, 24 Cal. Rptr. 2d at 469 n.1. The insurance companies attempted to introduce extrinsic evidence to show that Montrose's liability, if any, arose from it's regular business practices, and was not an "occurrence" as covered by the policies. *Montrose*, 6 Cal. 4th at 293-94, 861 P.2d at 1156, 24 Cal. Rptr. 2d at 470. The insurers claimed they had no duty to defend because "dumping was part of Montrose's normal business practices," and was, therefore, outside the coverage of the policy. *California Supreme Court Tightens Rule on Duty to Defend*, LIABILITY WEEK, Vol. 8, No. 46, Nov. 29, 1993.

2. The court noted that the issue of whether extrinsic evidence can be admitted to defeat an insurer's duty to defend had received inconsistent treatment in the courts of appeal. *Montrose*, 6 Cal. 4th at 296, 861 P.2d at 1158, 24 Cal. Rptr. 2d at 472. *See generally* 39 CAL. JUR. 3D, *Insurance Contracts and Coverage* §§ 414-418 (1977 & Supp. 1994) (discussing duty to defend); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 1135-1142 (9th ed. 1988 & Supp. 1993) (discussing an insurer's duty to defend).

The court considered this issue in the scope of a declaratory relief action brought by the plaintiff to determine whether its insurer owed a duty to defend. *Montrose*, 6 Cal. 4th at 293, 861 P.2d at 1156, 24 Cal. Rptr. 2d at 470. The trial court denied the motion, holding that a triable issue of fact existed as to whether the complaint alleged facts within the coverage, and that the extrinsic evidence "could support the inference" that it was not within the coverage. *Id.* at 293-94, 861 P.2d at 1156, 24 Cal. Rptr. 2d at 470. The appellate court reversed, allowing the extrinsic evidence, but finding that such evidence merely put the duty to defend issue in dispute and "[s]uch a dispute could not defeat the potential for liability or the concomitant duty to defend." Montrose Chem. Corp. v. Superior Court, 13 Cal. App. 1201, 1398, 10 Cal. Rptr. 2d 687, 694 (1992).

3. Justice Panelli wrote the opinion of the court, joined by Chief Justice Lucas, and Justices Mosk, Arabian, Baxter, and George. Justice Kennard wrote a concurring opinion. *See infra* note 11 for a discussion of Justice Kennard's opinion.

the underlying suit is potentially within the coverage of the policy.[4] The court held that such evidence is admissible to defeat a claim that the insurer's duty to defend has arisen, as well as to prove such a claim.[5]

In reaching its holding, the court first considered numerous allegedly conflicting[6] appellate court decisions.[7] Although the court affirmed the appellate court's decision that extrinsic evidence should be admitted,[8] the court also stated that extrinsic evidence will not defeat the duty to defend unless it conclusively establishes that no potential for liability exists that the policy would cover.[9]

---

4. *Montrose*, 6 Cal. 4th at 291, 861 P.2d at 1154-55, 24 Cal. Rptr. 2d at 468-69; *see* 39 CAL. JUR. 3D *Insurance Contracts & Coverage* § 415 & n.11 (1977 & Supp. 1994).

5. *Montrose*, 6 Cal. 4th at 291, 861 P.2d at 1155, 24 Cal. Rptr. 2d at 469.

6. After reviewing the relevant precedent, the court ultimately noted that the cases were not truly in conflict with the issue, but distinguishable or inapplicable. The court observed that "[i]n none of these cases . . . was the principle that an insurer may not resort to extrinsic evidence to defeat a duty to defend embodied in the holding." *Id.* at 297, 861 P.2d at 1158, 24 Cal. Rptr. 2d at 472.

7. The court discussed four cases which held that extrinsic evidence could be used to defeat the duty to defend: State Farm Mut. Auto. Ins. Co. v. Flynt, 17 Cal. App. 3d 538, 95 Cal. Rptr. 296 (1971); Saylin v. California Ins. Guar. Ass'n, 179 Cal. App. 3d 256, 224 Cal. Rptr. 493 (1986); Fire Ins. Exch. v. Jiminez, 184 Cal. App. 3d 437, 229 Cal. Rptr. 83 (1986); Montrose Chem. Corp. v. Superior Court, 13 Cal. App. 4th 1201, 1398, 10 Cal. Rptr. 2d 687, 694 (1992). The court dismissed as dictum a contrary rule expressed in CNA Casualty v. Seaboard Sur. Co., 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986), noting that the decision was based on a distinguishable case which addressed whether an insurer had a duty to defend a case that lacked merit, rather than one with merit, but outside the coverage of the policy. *Montrose*, 6 Cal. 4th at 298, 861 P.2d at 1159, 24 Cal. Rptr. 2d at 273.

8. In affirming the appellate court decision, the court held that, "where extrinsic evidence establishes that the ultimate question of coverage can be determined as a matter of law on undisputed facts, we see no reason to prevent an insurer from seeking summary adjudication that no potential for liability exists and thus that it has no duty to defend." *Id.* at 298, 861 P.2d at 1159, 24 Cal. Rptr. 2d at 473.

9. *Id.* at 299-300, 861 P.2d at 1160, 24 Cal. Rptr. 2d at 474. The court further instructed that "[a]ny doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor." *Id.*

The court found that the extrinsic evidence presented by the defendants merely put the issue of whether the alleged liability of Montrose was within the polices in dispute. It noted that a showing that some of Montrose's allegedly tortious actions were within its regular business practices did not negate the possibility that some of the harm resulted from an "occurrence" as defined in the policies. *Id.* at 304-05, 861 P.2d at 1164, 24 Cal. Rptr. 2d at 478.

For a discussion on the general trend of the duty to defend, see James M. Fischer, *Broadening the Insurer's Duty to Defend: How Gray v. Zurich Insurance Co. Transformed Liability Insurance Into Litigation Insurance*, 25 U.C. Davis L. Rev. 141

The decision, hailed by the insurance industry as "one of the most important for the industry in recent decades,"[10] was particularly significant because of the vast sums of money that insurance companies spend defending their insureds in environmental damages suits. Specialists are split, however, in predicting the impact of the decision on the volume of litigation. While several commentators argue that a broad reading of the duty to defend could expedite settlements,[11] others maintain that, because many of the alleged perpetrators are judgment proof, in the absence of insurance coverage, "no one would have bothered to sue."[12]

MARJORIE ANN WALTRIP

(1991). The *Montrose* court relied heavily on its decision in *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966), and rejected amicus curiae arguments that *Gray* is inconsistent with its *Montrose* decision. *Montrose*, 6 Cal. 4th at 298, 861 P.2d at 1160, 24 Cal. Rptr. 2d at 474.

10. Harriet Chiang, *Setback for Insurers in Environmental Cases: High Court Rules on Who Must Pay for Trial Defense*, S.F. CHRON., Nov. 23, 1993, at A15.

11. Scott Graham, *On the Straight and Narrow; The California Supreme Court Maintained a Steady, Conservative Course in its 1993 Civil Rulings. Some lawyers would like them to be more expansive*, THE RECORDER, Dec. 30, 1993, at 1.

Justice Kennard wrote separately to emphasize her view that, while an insurer may be entitled to declaratory relief as to the duty to defend, such relief may be stayed where such an action would prejudice the insured in the liability action. *Montrose*, 6 Cal. 4th 305, 861 P.2d 1164, 24 Cal. Rptr. 2d 478.

12. *Graham*, *supra* note 11.

VIII. JUVENILE LAW

An order terminating reunification services and setting a selection and implementation hearing is reviewable on appeal from a final order made at a Welfare and Institutions Code section 366.26 hearing: **In re Matthew C.**

I. INTRODUCTION

In the case of *In re Matthew C.*,[1] the California Supreme Court considered whether an order terminating reunification services and setting a selection and implementation hearing is reviewable on appeal from a final order made at a section 366.26 hearing.[2] The supreme court re-

---

1. 6 Cal. 4th 386, 862 P.2d 765, 24 Cal. Rptr. 2d 765 (1993). Justice Arabian authored the majority opinion of the court with Chief Justice Lucas and Justices Mosk, Kennard, and Baxter concurring. *Id.* at 388, 862 P.2d at 766, 24 Cal. Rptr. 2d at 766. Justice Panelli filed a dissenting opinion. *Id.* at 401, 862 P.2d at 775, 24 Cal. Rptr. 2d at 775 (Panelli, J., dissenting). Justice George also filed a separate dissenting opinion. *Id.* at 405, 862 P.2d at 778, 24 Cal. Rptr. 2d at 778. (George, J., dissenting).

2. *Id.* at 393, 862 P.2d at 769, 24 Cal. Rptr. 2d at 769; *see* CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994).

In April 1989, Matthew C. was declared a dependant of the court and was removed from his mother's custody. At the dispositional hearing, the court approved a reunification plan for Deborah C., Matthew's mother. Subsequently, at the 12-month review hearing, the juvenile court ordered the reunification services terminated and set a § 366.26 hearing. The juvenile court judge found that it was unlikely that the parent and child could be reunified because of the detrimental impact the reunification would have on Matthew C. Upon rehearing, at Deborah C.'s request, the juvenile court judge determined that because she had failed to participate in the reunification programs, the court should terminate reunification services and set a 366.26 hearing.

In November 1990, the juvenile court commissioner entered a final order terminating Deborah C.'s parental rights at the 366.26 hearing. Deborah C. sought to appeal the decision ordered at the 12-month review hearing (§ 366.21) and the decision ordered at the hearing terminating parental rights (§ 366.26). Deborah C. argued there was insufficient evidence for the juvenile court's finding that Matthew could not be returned to her custody within the next six months. *Matthew C.*, 6 Cal. 4th at 390, 862 P.2d at 767, 24 Cal. Rptr. 2d at 767. Deborah C. also contended that the trial court abused its discretion when it refused to grant a one-day continuance at the 12-month review hearing. *Id.*

The court of appeal held that the order, entered at the 12-month review hearing terminating reunification services and setting a § 366.26 hearing, was not appealable. *Id.* The court, relying on § 366.26(k), determined that such an order was reviewable only by extraordinary writ filed prior to the § 366.26 hearing. *Id.* The court of appeal affirmed the decision of the juvenile court and the California Supreme Court granted review. *Id.*

versed the ruling of the appellate court, which denied the mother's petition for rehearing, and remanded the case for consideration on the merits.[3] The supreme court determined that Deborah C. had a right to appeal a final order issued by the juvenile court at the end of the reunification phase.[4] The court reasoned that the statutory interpretation was consistent with the legislative intent of section 366.26, subdivision (k).[5]

II. TREATMENT

A. *The Majority Opinion*

In *Cynthia D. v. Superior Court*,[6] the California Supreme Court described the general procedures in dependency proceedings as follows: jurisdiction, disposition, reunification and implementation of a permanent plan.[7] The supreme court acknowledged that the findings of the lower

---

3. *Id.* at 401, 862 P.2d at 775, 24 Cal. Rptr. 2d at 775. California Welfare and Institutions Code § 366.26 applies to "[h]earings terminating parental rights or establishing guardianship of minors adjudged dependent children of [the] court." CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994).

4. *Matthew C.*, 6 Cal. 4th at 401, 862 P.2d at 775, 24 Cal. Rptr. 2d at 775.

5. *Id.* California Welfare and Institutions Code § 366.26(k) provides that "[a]n order by the court directing that a hearing pursuant to this section be held is not an appealable order, but may be the subject of review by extraordinary writ." CAL. WELF. & INST. CODE § 366.26(k) (West Supp. 1994). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 639, 719 (9th ed. 1989 & Supp. 1993) (discussing juvenile dependency orders and the possibility of an appeal); 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 2 (3d ed. 1985) (noting that where the right to appeal is ambiguous as a result of statutory construction, the ambiguity should be resolved in favor of the right); 27 CAL. JUR. 3D *Delinquent and Dependent Children* §§ 176, 196, 218 (1987 & Supp. 1993) (discussing reunification services, permanency planning hearings and appealable orders).

6. 5 Cal. 4th 242, 851 P.2d 1307, 19 Cal. Rptr. 2d 698 (1993), *cert. denied*, 114 S. Ct. 1221 (1994) (holding that the preponderance of the evidence standard of proof for termination of a parent's rights satisfies due process requirements).

7. *Matthew C.*, 6 Cal. 4th at 390-91, 862 P.2d at 767-68, 24 Cal. Rptr. 2d at 767-68 (citing Cynthia D. v. Superior Court, 5 Cal. 4th 242, 248-49, 851 P.2d 1307, 1309-10, 19 Cal. Rptr. 2d 698, 700-01 (1993)). At the jurisdiction phase, a hearing is held to determine "'whether the allegations in the petition that the [child] comes within section 300, and thus within the juvenile court's jurisdiction, are true.'" *Id.* at 391, 862 P.2d at 768, 24 Cal. Rptr. 2d at 768 (quoting *Cynthia D.*, 5 Cal. 4th at 248, 851 P.2d at 1310, 19 Cal. Rptr. 2d at 701). Subsequently, the juvenile court conducts a disposition hearing, where the court "'considers whether the child may remain with the parents' or must be removed." *Id.* The reunification phase commences when the child is removed from the custody of the parents. The reunification phase terminates when the court finds that the parents and child are unable to reunify within 12 months or if "'the return of the child would create a substantial risk of detriment to the physical or emotional well-being of the minor.'" *Id.* (quoting *Cynthia D.*, 5 Cal. 4th at 249, 851 P.2d at 1310, 19 Cal. Rptr. 2d at 701); *see* CAL. WELF. & INST. CODE §§ 361.5, 366.21(e), 366.22(a) (West Supp. 1994). The court implements a permanent plan if it decides to terminate

court at the jurisdictional, dispositional and termination of parental rights phases are reviewable on appeal.[8] The court, however, has never addressed the issue of whether orders made pursuant to the reunification phase are reviewable on appeal.[9]

The California Supreme Court accepted the petitioner's contention that an order by a court terminating reunification services is reviewable on appeal from a subsequent final judgment.[10] The court reasoned that while an order setting a section 366.26 hearing is not appealable immediately, it can be appealed once a final judgment is entered.[11] Accordingly, section 366.26(k) does not preclude the appellate review of final judgments concerning the reunification process.[12]

To preclude the right to appeal a lower court's decision, the legislature must clearly state such an intention within the statute.[13] The court examined the statutory language of section 366.26 and determined that the legislature did not expressly proscribe the right to appeal a lower court's decision concerning reunification.[14] Therefore, the court found it

---

reunification efforts and set a hearing under § 366.26, which governs permanent selection within 18 months of the original removal order. *Id.* at 391-92, 862 P.2d at 768, 24 Cal. Rptr. 2d at 768 (quoting *Cynthia D.*, 5 Cal. 4th at 249, 851 P.2d at 1310, 19 Cal. Rptr. 2d at 701); *see* CAL. WELF. & INST CODE § 366.21(g) (West Supp. 1994).

8. *Matthew C.*, 6 Cal. 4th at 392-93, 862 P.2d at 769, 24 Cal. Rptr. 2d at 769; *see Cynthia D.*, 5 Cal. 4th at 249, 851 P.2d at 1310, 19 Cal. Rptr. 2d at 701; *cf. In re* Troy Z., 3 Cal. 4th 1170, 1178-79, 840 P.2d 266, 271, 13 Cal. Rptr. 2d 724, 729 (1992) (holding that parents' plea of no contest waived their right to appeal the legal applicability of § 300(e) to their conduct). *See generally* California Welfare and Institutions Code § 366.26(h) which provides: "[a]ny order of the court permanently terminating parental rights under this section shall be conclusive and binding . . . but nothing under this section shall be construed to limit the right to appeal the order." CAL. WELF. & INST. CODE § 366.26(h) (West Supp. 1994).

9. *Matthew C.*, 6 Cal. 4th at 393, 862 P.2d at 769, 24 Cal. Rptr. 2d 769.

10. *Id.*; *see* Rao v. Campo, 233 Cal. App. 3d 1557, 1565, 285 Cal. Rptr. 691, 696 (1991) (holding that interlocutory orders are generally not appealable until there is a final judgment because such appeals are too time consuming and costly).

11. *Matthew C.*, 6 Cal. 4th at 393-94, 862 P.2d at 770, 24 Cal. Rptr. 2d at 770.

12. *Id.* at 394, 862 P.2d at 770, 24 Cal. Rptr. 2d at 770.

13. *Id.*; *see* People v. Bank of San Luis Obispo, 152 Cal. 261, 264, 92 P. 481, 482 (1907) (holding that where there is doubt as to whether there is a right to an appeal, the court should find in favor of the right); Bailey v. Fosca Oil Co., 211 Cal. App. 2d 307, 309, 27 Cal. Rptr. 454, 455 (1962) (similar holding). *See also* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 2 (3d ed. 1985) (noting that where the right to appeal is ambiguous, as a result of statutory construction, the ambiguity should be resolved in favor of the right).

14. *Matthew C.*, 6 Cal. 4th at 395, 862 P.2d at 771, 24 Cal. Rptr. 2d at 771; *cf.* Peo-

would be inconsistent with the legislature's intent to construe the words "not an appealable order" as preventing a party from the ability to appeal a final judgment.[15]

The court analogized the appealability of orders terminating reunification services and setting section 366.26 hearings to pre-1989 orders authorizing the filing of petitions terminating parental rights under Civil Code section 232, or orders initiating guardianship proceedings.[16] Courts that found the orders nonappealable reasoned that there was no immediate injury, as required to appeal, until a parent's rights were actually terminated.[17] Those courts assumed that a final order terminating parental rights would be reviewable on appeal.[18] Although orders terminating reunification services and setting selection and implementation hearings are interlocutory and not appealable, this court recognized that such orders are reviewable on appeal once the order is final.[19]

The supreme court examined the legislative history of section 366.26(k), in particular, Senate Bill Number 551.[20] The court found no express legislative intent precluding appellate review of orders that terminated reunification services and set section 366.26 hearings.[21] The

---

ple v. Hull, 1 Cal. 4th 266, 275, 820 P.2d 1036, 1042, 2 Cal. Rptr. 2d 526, 532 (1991) (holding that the language "not an appealable order and may be reviewed only by a writ of mandate" implies that a writ of mandate is the only manner in which appellate review can be granted).

15. *Matthew C.*, 6 Cal. 4th at 397, 862 P.2d at 772, 24 Cal. Rptr. 2d at 772.

16. *Id.* at 397, 862 P.2d at 772, 24 Cal. Rptr. 2d at 772. Courts faced with determining the appealability of such orders were split in their opinions on the issue. *Compare In re* Linda P., 195 Cal. App. 3d 99, 105, 240 Cal. Rptr. 474, 478 (1987) (holding such orders appealable) *and In re* Sarah F., 191 Cal. App. 3d 398, 404, 236 Cal. Rptr. 480, 483 (1987) (similar holding) *and In re* Lorenzo T., 190 Cal. App. 3d 888, 891-93, 235 Cal. Rptr. 680, 682-83 (1987) (similar holding) *and In re* Joshua S., 186 Cal. App. 3d 147, 154-55, 230 Cal. Rptr. 437, 441-42 (1986) (similar holding) *with In re* Debra M., 189 Cal. App. 3d 1032, 1039, 234 Cal. Rptr. 739, 743-44 (1987) (holding such orders nonappealable) *and In re* Lisa M., 177 Cal. App. 3d 915, 919-20, 225 Cal. Rptr. 7, 9-10 (1986) (similar holding) *and In re* Candy S., 176 Cal. App. 3d 329, 331, 222 Cal. Rptr. 43, 43, (1985) (similar holding).

17. *Matthew C.*, 6 Cal. 4th at 397, 862 P.2d at 772, 24 Cal. Rptr. 2d at 772; *see also In re* Candy S., 176 Cal. App. 3d at 331, 222 Cal. Rptr. at 43; *cf. In re* T.M., 206 Cal. App. 3d 314, 315-16, 253 Cal. Rptr. 535, 536, (1988) (holding that the right to appeal an order authorizing termination of parental rights may be retroactively terminated).

18. *Matthew C.*, 6 Cal. 4th at 398, 862 P.2d at 772, 24 Cal. Rptr. 2d at 772.

19. *Id.* at 399, 862 P.2d at 774, 24 Cal. Rptr. 2d at 774.

20. *Id.* at 399, 862 P.2d at 773, 24 Cal. Rptr. 2d at 773; *see also* CAL. WELF. & INST. CODE § 366.26(k) (West Supp. 1994).

21. *Matthew C.*, 6 Cal. 4th at 399, 862 P.2d at 773, 24 Cal. Rptr. 2d at 773. Senate Bill No. 551 provides, in pertinent part:

> '[P]arents cannot appeal a juvenile court order to hold a hearing to consider terminating parental rights . . . . [T]he bill requires that orders to hold hearings to terminate parental rights are subject to appellate review by

court concluded that the statutory language may be construed to mean that although such orders are not immediately appealable, the orders are reviewable on appeal from a final judgment.[22]

The majority reasoned that the legislative purpose in enacting section 366.26(k) was to eliminate the relitigation of dependency proceedings.[23] The court noted, however, that the legislature did not intend to preclude appellate review of all orders pertaining to the termination of reunification services, but only appellate review of interim orders.[24] The court concluded that although appellate review of orders terminating reunification services delays the permanent placement of a child, to eliminate appellate review of final orders would be contrary to the legislature's intent.[25] Thus, the supreme court reversed the court of appeal decision and remanded the case to be decided on the merits.[26]

B. The Dissenting Opinions

Justice Panelli dissented because he believed that section 366.26(k) permits a parent to seek appellate review only by extraordinary writ.[27] Justice Panelli reasoned that the legislature drafted this provision to protect the best interests of the child by assuring prompt, permanent placement.[28]

Justice Panelli acknowledged that section 366.26 is ambiguous in its statement that: "[a]n order by the court directing that a [permanency

---

extraordinary writ. Under current law, parents can appeal juvenile court orders to hold termination hearings to the court of appeals.'

Id. at 399, 862 P.2d at 773-74, 24 Cal. Rptr. at 773-74 (citations omitted).

22. *Matthew C.*, 6 Cal. 4th at 399, 862 P.2d at 774, 24 Cal. Rptr. 2d at 774.

23. *Id.* at 400, 862 P.2d at 774, 24 Cal. Rptr. 2d at 774; *see* CAL. WELF. & INST. CODE § 366.26(k) (West Supp. 1994). In enacting the statute, the legislature considered the child's interest in "'a placement that is stable, permanent, and which allows the caretaker to make a full emotional commitment to the child,'" and the parents' "'interest in the companionship, care, custody and management' of their child." *Id.* (quoting *In re* Marilyn H., 5 Cal. 4th 295, 306, 851 P.2d 826, 833, 19 Cal. Rptr. 2d 544, 551 (1993) (holding that the placement of a child at a permanency planning hearing is limited by the statutory options)).

24. *Matthew C.*, 6 Cal. 4th at 400, 862 P.2d at 774, 24 Cal. Rptr. 2d at 774.

25. *Id.* at 400, 862 P.2d at 774-75, 24 Cal. Rptr. 2d at 774-75.

26. *Id.* at 401, 862 P.2d at 775, 24 Cal. Rptr. 2d at 775.

27. *Id.* at 405, 862 P.2d at 777-78, 24 Cal. Rptr. 2d at 777-78 (Panelli, J., dissenting); *see* CAL. WELF. & INST. CODE § 366.26(k) (West Supp. 1994).

28. *Matthew C.*, 6 Cal. 4th at 402, 862 P.2d at 775, 24 Cal. Rptr. 2d at 775 (Panelli, J., dissenting).

planning] hearing pursuant to this section be held is not an appealable order, but may be the subject of review by extraordinary writ."[29] Nevertheless, Justice Panelli criticized the majority's interpretation that the order is not appealable on an interlocutory basis.[30] The use of specific words by the legislature may not necessarily be used by the courts in the same way.[31] In an attempt to resolve the statute's ambiguity, Justice Panelli examined the legislative history of the statute.[32] The legislative purpose in enacting section 366.26(k) was to eliminate any unnecessary delay in the child's permanent placement.[33] Justice Panelli criticized the majority's interpretation of section 366.36(k) because the majority failed to uphold the legislative intent to expedite the permanent placement of the child.[34]

Justice Panelli suggested that section 366.26(k) be interpreted to provide appellate review of orders terminating reunification services only by extraordinary writ, rather than on appeal from a final judgment.[35] If the courts allowed appeals from final judgments, then the child's right to prompt, permanent placement would be sacrificed.[36] Allowing appellate review of orders terminating reunification services only by extraordinary writs protects both the child's right to prompt permanent placement and the parent's right to review.[37] Believing that it is in the best interest of the child not to delay his or her permanent placement, Justice Panelli would have affirmed the appellate court judgment and denied review of orders terminating reunification services without extraordinary writs.[38]

---

29. *Id.* (Panelli, J., dissenting) (quoting CAL. WELF. & INST. CODE § 366.26(k) (West Supp. 1994)).

30. *Id.* at 402, 862 P.2d at 775, 24 Cal. Rptr. 2d at 775 (Panelli, J., dissenting).

31. *Id.* at 402, 862 P.2d at 775-76, 24 Cal. Rptr. 2d at 775-76 (Panelli, J., dissenting); *see* Harris v. Capital Growth Investors, 52 Cal. 3d 1142, 1157, 805 P.2d 873, 880, 278 Cal. Rptr. 614, 621 (1991) (noting that the legislature's "primary concern is not to study and refine the language used in judicial decisions, but to accomplish practical results").

32. *Matthew C.*, 6 Cal. 4th at 403, 862 P.2d at 776, 24 Cal. Rptr. 2d at 776 (Panelli, J., dissenting).

33. *Id.* (Panelli, J., dissenting); *see* Cynthia D. v. Superior Court, 5 Cal. 4th 242, 247, 851 P.2d 1307, 1309, 19 Cal. Rptr. 2d 698, 700 (1993), *cert. denied*, 114 S. Ct. 1221 (1994) (articulating that the purpose of § 366.26 was to prevent the delay of permanent placement); CAL. WELF. & INST. CODE § 366.26(k) (West Supp. 1994).

34. *Matthew C.*, 6 Cal. 4th at 404, 862 P.2d at 777, 24 Cal. Rptr. 2d at 777 (Panelli, J., dissenting).

35. *Id.* at 404, 862 P.2d at 777, 24 Cal. Rptr. 2d at 777 (Panelli, J., dissenting); *see* CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994).

36. *Matthew C.*, at 405, 862 P.2d at 777, 24 Cal. Rptr. 2d at 777 (Panelli, J., dissenting).

37. *Id.* at 405, 862 P.2d at 777, 24 Cal. Rptr. 2d at 777 (Panelli, J., dissenting); *see In re* Kristin W., 222 Cal. App. 3d 234, 247, 271 Cal. Rptr. 629, 636 (1990) (holding appellate review by writ to be prompt and effective); CAL. R. CT. 39.2A(b) (West 1994) ("[e]xtraordinary writs are encouraged to review orders in child custody proceedings").

38. *Matthew C.*, 6 Cal. 4th at 405, 862 P.2d at 777-78, 24 Cal. Rptr. 2d at 777-78

Justice George also wrote a separate dissenting opinion and argued that the appellate court decision should have been affirmed.[39] Justice George observed that many appellate court decisions support interpreting section 366.26(k) to preclude appellate review of orders terminating reunification services and scheduling a 366.26 hearing.[40]

Justice George criticized the majority's interpretation as contrary to the legislative intent to minimize the delay in implementing the permanent plan for the placement of dependent children.[41] Justice George proposed that the statute be interpreted to preclude appellate review of orders setting up a section 366.26 hearing unless an extraordinary writ is issued.[42] This interpretation upholds the legislative goal of expediting the permanent placement process for dependent minors.[43] Believing that section 366.26(k) precludes review from a final order entered at a section 366.26 hearing, Justice George would have affirmed the appellate court judgment.[44]

III. CONCLUSION

The California Supreme Court decided that an order terminating reunification services and setting a section 366.26 hearing is appealable from a subsequent final order terminating parental rights.[45] The supreme

---

(Panelli, J., dissenting).

39. *Id.* at 405, 862 P.2d at 778, 24 Cal. Rptr. 2d at 778 (George, J., dissenting).

40. *Id.* at 406, 862 P.2d at 778, 24 Cal. Rptr. 2d at 778 (George, J., dissenting); *see* CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994); *In re* Amanda B., 3 Cal. App. 4th 935, 940, 4 Cal. Rptr. 2d 922, 925 (1992) (holding that once a judgment in a selection and implementation hearing had been made a parent could not appeal from a referral hearing); *In re* Taya C., 2 Cal. App. 4th 1, 8-9, 2 Cal. Rptr. 2d 810, 813-14 (1991) (holding that a petition for an extraordinary writ is required for appellate review of orders terminating parental rights); *In re* Rebecca H., 227 Cal. App. 3d 825, 836, 278 Cal. Rptr. 185, 190 (1991) (holding that an order denying reunification is reviewable on appeal only by extraordinary writ).

41. *Matthew C.*, 6 Cal. 4th at 406, 862 P.2d at 778, 24 Cal. Rptr. 2d at 778 (George, J., dissenting).

42. *Id.* at 406-07, 862 P.2d at 778, 24 Cal. Rptr. 2d at 778 (George, J., dissenting); *see* CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994).

43. *Matthew C.*, 6 Cal. 4th at 407, 862 P.2d at 778-79, 24 Cal. Rptr. 2d at 778-79 (George, J., dissenting); *see In re* Amanda B., 3 Cal. App. 4th 935, 939-40, 4 Cal. Rptr. 2d 922, 925 (1992) (noting that the statutory objective is to eliminate delays in the permanent placement of minors).

44. *Matthew C.*, 6 Cal. 4th at 408, 862 P.2d at 779, 24 Cal. Rptr. 2d at 779 (George, J., dissenting); *see* CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994).

45. *Matthew C.*, 6 Cal. 4th at 401, 862 P.2d at 774-75, 24 Cal. Rptr. 2d at 774-75; *see*

court rejected the appellate court's decision that concluded such orders were appealable only by extraordinary writ.[46] The decision clarifies the statutory ambiguity of section 366.26(k) in favor of allowing appellate review of final orders terminating parental rights as well as appellate review by extraordinary writ.[47]

JEANNE M. MACCALDEN

CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994).

46. *Matthew C.*, 6 Cal. 4th at 401, 862 P.2d at 774-75, 24 Cal. Rptr. 2d at 774-75; *see* CAL. WELF. & INST. CODE § 366.26 (West Supp. 1994).

47. *Matthew C.*, 6 Cal. 4th at 401, 862 P.2d at 774-75, 24 Cal. Rptr. 2d at 774-75; *see* CAL. WELF. & INST. CODE § 366.26(k) (West Supp. 1994).

IX. PUBLIC IMPROVEMENTS

The Landscaping and Lighting Act of 1972 authorizes special assessments on residential property for maintaining public improvements constructed or installed prior to the Act when the property receives benefits from the maintenance of the improvement equivalent to the amount of the assessment: **Knox v. City of Orland.**

The Landscaping and Lighting Act of 1972 (the Act) allows special assessments on residential property for building and maintaining public landscaping and lighting improvements.[1] In *Knox v. City of Orland*,[2] the

1. 4 Cal. 4th 132, 136, 841 P.2d 144, 146, 14 Cal. Rptr. 2d 159, 161 (1992). The Act, codified in California Streets and Highways Code §§ 22500-22509, authorizes special benefit-related assessments, subject to certain procedural limitations, on residential landowners. CAL. STS. & HIGH. CODE §§ 22500-22509 (West Supp. 1994). *See generally* 51 CAL. JUR. 3D *Public Improvements* §§ 52-73 (1979 & Supp. 1993) (outlining the procedural requirements for creating districts and levying assessments). The local legislative body wishing to impose the assessment must first pass a resolution proposing the formation of a district, describing the improvement, and ordering an engineer's report. CAL. STS. & HIGH. CODE § 22585 (West Supp. 1994). Following the approval of the engineer's report, the local legislative body must hold a noticed public hearing, considering all oral statements and written protests. *Id.* at §§ 22588, 22590. If the owners of more than 50% of the assessable land file written protests, the local body must either abandon the assessment scheme or overrule the protest by a four-fifths majority vote. *Id.* at §§ 22592, 22593, 22594. The local body determines the boundaries of the district based on the benefits realized by property owners surrounding the public improvement. *Id.* at § 22503. The Act requires a noticed public hearing with proper notice and an engineer's report annually for each assessment imposed in subsequent years. *Id.* at §§ 22620-22631.

2. 4 Cal. 4th 132, 841 P.2d 144, 14 Cal. Rptr. 2d 159 (1992). Justice Baxter authored the majority opinion in which Chief Justice Lucas and Justices Mosk, Panelli, Arabian, and George concurred. Justice Kennard wrote a separate dissenting opinion. *Id.* at 151, 841 P.2d at 155, 14 Cal. Rptr. 2d at 170.

Pursuant to the Landscaping and Lighting Act, the City of Orland assessed residential property owners for the maintenance of parks built prior to the Act that the city previously maintained with general tax revenues. Four residential property owners challenged the assessment. The trial court granted summary judgment to the city on the procedural ground that the plaintiffs failed to challenge the defendant's statement of "undisputed facts" and on the substantive ground that no triable issue of fact existed as to the validity of the special assessment. *Id.* at 137-38, 841 P.2d at 146-47, 14 Cal. Rptr. 2d at 161-62. The court of appeal affirmed, basing its decision on the substantive ground. *Id.* The California Supreme Court granted review because of the importance of the legal issue to the governing bodies of California cities and counties. *See id.* at 138 n.9, 841 P.2d at 147 n.9, 14 Cal. Rptr. 2d at 162 n.9 (stating that three

California Supreme Court considered whether the Act allows special assessments for maintaining public improvements, constructed or installed prior to the Act, that a city previously funded with general tax revenues.[3]

The court first addressed whether the Act authorizes special assessments for maintenance of public parks not constructed pursuant to the Act.[4] Streets and Highways Code section 22525 specifically authorizes assessments for "improvements," including "[t]he installation of park or recreational improvements,"[5] and "[t]he maintenance or servicing, or both, of any of the foregoing."[6] All of the enumerated "improvements" are installations except for the latter quoted provision for maintenance and servicing that refers to the "foregoing" improvements.[7] The court held that special assessments for maintenance of public improvements made prior to the Act are independently authorized "improvements" under the Act.[8] The court reasoned that the express language used in section 22525 to describe improvements includes maintenance and servicing,[9] section 22605 specifically allows the consolidation of districts created under other assessment schemes,[10] and the legislative intent of the Act was to simplify the procedural muddle created by prior special assessment schemes.[11]

The court next addressed whether the assessment was a valid special assessment or whether it was a special tax and thus subject to con-

---

amicus curiae briefs were filed on behalf of at least twelve cities and three counties in support of the City of Orland); *see also*, CAL. R. CT., Rule 29(a) (listing grounds for supreme court review).

3. *Knox*, 4 Cal. 4th at 138, 841 P.2d at 147, 14 Cal. Rptr. 2d at 162.

4. *Id.* The plaintiff landowners contended that the Act authorized maintenance assessments only for public improvements constructed or installed under the Act. *Id.* Justice Kennard agreed with the plaintiffs' narrow construction of the Act and dissented on this ground. *See infra* note 23.

5. *Knox*, 4 Cal. 4th at 138, 841 P.2d at 147, 14 Cal. Rptr. 2d at 162 (quoting CAL. STS. & HIGH. CODE § 22525(e) (West Supp. 1994)).

6. *Id.* at 138, 841 P.2d at 147-48, 14 Cal. Rptr. 2d at 162-63 (quoting CAL. STS. & HIGH. CODE § 22525(f) (West Supp. 1994)). "Maintenance" is "the furnishing of services and materials for the ordinary and usual maintenance, operation, and servicing of *any* improvement." CAL. STS. & HIGH. CODE § 22531 (West Supp. 1994) (emphasis added).

7. See *id.* at § 22525(a)-(e) (West Supp. 1994) (describing all of the improvements except the provision for maintenance and servicing as "[t]he installation of" some improvement). The plaintiffs' argued "the foregoing" language in the provision for maintenance and servicing referred to the foregoing "installations," and were not themselves "improvements." *Knox*, 4 Cal. 4th at 138-39, 841 P.2d at 148, 14 Cal. Rptr. 2d at 163. The court, however, rejected the plaintiffs' narrow interpretation of the Act. *See infra* text accompanying notes 8-11.

8. *Knox*, 4 Cal. 4th at 140, 841 P.2d at 149, 14 Cal. Rptr. 2d at 164.

9. *Id.* at 139, 841 P.2d at 148, 14 Cal. Rptr. 2d at 163.

10. *Id.*

11. *Id.* at 139-40, 841 P.2d at 148-49, 14 Cal. Rptr. 2d at 163-64.

stitutional limitations.[12] Under the California Constitution, any part of a charge on real property in excess of specific benefits to the people or property charged is a special tax and is subject to constitutional limitations.[13]

The court explained the critical difference between special assessments and taxes.[14] A special assessment is a charge levied on real property that stands to benefit from a local public improvement to defray the costs of that improvement.[15] Revenue derived from special taxes, however, is not necessarily spent on improvements which benefit assessed persons or property.[16]

The court reaffirmed its pre-Proposition 13 statement in *Dawson v. Town of Los Altos Hills*,[17] providing that the standard for reviewing a special assessment imposed pursuant to statutory guidelines is one of deference and the court will not overturn the assessment unless it is disproportionately high compared to benefits bestowed on assessed property.[18] In *Knox*, the city complied with all statutory procedural requirements to impose the assessment.[19] The required engineer's report indicated that the twenty-four dollar per dwelling unit charge was for the cost of maintaining "the pools, playgrounds, picnic and barbecue areas,

---

12. *Id.* at 140-41, 841 P.2d at 149, 14 Cal. Rptr. 2d at 164.

13. *Knox*, 4 Cal. 4th at 148, 841 P.2d at 154-55, 14 Cal. Rptr. 2d at 169-70. Proposition 13, enacted by voter initiative in 1978, added Article XIII A to the California Constitution. *Id.* Article XIII A, § 4 requires two-thirds voter approval before a government locality can levy special taxes. *Id.*;*see also id.* at 142-43, 841 P.2d at 150, 14 Cal. Rptr. 2d at 165 ("Accordingly, if an assessment for park maintenance improvements provides a special benefit to the assessed properties, then the assessed property owners should pay for the benefit they receive. If it does not, the assessment effectively amounts to a special tax upon the assessed property owners for the benefit of the general public.").

14. *Id.* at 141-42, 841 P.2d at 149-50, 14 Cal. Rptr. 2d at 164-65; *see also* 51 CAL. JUR. 3D *Public Improvements* § 2 (1979 & Supp. 1993) (distinguishing special assessments from taxes); 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 110 (1989 & Supp. 1993) (same).

15. *Knox*, 4 Cal. 4th at 141-42, 841 P.2d at 150, 14 Cal. Rptr. 2d at 165; *see also* 51 CAL. JUR. 3D *Public Improvements* §§ 22-26 (1979 & Supp. 1993) (outlining the requirements for valid special benefit assessments).

16. *Knox*, 4 Cal. 4th at 142, 841 P.2d at 150, 14 Cal. Rptr. 2d at 165.

17. 16 Cal. 3d 676, 685, 547 P.2d 1377, 1082-83, 129 Cal. Rptr. 97, 102-03 (1976).

18. *Knox*, 4 Cal. 4th at 145-47 & n. 19, 841 P.2d at 152-53 & n. 19, 14 Cal. Rptr. 2d at 167-68 & n. 19; *see also* 51 CAL. JUR. 3D *Public Improvements* § 36 (1979 & Supp. 1993) (providing that the amount of the assessment is for the local body to decide, subject to judicial review under an abuse of discretion standard).

19. *Knox*, 4 Cal. 4th at 147-48, 841 P.2d at 154, 14 Cal. Rptr. 2d at 169; *see supra* note 1 for a synopsis of the procedural requirements.

bicycle paths, baseball and softball fields, tennis and volleyball courts, and horseshoe pits located at the various parks" in the assessment districts.[20] The record also did not contradict the city's benefit determination.[21] Furthermore, the court did not think it was relevant that the city shifted funding for the maintenance of parks from general tax revenues to special assessment districts.[22] Therefore, the court concluded the assessment was not a special tax and did not mandate two-thirds voter approval because the city imposed the charge on the real property that benefitted from the "improvement" in an amount equal to the assessment and in conformity with statutory procedural requirements.[23]

In *Knox v. City of Orland*, the California Supreme Court held that special assessments for maintenance of pre-Act public improvements are independently authorized "improvements" under the Act.[24] The court also concluded the assessment in *Knox* was not a special tax requiring two-thirds voter approval because the city imposed the charge on real property benefitted by the "improvement" in an amount equal to the assessment and in conformance with statutory procedural requirements.[25]

Many commentators have concluded that this decision gives local governments wider latitude to impose special assessments for

---

20. *Knox*, 4 Cal. 4th at 147, 841 P.2d at 154, 14 Cal. Rptr. 2d at 169; *see* 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 24 (1989 & Supp. 1993) (stating that substantive due process rights are implicated by assessments "without or in excess of benefits").

21. *Knox*, 4 Cal. 4th at 148, 841 P.2d at 155, 14 Cal. Rptr. 2d at 170.

22. *Id.* at 150, 841 P.2d at 155-56, 14 Cal. Rptr. 2d at 170-71 ("Plainly, if an improvement provides a special benefit, that benefit exists whether or not the public entity was correct in first financing it out of its general fund . . . . Accordingly, section 4 does not preclude a public entity from shifting funding for an improvement from its general fund to special assessment, so long as the requisite special benefit exists."). Earlier in its opinion, the majority clarified that it was addressing a traditional benefit assessment. *Id.* at 144-45, 841 P.2d at 151-52, 14 Cal. Rptr. 2d at 166-67. This governmental shifting factor may be relevant to determine the validity of an assessment for non-traditional purposes; *see also* 51 CAL. JUR 3D *Public Improvements* § 3 (1979 & Supp. 1993) (providing that funding questions are for the legislature to decide based on whether benefits will accrue to the public in general or whether some special benefit is bestowed on an identifiable group).

23. *Knox*, 4 Cal. 4th at 151, 841 P.2d at 156, 14 Cal. Rptr. 2d at 171. Justice Kennard dissented because she concluded that the "maintenance of preexisting facilities cannot be considered an 'improvement' within the meaning of the [Act] . . . ." *Id.* at 154, 841 P.2d at 158, 14 Cal. Rptr. 2d at 173 (Kennard, J., dissenting). Justice Kennard stated that she never would have reached the special tax issue because she would have reversed on the ground that maintenance is not an authorized improvement. *Id.* at 151, 841 P.2d at 156, 14 Cal. Rptr. 2d at 171 (Kennard, J., dissenting).

24. *Id.* at 140, 841 P.2d at 149, 14 Cal. Rptr. 2d at 164.

25. *Id.* at 151, 841 P.2d at 156, 14 Cal. Rptr. 2d at 171.

non-traditional purposes without a public vote.[26] While there is much speculation about whether local governments now will use special assessments for atypical sources of funding, the court in *Knox* specifically found that parks have historically been the subject of special assessments.[27] The court made no mention of atypical subjects of special assessment funding.[28] Furthermore, procedural due process rights to notice and a hearing before the imposition of a special assessment, while not equivalent to a public vote, are significant deterrents to overzealous locally elected governing officials.[29] The court in *Knox* did not, as others speculated, authorize the widespread shifting of funding sources from general tax revenues to special assessments.[30]

MICHAEL EMMET MURPHY

---

26. *See, e.g.*, Brad Altman, *Expanded Assessment Powers Are Seen In California, But Opposition Building*, THE BOND BUYER, Oct. 11, 1993, at 1 (reporting the liberalized use of special assessment districts after *Knox* "for such atypical purposes as cleaning up graffiti and funding library services" and recognizing a shift from general tax revenues to special assessments); Brad Altman, *Open House On Assessment Levies May Soon Be Closed*, THE BOND BUYER, Oct. 7, 1993, at 1A (outlining recent legislation introduced by taxpayer watchdog groups that require voter approval for special assessments and thus limit the government's ability to circumvent the limitations imposed by Proposition 13); Joel Fox, *Pterodactyl California Is Swooping Down on Local Governments*, THE SAN DIEGO UNION-TRIBUNE, July 4, 1993, at G6 (citing the state's budgetary shifting of school funding to local governments as the cause behind more creative and non-traditional subjects of special assessments); *Homeowner's Relief Measure Calls For Assessment Vote*, CALIFORNIA PUBLIC FINANCE, Mar. 8, 1993, at 1 (outlining recent legislation introduced by taxpayer watchdog groups that require voter approval for special assessments and thus limit the government's ability to circumvent the limitations imposed by Proposition 13); Brian S. Currey, *Benefit Assessment Ruling: An Invitation to Experiment*, CALIFORNIA PUBLIC FINANCE, Feb. 22, 1993, at 6 (briefing the *Knox* decision and arguing that special assessments for school facilities and other non-traditional subjects of assessments such as police stations, fire stations, and libraries are valid under *Knox* if the governing body complies with the statutory administrative requirements); *Benefit for Localities Seen In Court Assessment Ruling*, CALIFORNIA PUBLIC FINANCE, Feb. 8, 1993, at 1 (citing *Knox* as the impetus for expanded non-traditional use of assessment powers).

27. *Knox*, 4 Cal. 4th at 144-45, 841 P.2d at 151-52, 14 Cal. Rptr. 2d at 166-67.

28. *Id.*

29. *See* 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 20 (1989 & Supp. 1993) (outlining the constitutional requirements of notice and a hearing implicated by the imposition of a special assessment).

30. *See supra* note 26 and accompanying text.

X. RECORDS LAW

Neither the California Public Records Act nor the Brown Act compel public disclosure of letters from the city attorney to the city counsel that express legal opinions on matters before the city counsel:
Roberts v. City of Palmdale.

I. INTRODUCTION

In *Roberts v. City of Palmdale*,[1] the California Supreme Court held that a letter from a city attorney to the city counsel which expresses an opinion on a pending legal matter[2] does not fall within the California Public Records Act[3] and is, therefore, not subject to public disclosure.[4]

The court determined that the correspondence in question did not constitute a "meeting" as defined by the Ralph M. Brown Act,[5] (Brown Act). In addition, it concluded that a recent amendment to the Brown Act did not abrogate the attorney-client privilege with respect to legal correspondence by a city attorney to local governing bodies.[6]

II. TREATMENT

The court first examined the city of Palmdale's claim that, according to the Public Records Act, the attorney-client privilege protected the letter from any public disclosure.[7] Finding the letter to be a public re-

---

1. 5 Cal. 4th 363, 853 P.2d 296, 20 Cal. Rptr. 2d 330 (1993). Justice Mosk authored the unanimous opinion.

2. Roberts sought to have the Palmdale city counsel disclose a letter from the city attorney advising the city of its legal position with respect to a parcel map application approved by the planning commission. *Id.* at 367-68, 853 P.2d at 497-98, 20 Cal. Rptr. 2d at 331-32. He had appealed the proposed map to the Palmdale city counsel and threatened legal action. After receiving a confidential letter on the matter from the city attorney, the city counsel held a public meeting to discuss the issues raised in the letter. At the meeting, Roberts did not seek disclosure of the letter, and, subsequently, the city counsel approved the map. Several days later, he demanded a copy of the letter, and the city counsel refused to provide it. *Id.* at 368, 853 P.2d at 498, 20 Cal. Rptr. 2d at 332.

3. The California Public Records Act refers to California Government Code § 6250 and the following sections. *See* CAL. GOV'T CODE § 6250-6265 (West 1980 & Supp. 1994).

4. *Roberts*, 5 Cal. 4th at 367, 853 P.2d at 497, 20 Cal. Rptr. 2d at 331.

5. *Id.* The Brown Act refers to California Government Code § 54950 and the following sections. *See* CAL. GOV'T CODE § 54950-54961 (West 1983 & Supp. 1994).

6. *Roberts*, 5 Cal. 4th at 367, 853 P.2d at 497, 20 Cal. Rptr. 2d at 331.

7. *Id.* at 369-70, 853 P.2d at 499, 20 Cal. Rptr. 2d at 333. Section 6253(a) provides that "[p]ublic records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except

cord,[8] the court reasoned that Government Code section 6254(k) still excepted all public records within the attorney-client privilege[9] from disclosure.[10] In support, the court cited numerous authorities arguing that the attorney-client privilege applies to public entities.[11]

The court determined that section 6254(b) did not limit the attorney-client privilege solely to matters in litigation.[12] Although Section 6254(b) specifically exempts from disclosure any documents pertaining to pending litigation, the court insisted that the code did not imply the converse, that documents not pertaining to pending litigation must be disclosed.[13] Thus, according to the court, section 6254(b) did not limit the privilege.[14]

The court then addressed appellant's claim that the Brown Act[15]

---

as hereafter provided." CAL. GOV'T CODE § 6253(a) (West 1980 & Supp. 1994).

8. *Roberts*, 5 Cal. 4th at 370, 853 P.2d at 499, 20 Cal. Rptr. 2d at 333. Section 6252(d) defines a public record as any "writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." CAL. GOV'T CODE § 6252(d) (West 1980).

9. *See* CAL. EVID. CODE § 950 (West 1980).

10. Section 6254(k) does not require disclosure of records which are "exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." CAL. GOV'T CODE § 6254(k) (West 1980 & Supp. 1994).

11. *Roberts*, 5 Cal. 4th at 370, 853 P.2d at 499, 20 Cal. Rptr. 2d at 333; *see also* EVID. CODE § 175 (West 1980) (defining a person within the meaning of the statute to include public entities). *See generally* Vela v. Superior Court, 208 Cal. App. 3d 141, 255 Cal. Rptr. 921 (1989); Sutter Sensible Planning, Inc. v. Board of Supervisors, 122 Cal. App. 3d 813, 176 Cal. Rptr. 342 (1981); Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954); 2 B.E. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1114 (3d ed. 1986 & Supp. 1993).

12. *Roberts*, 5 Cal. 4th at 371, 853 P.2d at 500, 20 Cal. Rptr. 2d at 334. Section 6254(b) exempts from disclosure "[r]ecords pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled." CAL. GOV'T CODE § 6254(b) (West 1980 & Supp. 1994).

13. *Roberts*, 5 Cal. 4th at 371-72, 853 P.2d at 500, 20 Cal. Rptr. 2d at 334. The court noted that § 6254(b) made no mention of privilege. *Id.* at 372, 858 P.2d at 500, 20 Cal. Rptr. 2d at 334. Furthermore, the court explained that to compel disclosure under 6254(b) would be to imply an exception to 6254(k) for records protected by the attorney-client privilege. *Id.* at 372, 858 P.2d at 501, 20 Cal. Rptr. 2d at 335.

14. *Id.* at 373, 853 P.2d at 501, 20 Cal. Rptr. 2d at 335. The court concluded that the local government body is the keeper of the attorney-client privilege, and that such privilege could be asserted whether or not the writing relates to pending litigation. *Id.*

15. *See supra* note 5 and accompanying text.

and its subsequent amendments abrogated the attorney-client privilege for government entities with respect to non-litigation matters.[16] The court noted that the language of the Brown Act abrogated the attorney-client privilege only when the communication takes place at a "closed-session meeting" or "closed session".[17] Looking to the plain meaning of the statute, the court concluded that the word "meeting" in section 54956.9 did not contemplate correspondence, but rather a "'gathering'" or '"assembly . . . of members . . . for the transaction of business.'"[18]

Relying on letters from proponents of the legislation,[19] the court determined that the intent of the legislature was to "close a loophole" that extended the privilege to a government body's meeting with counsel over non-litigation matters.[20] Therefore, the court found no clear intent to limit the privilege with respect to written communication,[21] and thus refused to interpret the Brown Act as repealing, by implication, the attorney-client privilege.[22]

To further support its holding, the court examined section

---

16. *Roberts*, 5 Cal. 4th at 373, 853 P.2d at 501, 20 Cal. Rptr. 2d at 335.

17. *Id.* at 375, 853 P.2d at 502, 20 Cal. Rptr. 2d at 336. California Government Code § 54956.9 states in pertinent part:

> Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.

CAL. GOV'T CODE § 54956.9 (West 1983 & Supp. 1994).

18. *Roberts*, 5 Cal. 4th at 376, 853 P.2d at 503, 20 Cal. Rptr. 2d at 337 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1404 (3d ed. 1981)). The court also relied on Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr 480 (1968), to refute appellant's claim that private correspondence between a government body and its legal counsel constituted a meeting for purposes of § 54956.9. *Roberts*, 5 Cal. 4th at 376, 853 P.2d at 503, 20 Cal. Rptr. 2d at 337. *Sacramento Newspaper Guild* stated that a "meeting" and "session" involve "[a] collective decision-making process" and "[a] deliberative gathering." *Sacramento Newspaper Guild*, 263 Cal. App. 2d at 47-48, 69 Cal. Rptr. at 485. The *Roberts* court indicated that the term "meeting" had been interpreted to connote some type of "collective action". *Roberts*, 5 Cal. 4th at 376, 853 P.2d at 503, 20 Cal. Rptr. 2d at 337.

19. *Id.* at 378, 858 P.2d at 504, 20 Cal. Rptr. 2d at 338.

20. *Id.*

21. *Id.* at 377, 858 P.2d at 504, 20 Cal. Rptr. 2d at 338.

22. *Id.* at 378-79, 858 P.2d at 505, 20 Cal. Rptr. 2d at 339; *see also* Nicklesberg v. Workers' Compensation Appeals Bd., 54 Cal. 3d 288, 295-96, 814 P.2d 1328, 1333-34, 285 Cal. Rptr. 86, 90-91 (1991) (discussing the judicial presumption against repeals by implication); Board of Supervisors v. Lonegran, 27 Cal. 3d 855, 868, 616 P.2d 802, 810, 167 Cal. Rptr 820, 828 (1980) (stating that legislation intended to supersede existing laws "must constitute a revision of the entire subject" in order to overcome the presumption against implied repeals).

54957.5(a), which the court of appeal interpreted as a limitation to the privilege.[23] Although section 54957.5 (a) defines public records as any writings under consideration by a legislative body or agency,[24] the court noted that the statute exempted privileged communication under section 6254.[25]

Observing that "[a] city counsel needs freedom to confer with its lawyers confidentially in order to obtain adequate advice," the court noted that the privilege benefitted the public interest, and thus found that the statute did not abrogate the attorney-client privilege as to written advice from counsel to a government body.[26]

III. CONCLUSION

Finding no clear legislative intent to limit the attorney-client privilege with respect to written legal advice to a government body,[27] and recognizing the necessity of a government body to receive legal advice in confidence,[28] the California Supreme Court held that neither the Public Records Act nor the Brown Act compelled disclosure of legal advice given to the city counsel.[29] In clarifying the circumstances in which communications may be kept confidential, the court's decision should facili-

---

23. *Roberts*, 5 Cal. 4th at 379, 853 P.2d at 505, 20 Cal. Rptr. 2d at 339.

24. Section 54957.5 (a) provides:

> Notwithstanding Section 6255 or any other provisions of law, agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by a member, officer, employee, or agent of such body for discussion or consideration at a public meeting of such body, are public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1) as soon as distributed, and shall be made pursuant to Sections 6253 and 6256. However, this section shall not include any writing exempt from public disclosure under Section[s] 6253.5, 6254, or 6254.7.

CAL. GOV'T CODE § 54957.5(a) (West 1983 & Supp. 1994).

25. *Roberts*, 5 Cal. 4th at 379, 853 P.2d at 505, 20 Cal. Rptr. 2d at 339.

26. *Id.* at 380-81, 853 P.2d at 506, 20 Cal. Rptr. 2d at 340. For an argument against extending the privilege to government entities, see Lory A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725 (1988).

27. *Id.* at 378-79, 853 P.2d at 505, 20 Cal. Rptr. 2d at 339.

28. *Id.* at 380-81, 853 P.2d at 506, 20 Cal. Rptr. 2d at 340.

29. *Id.* at 381, 853 P.2d at 506, 20 Cal. Rptr. 2d at 340.

tate communications between a government entity and its respective counsel.

SANFORD A. TOYEN

XI. SECURITIES LAW

When pleading a cause of action for deceit, securities investors must plead actual reliance upon alleged misrepresentations; plaintiffs may not assert the "fraud-on-the-market" theory to establish a presumption of reliance: **Mirkin v. Wasserman.**

I. INTRODUCTION

In *Mirkin v. Wasserman*,[1] the California Supreme Court clarified the elements required for a claim of deceit involving securities fraud.[2] The court granted review in *Mirkin* to determine whether plaintiffs may assert the "fraud-on-the-market" theory,[3] which establishes a presumption of reliance, or whether plaintiffs must allege actual reliance, in order to properly plead a cause of action for deceit.[4] The court declined to

---

1. 5 Cal. 4th 1082, 858 P.2d 568, 23 Cal. Rptr. 2d 101 (1993). Justice Panelli delivered the majority opinion, in which Justices Arabian, Baxter, George, and Turner concurred. *Id.* at 1082-1108, 858 P.2d at 568-84, 23 Cal. Rptr. 2d at 101-17. Justice Turner, the Presiding Justice of the court of appeal, second appellate district, division five, was assigned to the court to fill the vacancy created by the temporary absence of Chief Justice Lucas. Justice Kennard filed a separate concurring and dissenting opinion, and was joined by Acting Chief Justice Mosk. *Id.* at 1108-24, 858 P.2d at 584-94, 23 Cal. Rptr. 2d at 117-27 (Kennard, J., concurring and dissenting).

2. *Id.* at 1091-1100, 858 P.2d at 572-78, 23 Cal. Rptr. 2d at 105-11. *See generally* 9 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 299 (9th ed. 1989 & Supp. 1993) (discussing fraud or misrepresentations in the purchase or sale of securities); 57 CAL. JUR. 3D *Securities Regulations* § 78 (1980 & Supp. 1994) (discussing civil liability for securities fraud).

3. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 241-47 (1988).

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.

Id. at 241-42 (quoting Peil v. Speiser, 806 F.2d 1154, 1160-61 (3d Cir. 1986)). *See generally* Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143 (1982) (examining the utility of the "fraud-on-the-market" theory and whether it should replace the actual reliance requirement); 57 CAL. JUR. 3D *Securities Regulations* § 86 (1980 & Supp. 1994) (discussing market manipulation and the fraud-on-the-market doctrine).

4. *Mirkin*, 5 Cal. 4th at 1087, 858 P.2d at 569, 23 Cal. Rptr. 2d at 102. Between

adopt the fraud-on-the-market theory, holding instead that plaintiffs must plead actual reliance upon misrepresentations[5] in order to establish a legitimate cause of action under California Civil Code section 1709.[6]

II. TREATMENT OF THE CASE

A. *Majority Opinion*

1. The Fraud-on-the-Market Doctrine

The court began its analysis by evaluating the applicability of the fraud-on-the-market doctrine.[7] While the plaintiffs attempted to apply the principle to a common law action of deceit, the court noted that the doctrine pertained primarily to actions brought under Rule 10b-5 of the Securities and Exchange Commission (SEC).[8] The court recognized how-

---

October 17, 1985 and February 29, 1988, the plaintiffs, Gerald Mirkin and Charles Miller, purchased common stock in Maxicare Health Plans, Inc. (Maxicare). Although Maxicare appeared to experience significant economic growth in 1985 and 1986, the corporation suffered substantial losses during the following period. Maxicare reported losses of $22,000,000 in the fourth quarter of 1986, followed by losses of $255,000,000 in 1987, and $21,300,000 in the first quarter of 1988.

The plaintiffs filed suit against Maxicare. Ernst & Young, the corporation's accounting firm, as well as Salomon Brothers, Inc. and Montgomery Securities, Inc., the corporations which underwrote public offerings of Maxicare stock, were also named in the action. The plaintiffs alleged that the defendants intentionally misrepresented Maxicare's financial status in economic prospectuses and documents filed with the Securities and Exchange Commission (SEC). Allegedly, such misrepresentations artificially inflated the price of Maxicare stock.

On this basis, the plaintiffs filed a cause of action for deceit and negligent misrepresentation. The defendants demurred on the grounds that the plaintiffs had not sufficiently plead actual reliance, a required element of these torts. *Id.* at 1088.

The plaintiffs subsequently amended their complaint, alleging that they had purchased Maxicare stock "'[i]n reliance upon the integrity of the securities market and the securities offering process, and the fidelity, integrity and superior knowledge of defendants.'" *Id.* at 1088, 858 P.2d at 570, 23 Cal. Rptr. 2d at 103. Nevertheless, the trial court sustained the defendants' demur without leave to amend, and dismissed the complaint. *Id.*

The plaintiffs appealed, arguing that the fraud-on-the-market theory established a presumption of reliance in situations where misrepresentations would potentially affect the market price of a stock. *Id.* Rejecting this argument, however, the court of appeal affirmed the trial court decision. *Id.* Subsequently, the supreme court granted review. *Id.*

5. *Id.* at 1107, 858 P.2d at 585, 23 Cal. Rptr. 2d at 118.

6. Section 1709 provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." CAL. CIV. CODE § 1709 (West 1985).

7. *Mirkin*, 5 Cal. 4th at 1089, 858 P.2d at 571, 23 Cal. Rptr. 2d at 104; *see supra* note 3.

8. *Id.* Rule 10b-5 provides, in pertinent part: "It shall be unlawful for any person, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit

ever, that the elements of a private, 10b-5 action are neither derived from, nor directly analogous to, a common law action of deceit.[9]

In fact, state appellate courts have uniformly rejected any incorporation of fraud-on-the-market into common law deceit actions.[10] Similarly, federal courts applying California law have declined to apply the doctrine to state law fraud claims.[11] Following such persuasive precedent, the court in *Mirkin* refused to apply the doctrine's presumption of reliance to an action of deceit under Civil Code section 1709.[12]

2. The Requirement of Actual Reliance

The court next addressed the argument that California law does not expressly require a showing of actual reliance in actions for deceit.[13] In support of this contention, the plaintiffs noted that Civil Code section 1709 does not establish a specific requirement of reliance.[14] Similarly, section 1710 fails to expressly enumerate an element of reliance in defining deceit.[15]

The court acknowledged the lack of a statutory requirement of actu-

---

to state a material fact . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (1992). *See generally* Michael P. Whalen, *Causation and Reliance in Private Actions Under SEC Rule 10b-5*, 13 PAC. L.J. 1003 (1982).

9. *Mirkin*, 5 Cal. 4th at 1089, 858 P.2d at 571, 23 Cal. Rptr. 2d at 104.

10. *Id.* at 1090 & n.3, 858 P.2d at 571 & n.3, 23 Cal. Rptr. 2d at 104 & n.3; *see also* Piel v. Speiser, 806 F.2d 1154, 1163 n.17 (3d Cir. 1986) ("[N]o state courts have adopted the [fraud-on-the-market] theory, and thus direct reliance remains a requirement of a common law securities fraud claim.").

11. *Mirkin*, 5 Cal. 4th at 1091, 858 P.2d at 572, 23 Cal. Rptr. 2d at 105.

12. *Id.* at 1108, 858 P.2d at 584, 23 Cal. Rptr. 2d at 117.

13. *Id.* at 1091, 858 P.2d at 572, 23 Cal. Rptr. 2d at 105.

14. *Id.*; *see* CAL. CIV. CODE § 1709 (West 1985); *see also supra* note 6.

15. *Mirkin*, 5 Cal. 4th at 1091, 858 P.2d at 572, 23 Cal. Rptr. 2d at 105. Section 1710 provides, in pertinent part:

> A deceit, within the meaning of [§ 1709], is either:
>
> 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
>
> 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
>
> 4. A promise, made without any intention of performing it.

CAL. CIV. CODE § 1710 (West 1985).

al reliance.[16] Nevertheless, the court asserted that deceit, like other torts in California, is derived from a combination of both statutory and common law principles.[17] California civil provisions, which serve to codify common law torts, "'must be construed as continuations thereof, and not as new enactments.'"[18] Following this principle, courts have recognized that Civil Code sections 1709 and 1710 represent continuations of the common law.[19]

Therefore, California courts have consistently required plaintiffs to plead the common law element of actual reliance, in order to establish a legitimate cause of action for deceit.[20] Applying such reasoning, the court in *Mirkin* maintained that plaintiffs must plead actual reliance.[21]

B. Justice Kennard's Concurring and Dissenting Opinion

Justice Kennard, joined by Acting Chief Justice Mosk, concurred in the judgment "only to the extent it declines to apply the fraud-on-the-market principle to claims for negligent misrepresentation."[22] Kennard dissented, however, with respect to the majority's opinion regarding actual reliance in actions for intentional deceit.[23]

Justice Kennard adamantly disagreed with the majority's implication that reliance established under the fraud-on-the-market theory represents "something other than actual reliance."[24] Rather Kennard maintained

---

16. *Mirkin*, 5 Cal. 4th at 1091, 858 P.2d at 572, 23 Cal. Rptr. 2d at 105.

17. *Id.*

18. *Id.* (quoting CAL. CIV. CODE § 5 (West 1982)).

19. *Id.* at 1091-92, 858 P.2d at 752, 23 Cal. Rptr. 2d at 105; *see also* Lacher v. Superior Court, 230 Cal. App. 3d 1038, 1043 n.1, 281 Cal. Rptr. 640, 641 n.1 (1991).

20. *Mirkin*, 5 Cal. 4th at 1092, 858 P.2d at 752-53, 23 Cal. Rptr. 2d at 105-06; *see, e.g.*, Molko v. Holy Spirit Ass'n, 46 Cal. 3d 1092, 1108, 762 P.2d 46, 53, 252 Cal. Rptr. 122, 129 (1988), *cert. denied*, 490 U.S. 1084 (1989); Seeger v. Odell, 18 Cal. 2d 409, 414, 115 P.2d 977, 980 (1941). *See generally* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 675, 711 (9th ed. 1988 & Supp. 1993) (enumerating elements of deceit cause of action and discussing the requirement of actual reliance); 34 CAL. JUR. 3D *Fraud and Deceit* § 75 (1977 & Supp. 1993) (discussing reliance requirement of fraud cause of action).

21. *Mirkin*, 5 Cal. 4th at 1092, 858 P.2d at 753, 23 Cal. Rptr. 2d at 106. The court also rejected the plaintiffs' contention that actual reliance could not be required in cases of deceit involving an omission of material information. *Id.* at 1093, 858 P.2d at 573-74, 23 Cal. Rptr. 2d at 106-07. The court reasoned, "it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed one would have been aware of it and behaved differently." *Id.* at 1093, 858 P.2d at 574, 23 Cal. Rptr. 2d at 107.

22. *Id.* at 1108, 858 P.2d at 584, 23 Cal. Rptr. 2d at 117 (Kennard, J., concurring and dissenting).

23. *Id.* at 1108-24, 858 P.2d at 584-94, 23 Cal. Rptr. 2d at 117-27 (Kennard, J., concurring and dissenting).

24. *Id.* at 1121, 858 P.2d at 593, 23 Cal. Rptr. 2d at 126 (Kennard, J., concurring and

that the fraud-on-the-market doctrine is a legitimate means for establishing that "one who has purchased a security at an artificially inflated price, believing that the price-setting mechanism is untainted, has indirectly relied on the public misrepresentations that caused the price distortion."[25] As such, Kennard suggested that the majority erroneously rejected application of the fraud-on-the-market doctrine.[26] In fact, Kennard argued that such a holding directly conflicts with California case law regarding indirect reliance.[27] Therefore, Kennard would have reversed the decision of the court of appeal.[28]

III. CONCLUSION

The court's decision in *Mirkin* serves to clarify the elements required for an action for deceit under Civil Code section 1709.[29] By rejecting incorporation of the fraud-on-the-market doctrine, the court reiterated the need to plead actual reliance.[30] Nevertheless, the decision does not eliminate the availability of alternative causes of action, including SEC Rule 10b-5, which allow the plaintiff to establish a presumption of reliance by asserting fraud-on-the-market.[31] Application of market reliance in common law deceit cases would allow plaintiffs to circumvent

---

dissenting).

25. *Id.* (Kennard, J., concurring and dissenting).

26. *Id.* at 1124, 858 P.2d at 595, 23 Cal. Rptr. 2d at 128 (Kennard, J., concurring and dissenting).

> To drive up the value of a security by means of knowingly false public statements is actual fraud. Innocent investors who purchase the security at the inflated price in ignorance of the falsehood suffer actual loss when the falsehood is revealed and the value of the security declines. When these actual victims of actual fraud seek compensation for actual losses, it requires no revolution in judicial thinking to hold that the traditional tort action for fraud provides a remedy.

Id. at 1124-25, 858 P.2d at 595, 23 Cal. Rptr. 2d at 128. (Kennard, J., concurring and dissenting).

27. *Id.* (Kennard, J., concurring and dissenting); *see, e.g.*, Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 673 P.2d 660, 197 Cal. Rptr. 783 (1983). *See generally* 34 CAL. JUR. 3D *Fraud and Deceit* § 38 (1977 & Supp. 1993) (discussing fraud cause of action based upon indirect misrepresentations).

28. *See Mirkin*, 5 Cal. 4th at 1124, 858 P.2d at 595, 23 Cal. Rptr. 2d at 128 (Kennard, J., concurring and dissenting).

29. *Id.* at 1091-1100, 858 P.2d at 572-78, 23 Cal. Rptr. 2d at 105-11.

30. *See id.* at 1091, 858 P.2d at 572, 23 Cal. Rptr. 2d at 105.

31. *Id.* at 1090, 858 P.2d at 572, 23 Cal. Rptr. 2d at 105.

the balancing principles imposed by such alternatives.[32] Thus, as a matter of public policy, the court appropriately declined to eliminate the pleading of actual reliance.

MICHAEL ALDEN MILLER

32. *Id.* at 1107, 858 P.2d at 583-84, 23 Cal. Rptr. 2d at 116-17. For example, under Rule 10b-5, a plaintiff must prove that he actually purchased or sold securities. *Id.* at 1107, 858 P.2d at 584, 23 Cal. Rptr. 2d at 117; *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730-55 (1975). Additionally, a plaintiff must prove that a defendant had scienter, a degree of fault involving intent or reckless disregard. *Mirkin*, 5 Cal. 4th at 1107, 858 P.2d at 584, 23 Cal. Rptr. 2d at 117; *see also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194-215 (1976). These requirements, coupled with a shorter statute of limitations, are intended to balance the advantages created by the fraud-on-the-market presumption of reliance. *Mirkin*, 5 Cal. 4th at 1107, 858 P.2d at 584, 23 Cal. Rptr. 2d at 117.

XII. TORT LAW

A. *Business landlords do not have a duty to hire security guards to protect patrons, tenants, or tenants' employee's against the criminal acts of third parties unless the landowners have notice of prior similar incidents of violent crimes on the premises:* **Ann M. v. Pacific Plaza Shopping Center.**

I. INTRODUCTION

In *Ann M. v. Pacific Plaza Shopping Center*,[1] the California Supreme Court considered whether the owner of a shopping center owes a duty to its patrons, tenants, and tenants' employees to hire security guards to secure the premises against the criminal acts of third parties.[2] The court emphasized that foreseeability is the crucial factor to consider in determining the existence or scope of a landowner's duty to take precautionary measures.[3] In the 1985 case of *Isaacs v. Huntington Memo-*

---

1. 6 Cal. 4th 666, 863 P.2d 207, 25 Cal. Rptr. 2d 137 (1993). Justice Panelli authored the majority opinion, in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, and George concurred. *Id.* at 670, 863 P.2d at 209, 25 Cal. Rptr. 2d at 139. Justice Mosk filed a separate dissenting opinion. *Id.* at 680, 863 P.2d at 216, 25 Cal. Rptr. 2d at 146.

2. *Id.* at 670, 863 P.2d at 209, 25 Cal. Rptr. 2d at 139. *See generally* CAL. CIV. CODE § 1714 (West 1985 & Supp. 1994) (stating that a property owner is responsible for an injury to another person which results from his lack of care in the management of his property); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 933 (9th ed. 1988 & Supp. 1993) (discussing the duty of a landowner to take affirmative action to control the wrongful acts of third parties); 50 CAL. JUR. 3D *Premises Liability* §§ 38-42 (1993) (discussing liability for injuries caused by the wrongful acts of third parties); RESTATEMENT (SECOND) OF TORTS § 344 (1965) (stating that when business premises are open to the public, the failure of a landowner to exercise reasonable care may subject him to liability for harm caused by the acts of third persons); WILLIAM L. PROSSER, PROSSER ON TORTS § 61, at 395 (4th ed. 1971) (stating that a possessor of land must exercise control over the conduct of a third person to prevent injury to a business visitor); Uri Kaufman, *When Crime Pays: Business Landlord's Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 S. TEX. L. REV. 89 (1990).

3. *Pacific Plaza*, 6 Cal. 4th at 676, 863 P.2d at 214, 25 Cal. Rptr. 2d at 144. *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 934 (9th ed. 1988 & Supp. 1993) (explaining that liability is only imposed where a landowner "has reasonable cause to anticipate the misconduct of third persons"); 50 CAL. JUR. 3D *Premises Liability* § 39 (1993) (stating that a landowner only has a duty to protect against "known or reasonably foreseeable" risks); PROSSER, *supra* note 2, § 61 (explaining that the occupier of property only has a duty to protect the business visitor from foresee-

rial Hospital,[4] the California Supreme Court held that foreseeability should be assessed in light of the "totality of circumstances" and that evidence of foreseeability should not be limited to "prior similar incidents" of crime.[5] In *Pacific Plaza*, the court changed its position with respect to hiring security guards because of its concern over imposing unfair burdens on landlords.[6] The court concluded that prior similar incidents of violent crime on the landowner's premises will almost always be a prerequisite for finding that a landowner has a duty to provide security guards.[7] The court reasoned that without this high degree of foreseeability requirement, landlords would, in essence, become the insurers of public safety[8]—a responsibility which would create significant financial and social burdens.

II. STATEMENT OF THE CASE

The plaintiff, Ann M., brought a civil action against the Pacific Plaza Shopping Center after she was raped on the premises.[9] The plaintiff was employed by a photo store, which was located in a secluded area of the

---

able dangers).

4. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356.

5. *Id.* at 127-29, 695 P.2d at 659-61, 211 Cal. Rptr. at 362-64. In *Isaacs*, a doctor brought an action against a hospital for injuries he suffered as a result of being shot in the hospital parking lot. The doctor claimed that the hospital was negligent for failing to provide adequate security measures. *Id.* at 120, 695 P.2d at 655, 211 Cal. Rptr. at 358. In order to prove that the hospital had a duty to protect the plaintiff and other visitors from third-party crime, the plaintiff had the burden to prove that the attack on him was foreseeable. The California Supreme Court considered the issue of whether foreseeability could be established without evidence of prior similar incidents of crime. *Id.* The court held that "foreseeability is determined in light of all the circumstances and not by a rigid application of a mechanical 'prior similars' rule. *Id.* at 126, 695 P.2d at 659, 211 Cal. Rptr. at 362. Accordingly, the court considered several facts: the hospital was in a high crime area, the parking lot was not well lit, several threatened assaults and thefts had been reported in the area, and the parking lot was devoid of any security at the time of the shooting. This led the court to conclude that the issue of whether these circumstances, together, established the foreseeability of the assault should have been submitted to the jury. *Id.* at 130, 695 P.2d at 661-62, 211 Cal. Rptr. at 364-65.

6. *Pacific Plaza*, 6 Cal. 4th at 679, 863 P.2d at 215-16, 25 Cal. Rptr. 2d at 145-46.

7. *Id.* at 679, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145.

8. *Id.* at 679, 863 P.2d at 216, 25 Cal. Rptr. 2d at 146; *see also* 50 CAL. JUR. 3D *Premises Liability* § 39 (1993) (stating that the owner or possessor of property is "not an insurer of the safety of persons on the premises"); RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (stating that the possessor of land is not an insurer of the visitor's safety); PROSSER, *supra* note 2, § 61 (stating that the occupier of land is not an insurer of the safety of visitors).

9. *Pacific Plaza*, 6 Cal. 4th at 670, 863 P.2d at 209, 25 Cal. Rptr. 2d at 139. The shopping center was a strip mall located in the Pacific Beach area of San Diego. *Id.*

defendant's mall.[10] The lease between the photo store and the shopping center did not impose any specific obligation on the shopping center to police either the common areas or those areas within the exclusive control of the merchants.[11] However, the plaintiff presented evidence that there had been assaults and robberies in the shopping center prior to her being raped[12] and that the employees and tenants were concerned about their safety and the lack of security.[13]

After the rape, the plaintiff filed a complaint against the shopping center in superior court, alleging that it was "negligent in failing to provide adequate security to protect her from an unreasonable risk of harm."[14] The defendant shopping center filed a motion for summary judgment, claiming that it had no legal duty to protect the plaintiff because the attack on her was unforeseeable.[15] The trial court granted the motion, finding that the defendant owed no duty of care to the plaintiff.[16] The court of appeal affirmed the trial court decision, but for different reasons.[17]

Contrary to the opinion of the trial court, the court of appeal found that the defendant did owe a duty to the tenants and their employees to keep the premises safe and to take "reasonable" precautionary measures

---

10. *Id.* There were approximately 25 stores in the shopping center. *Id.*

11. *Id.* at 670-71, 863 P.2d at 209-10, 25 Cal. Rptr. 2d at 139-40.

12. The plaintiff presented evidence that there had been several prior bank robberies and purse snatchings. *Id.* at 671, 863 P.2d at 210, 25 Cal. Rptr. 2d at 140. The plaintiff also testified that there was a transient running around the shopping mall pulling down women's pants. *Id.* at 671 n.3, 863 P.2d at 210 n.3, 25 Cal. Rptr. 2d at 140 n.3.

13. *Id.* at 671, 863 P.2d at 210, 25 Cal. Rptr. 2d at 140. The tenants and employees were particularly concerned about the transients who congregated in the common areas of the shopping mall. *Id.* The tenants also complained about the presence of transients and the lack of security at the merchants' association meetings, an organization to which all the tenants belonged. *Id.* at 672, 863 P.2d at 210, 25 Cal. Rptr. 2d at 140. According to the plaintiff's deposition, the merchants' association requested that the defendants provide security patrols but that none were provided. *Id.*

14. *Id.* at 672, 863 P.2d at 210-11, 25 Cal. Rptr. 2d at 140-41. The plaintiff also filed suit against the owner of the photo store for negligence, but she withdrew that claim in order to receive workers' compensation benefits. (Under Labor Code § 3602, workers' compensation is an exclusive remedy.) *Id.* at 672 n.4, 863 P.2d at 211 n.4, 25 Cal. Rptr. 2d at 141 n.4; *see* CAL. LAB. CODE § 3602 (West 1989 & Supp. 1994). The court stated that it would not consider the issue of the possible liability of the tenant/employer. *Pacific Plaza*, 6 Cal. 4th at 672 n.4, 863 P.2d at 211 n.4, 25 Cal. Rptr. 2d at 141 n.4.

15. *Id.* at 672-73, 863 P.2d at 211, 25 Cal. Rptr. 2d at 141.

16. *Id.* at 673, 863 P.2d at 211, 25 Cal. Rptr. 2d at 141.

17. *Id.*

to protect them against foreseeable criminal acts of third parties.[18] The court of appeal concluded, however, that the evidence presented did not show that the defendant acted unreasonably in failing to provide security guards.[19] The California Supreme Court granted review.[20]

III. TREATMENT OF THE CASE

A. *Relationship Between the Plaintiff and the Defendant*

Under California law, a landlord owes a duty to its tenants and patrons "to secure common areas against foreseeable criminal acts of third parties."[21] Pacific Plaza argued that it did not owe a duty to the plaintiff because she was neither a patron nor a tenant, but rather an employee of a tenant.[22] The court rejected this argument, concluding that in the business context, it is appropriate to extend the duty owed to tenants to their employees.[23] It reasoned that in the commercial context, the tenant

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 674, 863 P.2d at 212, 25 Cal. Rptr. 2d at 142; *see* Frances T. v. Village Green Owners Ass'n, 42 Cal. 3d 490, 499, 723 P.2d 573, 576-77, 229 Cal. Rptr. 456, 459-60 (1986) (holding that a homeowners' association, which functioned as a landlord in maintaining the common areas of a condominium, had a duty to exercise due care for the residents' safety); Isaacs v. Huntington Memorial Hospital, 38 Cal. 3d at 123, 695 P.2d at 657, 211 Cal. Rptr. at 360 (stating that it is "well settled" that an owner of land has a duty to control the wrongful acts of third parties where the owner has "reasonable cause to anticipate such acts"). *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 934 (9th ed. 1988 & Supp. 1993) (explaining that liability is imposed where a landowner "has reasonable cause to anticipate the misconduct of third persons"); 50 CAL. JUR. 3D *Premises Liability* § 39 (1993) (stating that a landowner has a duty to protect against "known or reasonably foreseeable" criminal acts of third parties).

22. *Pacific Plaza*, 6 Cal. 4th at 674, 863 P.2d at 212, 25 Cal. Rptr. 2d at 142. The court noted that in the state of California, "duties are no longer imposed on an occupier of land solely on the basis of rigid classifications of trespasser, licensee, and invitee." *Id.* In other words, a landowner owes a duty to every person who enters his property to protect against foreseeable risks. *See* CAL. CIV. CODE § 1714 (West 1985 & Supp. 1994) (making no distinction among the types of persons injured as a result of a landowner's negligence in managing his property); *see also* Rowland v. Christian, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968) (holding that the status of the person harmed is not determinative with respect to a landowner's liability), *superseded by statute as stated in* Perez v. Southern Pac. Transp. Co., 218 Cal. App. 3d 426, 467, 267 Cal. Rptr. 100, 102 (1990). *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 894-896 (9th ed. 1988) (discussing the traditional classifications of trespasser, licensee, and invitee and the modern repudiation of these distinctions); 50 CAL. JUR. 3D *Premises Liability* § 43 (1993) (stating that although the status of a person on the premises is "not determinative of the duty of care owed to the person," there has not been a "total abandonment of such classifications").

23. *Pacific Plaza*, 6 Cal. 4th at 675, 863 P.2d at 212, 25 Cal. Rptr. at 142; *see also*

is usually not a natural person and must therefore act through its employees.[24]

B. Lack of Control Over the Premises Where the Crime Occurred

Pacific Plaza also contended that it owed no duty to the plaintiff because the crime took place on property which was not in its possession and control.[25] Rather, the plaintiff was raped in the photo store, which was within the exclusive control and management of the merchant.[26] The court dismissed this argument, citing *Frances T. v. Village Green Owners Ass'n.*[27] and *O'Hara v. Western Seven Trees Corp.*[28] as precedent. These cases established that if the landlord's failure to secure the common areas contributed to the tenant's injuries, then the fact that the criminal activity occurred in an area within the exclusive control of the tenant will not relieve the landlord of liability.[29]

1. Foreseeability, When Analyzed to Determine Duty, is a Question of Law

A landlord only has a duty to take precautionary measures to prevent the criminal acts of third parties when such criminal activity is foreseeable.[30] While duty is a question of law for the court, foreseeability is

---

50 CAL. JUR. 3D *Premises Liability* § 54 (1993) (stating that anyone working on the premises in the interest of the owner has the same status as the owner).

24. *Pacific Plaza*, 6 Cal. 4th at 675, 863 P.2d at 212-13, 25 Cal. Rptr. 2d at 142-43.

25. *Id.* at 675, 863 P.2d at 213, 25 Cal. Rptr. 2d at 143.

26. *Id.* at 671, 863 P.2d at 210, 25 Cal. Rptr. 2d at 140.

27. *Id.* at 676, 863 P.2d at 213, 25 Cal. Rptr. 2d at 143 (citing Frances T. v. Village Green Owners Ass'n, 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 2d 456 (1986)).

28. *Id.* at 676-77, 863 P.2d at 213, 25 Cal. Rptr. 2d at 143 (citing O'Hara v. Western Seven Trees Corp. Intercoast Management, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977)).

29. *Pacific Plaza*, 6 Cal. 4th at 675-76, 863 P.2d at 213, 25 Cal. Rptr. 2d at 143. In both *Frances T.* and *O'Hara*, a tenant was raped inside her apartment. In each case, the court found that the negligence of the landlord in failing to provide adequate security measures in the common areas contributed to the rape inside the tenant's unit, and, therefore, the landlord in each case was held liable. *Frances T.*, 42 Cal. 3d at 498, 723 P.2d at 578, 226 Cal. Rptr. at 461; *O'Hara*, 75 Cal. App. 3d at 803, 142 Cal. Rptr. at 490. In *O'Hara*, the court of appeal stated that "since only the landlord is in the position to secure common areas, he has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure." *O'Hara*, 75 Cal. App. 3d at 802-03, 142 Cal. Rptr. at 490.

30. *Pacific Plaza*, 6 Cal. 4th at 676, 863 P.2d at 214, 25 Cal. Rptr. 2d at 144; *see*

normally a question of fact for the jury.[31] However, the court in *Pacific Plaza* held that when foreseeability is analyzed to determine the existence or scope of a duty, it is a question of law to be decided by the court.[32] This seems to contradict a number of other courts which have explained that although the existence of a duty as a whole is a question of law, foreseeability as a factor in determining duty is a question of fact for the jury.[33] One possible means of reconciling *Pacific Plaza* with these other decisions is to interpret the *Pacific Plaza* opinion as saying that the degree of foreseeability required to impose a particular duty will be a question of law for the court, but the jury will evaluate the specific facts of the case based on that standard.[34]

Hollywood Boulevard Venture v. Superior Court, 116 Cal. App. 3d 901, 905, 172 Cal. Rptr. 528, 530 (1981) (stating that a landlord "is not required to take precautions against attacks by third parties which he has no reason to anticipate"), *disapproved by Frances T.*, 42 Cal. 3d at 502-03, 723 P.2d at 579, 229 Cal. Rptr. at 462. *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 934 (9th ed. 1988 & Supp. 1993) (explaining that liability is only imposed where a landowner "has reasonable cause to anticipate the misconduct of third persons"); 50 CAL. JUR. 3D *Premises Liability* § 39 (1993) (stating that a landowner only has a duty to protect against "known or reasonably foreseeable" risks); PROSSER, *supra* note 2, § 61 (explaining that the occupier of property only has a duty to protect the business visitor from foreseeable dangers).

31. Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 472 (1975); *see* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 748 (9th ed. 1988 & Supp. 1993) (stating that the existence of a legal duty is a question of law).

32. *Pacific Plaza*, 6 Cal. 4th at 678, 863 P.2d at 215, 25 Cal. Rptr. at 145 (citing Ballard v. Uribe, 41 Cal. 3d 564, 573 n.6, 715 P.2d 624, 629 n.6, 224 Cal. Rptr. 664, 669 n.6 (1986)). In *Ballard*, the court stated that "[s]ome confusion has arisen over the respective roles played by the court and the jury" with respect to "foreseeability." 41 Cal. 3d 564, 573 n.6, 715 P.2d 624, 629 n.6, 224 Cal. Rptr. 664, 669 n.6. The court explained that in some contexts it is a question of fact for the jury and in other contexts, such as the "boundaries" of duty, it is a question of law for the court. *Id.* The *Ballard* court further explained that foreseeability is a question of law only when determining whether a category of negligent conduct is likely to result in harm. *Id.* In contrast, foreseeability is a question of fact for the jury when determining whether a particular plaintiff's injury was foreseeable and whether a particular defendant's conduct was negligent. *Id.*

33. *See Isaacs v. Huntington Memorial Hospital*, 38 Cal. 3d at 124-26, 695 P.2d at 658-59, 211 Cal. Rptr. at 361-62 (stating that "[i]n considering whether one owes another a duty of care, several factors must be weighed, including 'the foreseeability of harm to the plaintiff,'" and that it is "well established" that foreseeability is a question of fact); *Weirum*, 15 Cal. 3d at 46, 539 P.2d at 39, 123 Cal. Rptr. 471 (stating that "foreseeability of the risk is a primary consideration in establishing the element of duty . . . [and] foreseeability is a question of fact for the jury"); Cohen v. Southland Corp., 157 Cal. App. 3d 130, 138, 203 Cal. Rptr. 572, 576 (1984) (stating that "[f]oreseeability of the harm is of primary importance in establishing the element of duty . . . [and] it is ordinarily a question of fact for the jury"); Gomez v. Ticor, 145 Cal. App. 3d 622, 627, 193 Cal. Rptr. 600, 603 (1983) (explaining that foreseeability of harm is the most important factor in determining the existence of a duty and that foreseeability is a question of fact for the jury).

34. The court stated that "'in cases where the burden of preventing future harm is

2. Standard for Establishing Foreseeability

In *Isaacs v. Huntington Memorial Hospital*,[35] the California Supreme Court pronounced that foreseeability of third-party crime should be determined in light of the "totality of the circumstances."[36] Under this rule, foreseeability could be established without evidence of prior criminal activity on the landlord's premises.[37] The *Pacific Plaza* court asserted that the rule articulated in *Isaacs* needed "refinement."[38]

The court in *Pacific Plaza* emphasized that the scope of a landlord's duty to protect against third-party crime should be determined by balancing the foreseeability of harm against the burden and effectiveness of the proposed security measures.[39] Using this analysis, the court found that the hiring of security guards is a significant financial burden.[40] Furthermore, the court suggested that even if a landlord does hire security guards, such measures may not be adequate to deter criminal conduct.[41] Finally, the court asserted that it is against the social policy of the state to force private landowners "to become the insurers of public safety."[42]

---

great, a high degree of foreseeability may be required.'" *Pacific Plaza*, 6 Cal. 4th at 678-79, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145 (quoting *Isaacs*, 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361). "'On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.'" *Id.* (quoting *Isaacs*, 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361). In *Isaacs*, the court stated that "[t]he degree of foreseeability necessary to warrant the finding of a duty will thus vary from case to case." 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361.

35. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985).

36. *Id.* at 127, 695 P.2d at 659-60, 211 Cal. Rptr. at 362-63; *see supra* notes 4 and 5 and accompanying text; *see also* Kaufman, *supra* note 2, at 97 (stating that California was the only jurisdiction to adopt a "totality of the circumstances rule"). Other rules which various jurisdictions have adopted with respect to a landowner's duty include: (1) the "limited duty rule," where foreseeability arises only in those instances where the criminal act was imminent; (2) the "prior similar incidents rule," where foreseeability requires that there have been prior criminal incidents on or near the premises; (3) the "first line of defense rule," which requires a landowner to provide basic security measures; and (4) the "tempting target rule," which obligates business landlords to protect customers when the business is by its nature particularly conducive to crime. *Id.* at 95-98.

37. *Isaacs*, 38 Cal. 3d at 127, 695 P.2d at 659, 211 Cal. Rptr. at 362.

38. *Pacific Plaza*, 6 Cal. 4th at 678, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145.

39. *Id.* at 678-79, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145.

40. *Id.* at 679, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145.

41. *Id.*

42. *Id.* at 679, 863 P.2d at 216, 25 Cal. Rptr. 2d at 146. *See* Hollywood Boulevard

The court explained that because the financial and social burden of hiring security guards is so significant, a "high degree of foreseeability" is required in order to find that a landlord has a duty to provide these security measures.[43] As a result, the court concluded that "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises."[44] The court further asserted that a landowner must have notice of these prior similar incidents of crime in order for future criminal activity to be foreseeable.[45]

Applying this analysis to the facts of the present case, the court found that Pacific Plaza did not have notice of any violent criminal acts occurring on its premises.[46] The court further found that the prior assaults and robberies which allegedly occurred on the defendant's property were not similar enough in nature to the violent rape that the plaintiff suffered.[47] Accordingly, the court seemed to suggest that even if the defendant did have notice of the prior assaults and robberies, those crimes were not sufficiently violent to impose a duty on the defendant to hire security guards.[48]

IV. IMPACT

While the *Pacific Plaza* decision clearly represents a victory for business landlords, it provides a disincentive for landlords to make their property safe from crime. The majority obviously felt that a policy shielding business landlords from liability outweighed a policy encouraging landlords to take precautionary security measures.[49] This is evi-

---

Venture v. Superior Court, 116 Cal. App. 3d 901, 905, 172 Cal. Rptr. 528, 530 (1981) (stating that "[a] proprietor of premises is not the insurer of the safety of persons on those premises"); 50 CAL. JUR 3D *Premises Liability* § 39 (1993) (stating that "the owner or possessor of property is not an insurer of the safety of persons on the premises"). *See generally* RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (stating that the possessor of land is not an insurer of the visitor's safety); PROSSER, *supra* note 2, § 61 (stating that the occupier of land is not an insurer of the safety of visitors).

43. *Pacific Plaza*, 6 Cal. 4th at 679, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145.

44. *Id.*

45. *Id.* at 679, 863 P.2d at 216, 25 Cal. Rptr. 2d at 146. The court stated that a "landowner's duty includes the duty to exercise reasonable care to discover that criminal acts are being or are likely to be committed on its land." *Id.* (citing Peterson v. San Francisco College Dist., 36 Cal. 3d 799, 807, 685 P.2d 1193, 1197, 205 Cal. Rptr. 842, 846 (1984)).

46. *Id.*

47. *Id.* at 680, 863 P.2d at 216, 25 Cal. Rptr. 2d at 146.

48. *Id.*

49. *Id.* Justice Mosk, in his dissenting opinion, stated that "'the rule leads to results which are contrary to public policy.'" *Id.* at 681, 863 P.2d at 217, 25 Cal. Rptr. 2d at

denced by the very nature of the "prior similar incidents" rule, which requires that there be at least one victim of violent crime on the premises before a duty to hire security guards will be imposed.[50]

Because *Pacific Plaza* dealt specifically with a landlord's duty to provide security guards, it is unclear what degree of foreseeability will be required for other security measures. The court seemed to suggest that when the financial burden of providing a particular security measure is significant, the test for foreseeability will be "prior similar incidents" of violent crime.[51] Conversely, the court also implied that if a certain security measure imposes only a minimal burden, foreseeability might be assessed in light of the "totality of the circumstances."[52]

APRIL LERMAN

---

147. (Mosk, J., dissenting) (quoting *Isaacs*, 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361). He continued that, "'[t]he rule has the effect of discouraging landowners from taking adequate measures to protect premises which they know are dangerous.'" *Id.* (Mosk, J., dissenting).

50. *Id.* at 681, 863 P.2d at 217, 25 Cal. Rptr. 2d at 147 (Mosk, J., dissenting). "'Surely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property.'" *Id.* (Mosk, J., dissenting) (quoting *Isaacs*, 38 Cal. 3d at 126, 695 P.2d at 658, 211 Cal. Rptr. at 361). "'[U]nder the rule, the first victim always loses, while subsequent victims are permitted recovery.'" *Id.* at 681, 863 P.2d at 117, 25 Cal. Rptr. 2d at 147. (Mosk, J., dissenting) (quoting *Isaacs*, 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361).

51. The court stated that "'in cases where the burden of preventing future harm is great, a high degree of foreseeability may be required.'" *Id* at 678, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145 (quoting *Isaacs*, 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361).

52. The court quoted *Isaacs*, stating that "'in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.'" *Id.* at 678-79, 863 P.2d at 215, 25 Cal. Rptr. 2d at 145 (quoting *Isaacs*, 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361).

The *Pacific Plaza* decision did not directly overrule the *Isaacs* court's "totality of the circumstances rule," but rather stated that a "refinement of the rule enunciated in *Isaacs* is required." *Id.* at 678, 863 P.2d at 115, 25 Cal. Rptr. 2d at 145. However, *Pacific Plaza* effectively overruled *Isaacs* by reviving the "prior similar incidents" test in situations where the burden imposed on landlords is significant.

B. *A court should not rule as a matter of law for specific disclosure requirements in an informed consent case because the ruling would invade the province of the jury; informed consent does not take into account nonmedical interests; and experts may be used to explain decisions on the withholding of information:* **Arato v. Avedon.**

I. INTRODUCTION

In *Arato v. Avedon*,[1] the California Supreme Court addressed issues arising from the doctrine of "informed consent."[2] The controversy at bar concerned a physician's decision not to disclose the life expectancy of a patient with pancreatic cancer when recommending a course of treatment.[3] The court determined that the defendant physicians had not breached their duty to obtain informed consent from the plaintiff patient by failing to disclose the high statistical mortality rate of the procedure.[4]

At the trial court level, the jury found that the defendants disclosed "all relevant information" and, therefore, allowed the patient to make an informed decision regarding the cancer treatment.[5] The court of appeal

---

1. 5 Cal. 4th 1172, 858 P.2d 598, 23 Cal. Rptr. 2d 131 (1993). Justice Arabian delivered the unanimous opinion of the court, joined by Chief Justice Lucas, and Justices Panelli, Kennard, Baxter, and George.

2. *Id.* at 1175, 858 P.2d at 599, 23 Cal. Rptr. 2d at 132. For a general discussion on the doctrine of informed consent, see 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 359-62 (1988 & Supp. 1993); 36 CAL. JUR. 3D *Healing Arts and Institutions* §§ 152-53 (1977 & Supp. 1993).

3. *Arato*, 5 Cal. 4th at 1176, 858 P.2d at 599, 23 Cal. Rptr. 2d at 132. Originally, Mr. Arato's internist diagnosed a kidney problem. During surgery, the operating surgeon discovered and removed a tumor on the pancreas. The surgeon then referred Mr. Arato to a group of oncologists who recommended chemotherapy treatment. Mr. Arato went through the treatment but died a short while later. Mrs. Arato and family brought an action against the operating surgeon and oncologists for failure to obtain informed consent before treating Mr. Arato. *Id.* at 1176-78, 858 P.2d at 600-01, 23 Cal. Rptr. 2d at 133-34.

4. *Id.* at 1176, 858 P.2d at 599-600, 23 Cal. Rptr. 2d at 132-33. For a complete discussion on the development and background of informed consent, see Jay Katz, *Informed Consent - A Fairy Tale?*, 39 U. PITT. L. REV. 137 (1977).

5. *Arato*, 5 Cal. 4th at 1181, 858 P.2d at 603, 23 Cal. Rptr. 2d at 136. The trial court instructed the jury with a modified form of BAJI No. 6.11 ("Reality of Consent" instruction), along with other BAJI instructions concerning legal duties of physicians and their standard of care. *Id.* at 1180-81, 858 P.2d at 602-03, 23 Cal. Rptr. 2d at 135-36. BAJI No. 6.11 states in pertinent part:

> [I]t is the duty of the physician to disclose to the patient all material information to enable the patient to make an informed decision regarding the proposed operation or treatment.
>
> Material information is information which the physician knows or should know would be regarded as significant by a reasonable person in the

reversed the decision and ordered a new trial on a number of grounds.[6] The supreme court unanimously reversed the court of appeal decision, remanding the case with the instruction to reinstate the original trial court decision.[7]

II. TREATMENT

In addressing each reason given by the court of appeal separately,[8] the supreme court relied on *Cobbs v. Grant*[9] in deciding the informed consent issue.[10] The supreme court rejected the court of appeal's decision to incorporate specific disclosure requirements, such as life expectancy for cancer patients.[11] The court explained that, although *Cobbs*

---

patient's position when deciding to accept or reject a recommended medical procedure.

CA BAJI 6.11 (approving instruction for reality of consent or physician's duty of disclosure). BAJI No. 6.11 is based on Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (discussing physician's duty of disclosure).

6. *Arato*, 5 Cal. 4th at 1181, 858 P.2d at 603, 23 Cal. Rptr. 2d at 136. The court of appeal reversed on a number of grounds, including that the failure to disclose the life expectancy constituted a breach of duty while causing financial hardship. *Id.* at 1182, 858 P.2d at 604, 23 Cal. Rptr. 2d at 137. In addition, the court of appeal held that the trial court's instructions were both improper and misleading, and that the lower court erred in allowing the defendant's expert testimony. *Id.*

7. *Id.* at 1192, 858 P.2d at 611, 23 Cal. Rptr. 2d at 144.

8. *Id.* at 1182-92, 858 P.2d at 604-11, 23 Cal. Rptr. 2d at 137-44.

9. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

10. *Arato*, 5 Cal. 4th at 1182-84, 858 P.2d at 604-05, 23 Cal. Rptr. 2d at 137-38. *Cobbs* discussed the theory of informed consent in the form of "postulates" as follows:

> [P]atients are generally persons unlearned in the medical sciences and therefore . . . courts may safely assume the knowledge of patient and physician are not in parity . . . . [A] person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment . . . . [T]he patient's consent to treatment . . . must be an informed consent . . . . And . . . the patient, being unlearned in medical sciences, has an abject dependence upon the trust in his physician for the information upon which he relies during the decisional process, thus raising an obligation in the physician that transcends arms-length transactions.

Cobbs, 8 Cal. 3d at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513. For cases developing the theory of informed consent, see Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960); Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

11. *Arato*, 5 Cal. 4th at 1186-87, 858 P.2d at 607, 23 Cal. Rptr. 2d at 140.

calls for the disclosure of information, each case is unique, and the trier of fact should determine the necessary extent of disclosure based on a materiality of information standard.[12] Therefore, the supreme court emphasized that the court of appeal "invaded the province of the trier of fact" by requiring the disclosure of life expectancy figures as a matter of law.[13]

The supreme court also rejected the suggestion by the court of appeal that the duty to disclose information involves both medical and nonmedical interests.[14] The court stressed that the basis for mandating informed consent is to enable the patient to make an educated decision regarding medical treatment to the body.[15] According to the court, a "therapeutic limitation" exists within the doctrine of informed consent which allows for the withholding of information under certain circumstances.[16] Therefore, the trial court did not err in refusing to give an instruction which required the physician to disclose "all facts which materially affect the patient's rights and interests."[17]

The court next considered whether the defendants improperly employed expert testimony on the standard of care used with the treatment of pancreatic cancer.[18] The court noted that certain situations allow for the withholding of information, unless there exists the risk of serious harm or death from that particular procedure.[19] Therefore, in some situ-

---

12. *Id.* at 1187, 858 P.2d at 607, 23 Cal. Rptr. 2d at 140. The court relied on the language in BAJI No. 6.11, *supra* note 5, which allows for the jury to determine the materiality of information. *Id.*; *see also* Truman v. Thomas, 27 Cal. 3d 285, 293-94, 611 P.2d 902, 907, 165 Cal. Rptr. 308, 313 (1980) (noting that a court may not rule as a matter of law whether a physician has a duty to disclose).

13. *Arato*, 5 Cal. 4th at 1187, 858 P.2d at 608, 23 Cal. Rptr. 2d at 141.

14. *Id.* at 1188, 858 P.2d at 608, 23 Cal. Rptr. 2d at 141. The plaintiffs argued that the defendants must disclose the life expectancy figures because those figures would influence financial decisions by Mr. Arato. *Id.* The plaintiffs relied on Bowman v. McPheeters, 77 Cal. App. 2d 795, 800, 176 P.2d 745, 748 (1947) (noting that a physician has a duty to disclose all information affecting a patient's rights and interest), to support their contention. *Arato*, 5 Cal. 4th at 1188, 858 P.2d at 608, 23 Cal. Rptr. 2d at 141.

15. *Arato*, 5 Cal. 4th at 1188, 858 P.2d at 608, 23 Cal. Rptr. 2d at 141; *see also* Moore v. Regents of Univ. of Cal., 51 Cal. 3d 120, 131 n.10, 793 P.2d 479, 485 n.10, 271 Cal. Rptr. 146, 152 n.10 (1990) (noting that a "physician is not the patient's financial adviser").

16. *Arato*, 5 Cal. 4th at 1189, 858 P.2d at 609, 23 Cal. Rptr. 2d at 142; *see also supra* note 5 (text of BAJI No. 6.11). The language in BAJI No. 6.11 suggests that the duty to disclose information only pertains to medical interests of the patient.

17. *Arato*, 5 Cal. 4th at 1189, 858 P.2d at 609, 23 Cal. Rptr. 2d at 142.

18. *Id.* at 1190-91, 858 P.2d at 610-611, 23 Cal. Rptr. 2d at 143-44. In these informed consent cases, a "therapeutic exception" exists, allowing the physician to withhold information in appropriate circumstances. *Id.* at 1191, 858 P.2d at 611, 23 Cal. Rptr. 2d at 144.

19. *Id.* at 1190, 858 P.2d at 610, 23 Cal. Rptr. 2d at 143. *See also* Cobbs v. Grant, 8

ations, expert testimony may be justified to allow a jury to better understand the reasoning behind a decision to withhold information.[20]

III. CONCLUSION

The court in *Arato v. Avedon* reinstated the trial court's ruling on the informed consent issues.[21] The court held that the trier of fact should determine the propriety of withholding information pertaining to a medical procedure or treatment.[22] In addition, the court held that the doctrine of informed consent only applies to the medical interests of the patient.[23] Finally, the court held that the disclosure of information in a procedure not involving any risk of serious harm or death is measured on a medical community standard, and therefore, expert testimony should be allowed to assist the trier of fact in assessing the physician's decision to withhold information.[24]

The doctrine of informed consent is a highly controversial area of the law.[25] Some scholars argue that the body is sacred and all information should be disclosed. Other scholars argue that the requirement of full disclosure simply inhibits the practice of medicine. Through *Arato*, the supreme court allows the trier of fact to decide.

ERIC MASAKI TOKUYAMA

Cal. 3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (mandating information on procedures potentially involving serious harm or death). For a general discussion on the defenses to informed consent see 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 362 (1988 & Supp. 1993); 36 CAL. JUR. 3D, *Healing Arts and Institutions* § 153 (1977 & Supp. 1993).

20. *Arato*, 5 Cal. 4th at 1190, 858 P.2d at 610-11, 23 Cal. Rptr. 2d at 143-44. Expert testimony assists the jury in determining whether a decision complies with the medical community's standard of disclosure. *Id.*

21. *Id.* at 1192, 858 P.2d at 611, 23 Cal. Rptr. 2d at 144.

22. *Id.* at 1186-87, 858 P.2d at 607, 23 Cal. Rptr. 2d at 140.

23. *Id.* at 1188, 858 P.2d at 608, 23 Cal. Rptr. 2d at 141.

24. *Id.* at 1190-91, 858 P.2d at 610-11, 23 Cal. Rptr. 2d at 143-44.

25. For further discussions on the issue of informed consent *see generally* Alan J. Weisbard, *Informed Consent: The Law's Uneasy Compromise With Ethical Theory*, 65 NEB. L. REV. 749 (1986); Marjorie M. Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985); Alan Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 WIS. L. REV. 413.

C. *Under Government Code section 835, a person injured while working on public grounds may not use res ipsa loquitur to establish a prima facie case against a public entity without demonstrating that the public entity had actual or constructive notice of the allegedly dangerous condition:* **Brown v. Poway Unified School District.**

I. INTRODUCTION

In *Brown v. Poway Unified School District*,[1] the California Supreme Court discussed whether a worker may establish a cause of action using the doctrine of res ipsa loquitur when he sustained injuries while on school district property.[2] The court analyzed the case under Government Code section 835[3] which outlines the exclusive conditions under which a public entity may be held liable for an injury caused by a dangerous condition which exists on its premises.[4] The court held that the plaintiff may not use the doctrine of res ipsa loquitur in a section 835 action unless there is evidence that the school district had notice of the dangerous condition.[5]

The plaintiff, Francis Brown, a self-employed computer repairman, slipped and fell in a school district building while delivering computers.[6]

---

1. 4 Cal. 4th 820, 843 P.2d 624, 15 Cal. Rptr. 2d 679 (1993). Justice Panelli wrote the majority opinion in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, and George joined. *Id.* at 823-38, 843 P.2d at 626-36, 15 Cal. Rptr. 2d at 681-91. Justice Mosk issued a dissenting opinion. *Id.* at 838-42, 843 P.2d at 636-38, 15 Cal. Rptr. 2d at 691-93 (Mosk, J., dissenting).

2. *Id.* at 828-38, 843 P.2d at 629-35, 15 Cal. Rptr. 2d at 684-90.

3. Government Code § 835 provides:

> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either:
>
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The public entity had actual or constructive notice of the dangerous condition under section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

CAL. GOV'T CODE § 835 (West 1980). *See generally* 35 CAL. JUR. 3D *Government Tort Liability* § 31 (1988 & Supp. 1994) (discussing liability for the existence of dangerous circumstances); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 172 (9th ed. 1988 & Supp. 1993).

4. *Brown*, 4 Cal. 4th at 828-38, 843 P.2d at 629-35, 15 Cal. Rptr. 2d at 684-90.

5. *Id.* at 838, 843 P.2d at 636, 15 Cal. Rptr. 2d at 691.

6. *Id.* at 824, 843 P.2d at 626, 15 Cal. Rptr. 2d at 681.

Immediately following the accident, a co-worker found a fresh piece of lunch meat lodged in the sole of Brown's shoe.[7] Brown sued the school district for his personal injuries.[8]

The school district moved for summary judgment under section 835 based on the undisputed fact that it had no prior notice of the dangerous condition and the absence of evidence showing that a district employee created the dangerous condition.[9] The trial court granted the motion for summary judgment, rejecting Brown's argument that he did not need to show evidence of prior notice because the doctrine of res ipsa loquitur creates a presumption of negligence on the part of district employees.[10] The court of appeal reversed, holding that the facts of the case satisfied the elements of the res ipsa loquitur doctrine and that the resulting presumption of negligence established a prima facie case under section 835(a).[11] The California Supreme Court reversed.[12]

II. TREATMENT

A. *Majority Opinion*

1. The Doctrine of Res Ipsa Loquitur

The California Supreme Court initially analyzed whether the facts in *Brown* satisfied the requirements of the res ipsa loquitur doctrine.[13] Under this doctrine, a presumption of negligence arises if a plaintiff proves three conditions: "'(1) the accident must be of a kind which ordinarily

---

7. *Id.*

8. *Id.*

9. *Id.* at 824-25, 843 P.2d at 626-27, 15 Cal. Rptr. 2d at 681-82.

10. *Id.* at 825, 843 P.2d at 627, 15 Cal. Rptr. 2d at 682.

11. *Id.*; *see supra* note 3 for the statutory text.

12. *Brown*, 4 Cal. 4th at 838, 843 P.2d at 636, 15 Cal. Rptr. 2d at 691.

13. *Id.* at 825-27, 843 P.2d at 627-29, 15 Cal. Rptr. 2d at 682-84. The res ipsa loquitur doctrine is defined in California as "a presumption affecting the burden of producing evidence." CAL. EVID. CODE § 646(b) (West Supp. 1994). The English translation of this Latin phrase is "the thing speaks for itself." *Brown*, 4 Cal. 4th at 825, 843 P.2d at 627, 15 Cal. Rptr. 2d at 682. The phrase was first used in a case where the plaintiff was injured by a barrel that fell from the defendant's second story window. *Id.* (citing Byrne v. Boadle, 159 Eng. Rep. 299, 300 (1863)). *See generally* 46 CAL. JUR. 3D *Negligence* § 167 (1978 & Supp. 1994) (discussing res ipsa loquitur); Thomas A. Eaton, *Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment*, 17 GA. L. REV. 33, 33-34 (1982) (providing the history of the res ipsa loquitur doctrine); William L. Prosser, *Res Ipsa Loquitur in California*, 37 CAL. L. REV. 183 (1949) (discussing the res ipsa loquitur doctrine in California case law).

does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'"[14]

As a general rule, the court noted that an ordinary slip and fall does not dictate an automatic application of the res ipsa loquitur doctrine.[15] The court stated that res ipsa loquitur may, in certain cases, apply to a slip and fall where the evidence satisfies the three requirements.[16] However, the evidence in the instant case failed to meet the first and second conditions.[17] The plaintiff failed to show that his injury was caused by the negligence of either a district employee or an agency or instrumentality within the school district's control.[18] Thus, the supreme court noted that the evidence in the instant case was insufficient to raise a presumption of negligence under the res ipsa loquitur doctrine.[19]

---

14. *Brown*, 4 Cal. 4th at 825-26, 843 P.2d at 627, 15 Cal. Rptr. 2d at 682 (quoting Ybarra v. Spangard, 25 Cal. 2d 486, 489, 154 P.2d 687, 689 (1944)). *See generally* 46 CAL. JUR. 3D *Negligence* §§ 168, 184 (1978) (noting the conditions and evidence required for invoking res ipsa loquitur).

15. *Brown*, 4 Cal. 4th at 826, 843 P.2d at 627, 15 Cal. Rptr. 2d at 683; *see* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 246 (5th ed. 1984)); *see also* Oldenburg v. Sears, Roebuck & Co., 152 Cal. App. 2d 733, 741 314 P.2d 33, 36 (1957) (declining to use res ipsa loquitur in the slip and fall context); Vaughn v. Montgomery Ward & Co., 95 Cal. App. 2d 553, 557, 213 P.2d 417, 419 (1950) (same); Gold v. Arizona Realty Co., 12 Cal. App. 2d 676, 677, 55 P.2d 1254, 1254 (1936) (same); Finch v. Willmott, 107 Cal. App. 662, 666, 290 P. 660, 662 (1930) (same); and Marple v. Manspeaker 88 Cal. App. 682, 685, 263 P. 1022, 1023 (1928) (same). *See generally* 46 CAL. JUR. 3D *Negligence* § 194 (1978).

16. *Brown*, 4 Cal. 4th at 827, 843 P.2d at 628, 15 Cal. Rptr. 2d at 683.

17. *Id.* Justice Panelli pointed to the fact that the lunch meat went undetected prior to Brown's fall and that there were numerous equally probable explanations for the appearance of the lunch meat on the ground: an employee of the District or a visitor might have dropped it, it could even have fallen from one of the computers Brown was delivering, an animal could have carried it, or it could have been tracked in from outside the building or from Brown's van. *Id.*

18. *Id.* The court stated that in order to determine how the lunch meat turned up on Brown's shoe, one must enter the "'field of conjecture.'" *Id.* at 827, 843 P.2d at 629, 15 Cal. Rptr. 2d at 684 (quoting Gold v. Arizona Realty Co., 12 Cal. App. 2d 676, 677, 55 P.2d 1254, 1254). Justice Panelli observed that one must "pile conjecture upon conjecture" to find that a District employee was responsible and that the lunch meat was under the District's exclusive control. *Id.* at 828, 843 P.2d at 629, 15 Cal. Rptr. 2d at 684.

19. *Id.*

2. Government Code Section 835(a)

The California Supreme Court then discussed whether res ipsa loquitur, if its three requirements had been met, may be used to establish a prima facie case under section 835(a).[20] The court first addressed the plaintiff's argument that section 830.5[21] sanctioned the use of res ipsa loquitur to hold a public entity liable under section 835(a).[22] The court determined that the legislature intended to strictly apply res ipsa loquitur under section 830.5.[23] Res ipsa loquitur may only be used to raise a presumption that the public entity's property was in a dangerous condition.[24] The court held that the plaintiff could not use res ipsa loquitur to infer that the public entity or its employee *created* the dangerous condition or had prior notice with sufficient time to correct the situation.[25]

The court, in examining the intent of section 835(a), observed that the California Legislature intended to adopt the then-existing rule which presumed that the public entity had notice of the dangerous condition when that condition was created by its employee.[26] Since the res ipsa

---

20. *Id.* at 828-38, 843 P.2d at 629-35, 15 Cal. Rptr. 2d at 684-90; *see supra* note 3 for the statutory text. The court stated that Brown's action against the District was a suit under § 835, and not an ordinary tort action. *Brown*, 4 Cal. 4th at 829, 843 P.2d at 629, 15 Cal. Rptr. 2d at 684. In 1963, the California Legislature enacted the Tort Claims Act which delineates the scope of governmental tort liability and effectively abrogates the doctrine of governmental tort immunity. 35 CAL. JUR. 3D *Government Tort Liability* § 1 (1988). Under the Act, government entities are liable for tort only to the extent set forth by the statute. *Id. See generally* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 129 (9th ed. 1988 & Supp. 1993) (discussing the Tort Claims Act); Robert H. O'Brien, *Suing the Sovereign in Tort*, 43 LOS ANGELES B. ASS'N BULL. 11 (1967) (outlining the procedure for commencing a tort action against a public entity under § 835).

21. "Except where the doctrine of res ipsa loquitur is applicable, the happening of the accident which results in the injury is not in and of itself evidence that public property was in a dangerous condition." CAL. GOV'T CODE § 830.5(a) (West 1980).

22. *Brown*, 4 Cal. 4th at 830, 843 P.2d at 630, 15 Cal. Rptr. 2d at 685.

23. *Id.* at 830-32, 843 P.2d at 630-32, 15 Cal. Rptr. 2d at 685-87. In contemplation of the Tort Claims Act, the legislature created the California Law Revision Commission to research the possible abrogation of the doctrine of sovereign immunity. *Id.* at 830, 843 P.2d at 630, 15 Cal. Rptr. 2d at 685.

24. *Id.* at 832, 843 P.2d at 632, 15 Cal. Rptr. 2d at 687.

25. *Id.* at 833, 843 P.2d at 632, 15 Cal. Rptr. 2d at 687.

26. *Id.* at 834, 843 P.2d at 633, 15 Cal. Rptr. 2d at 688. The legislative committee comment described § 835 as similar to the Public Liability Act pursuant to which public entities were liable for injuries resulting from a dangerous condition in their property created by their employees. *Id.* In such a case, actual or constructive notice on the part of the public entity was not required. *Id.* at 833-34, 843 P.2d at 632-33, 15 Cal.

loquitur presumption does not require a showing of either actual or constructive notice when a defendant or its employee created the dangerous condition, the court concluded that the presumption cannot be used to establish a case under section 835(a).[27]

B. Dissenting Opinion

In his dissent, Justice Mosk argued that the three requirements of the res ipsa loquitur doctrine had been established.[28] First, Justice Mosk observed that Brown's accident would not have ordinarily happened absent someone's negligence.[29] Second, because the element of exclusivity of control is "flexible," he argued that the second prong was also met.[30] Finally, Justice Mosk concluded that Brown was not contributorily negligent.[31]

Therefore, there was no obstacle preventing the doctrine of res ipsa loquitur from establishing a prima facie case under section 835(a).[32] Justice Mosk rather summarily concluded that the school district should be presumed negligent since all the elements of res ipsa loquitur had been

---

Rptr. 2d at 687-88 (citing Pritchard v. Sully-Miller Contracting Co. 178 Cal. App. 2d 246, 2 Cal. Rptr. 830 (1960) and Fackrell v. City of San Diego 26 Cal. 2d 196, 157 P.2d 625 (1945)); *see* CAL. GOV'T CODE § 835(a) legislative committee comment (West 1980) (discussing notice requirements).

27. *Brown*, 4 Cal. 4th at 836-37, 843 P.2d at 634-35, 15 Cal. Rptr. 2d at 689-90. The court illustrated the difference between a case involving the res ipsa loquitur doctrine and a § 835 action. For example, a landlord would be liable for injuries under res ipsa loquitur for failing to discover the natural deterioration of a stairway. *Id.* at 836-37, 843 P.2d at 635, 15 Cal. Rptr. 2d at 690 (citing Di Mare v. Cresci, 58 Cal.
2d 292, 373 P.2d 860, 23 Cal. Rptr. 772 (1962)). If the defendant was a public entity, it would not be liable unless it had notice of the condition with sufficient time to correct the dangerous condition. *Id. See generally* Alvin J. Knudson, Comment, *An Unusual Defense Available to Public Entities in the Area of the Maintenance of Dangerous Conditions on Public Property*, 4 U.S.F. L. REV. 442 (1970) (discussing § 835 and the possible defenses for public entities under a § 835 action).

28. *Brown*, 4 Cal. 4th at 838, 843 P.2d at 636, 15 Cal. Rptr. 2d at 691 (Mosk, J., dissenting); *see supra* note 14 and accompanying text.

29. *Brown*, 4 Cal. 4th at 839, 843 P.2d at 636-37, 15 Cal. Rptr. 2d at 691-92 (Mosk, J., dissenting).

30. *Id.* at 839-40, 843 P.2d at 637, 15 Cal. Rptr. 2d at 692 (Mosk, J., dissenting). "'Although . . . the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident.'" *Id.* at 840, 843 P.2d at 637, 15 Cal. Rptr. 2d at 692 (Mosk, J., dissenting) (quoting Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 443-44, 247 P.2d 344, 368 (1952)).

31. *Id.* at 840, 843 P.2d at 637, 15 Cal. Rptr. 2d at 692 (Mosk, J., dissenting).

32. *Id.* at 841, 843 P.2d at 638, 15 Cal. Rptr. 2d at 693 (Mosk, J., dissenting).

established.[33]

III. CONCLUSION

In *Brown*, the California Supreme Court precluded the use of the res ipsa loquitur doctrine as a method of establishing negligence under Government Code section 835 because the doctrine does not require proof of actual or constructive notice.[34] Without the res ipsa loquitur doctrine, the injured plaintiff bears the difficult burden of proving either that the public entity received notice of the dangerous condition or that a public employee created the condition. This bar on the use of the doctrine in section 835 cases effectively insulates public entities from liability and will consequently leave many plaintiffs without compensation.

ANNA HUR

33. *Id.* at 841, 843 P.2d at 638, 15 Cal. Rptr. 2d at 693 (Mosk, J., dissenting).

34. *Id.* at 836, 843 P.2d at 634-35, 15 Cal. Rptr. 2d at 689-90; *see* CAL. GOV'T CODE § 835(a) (West 1980).

D. *A cause of action for damages for fear of cancer, in the absence of physical injury, must include proof that it is more likely than not that cancer will develop in the future, unless toxic exposure results from fraud, oppression or malice:* **Potter v. Firestone Tire and Rubber Co.**

I. INTRODUCTION

In *Potter v. Firestone Tire and Rubber Co.*,[1] a toxic tort case, the California Supreme Court allowed damages for fear of cancer, in the absence of physical injury, where it is proven "more likely than not" that cancer will develop from the toxic exposure[2] or where the defendant's conduct amounts to fraud, oppression, or malice.[3]

Regarding the issue of intentional infliction of emotional distress, the court was consistent with another recent decision,[4] and held that a plaintiff, in order to recover damages, must prove the defendant either directed the extreme and outrageous conduct at the plaintiff or had knowledge to a substantial certainty that the plaintiff would suffer.[5] The court found no such proof in this case.[6] The court further held that comparable fault principles apply and that costs of future medical monitoring are compensable.[7] The holding, however, was strictly limited to cases where the plaintiff's fear of cancer stems from multiple sources, rather than where the actual likelihood of future cancer is from multiple sources.[8]

Two couples living adjacent to the Crazy Horse landfill[9] near the city of Salinas, California filed the action.[10] The parties brought suit af-

---

1. 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993). Justice Baxter wrote the opinion of the court, joined by Chief Justice Lucas and Justices Panelli and Arabian. Justices Mosk, Kennard, and George filed separate opinions concurring in part and dissenting in part.

2. *Id.* at 974, 863 P.2d at 800, 25 Cal. Rptr. 2d at 555. The court held that such a determination must be "corroborated by reliable medical and scientific opinion." *Id.*

3. *Id.* Where such malice is found, the court held that the plaintiff need only plead and prove fear of cancer, not the probability of its development. *Id.*

4. Christiansen v. Superior Court, 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

5. *Potter*, 6 Cal. 4th at 974, 863 P.2d at 800, 25 Cal. Rptr. 2d at 555.

6. *Id.*

7. *Id.*

8. *Id.* at 974, 863 P.2d at 800-01, 25 Cal. Rptr. 2d 555-56.

9. The landfill was classified as a "Class II" landfill, where the disposal of toxic substances or liquids of any kind is prohibited due to the "danger that they will leach into the groundwater and cause contamination." *Id.* at 975, 863 P.2d at 801, 25 Cal. Rptr. 2d at 556.

10. *Id.* at 976, 863 P.2d at 801, 25 Cal. Rptr. 2d 556. The plaintiffs were Frank and Shirley Potter, who lived directly next to the landfill, and Joe and Linda Plescia, who

ter discovering that their domestic water wells contained toxic chemicals.[11] The facts, as found by the trial court, revealed that despite the landfill's Class II status,[12] Firestone disposed of large quantities of liquid waste at the site even after its own environmental specialist warned them of the impropriety of such action.[13] The chemicals found in the plaintiffs' water were identified as those dumped by Firestone.[14]

The trial court found for the plaintiffs on the issues of negligence, negligent and intentional infliction of emotional distress, and strict liability for ultrahazardous activity.[15] The trial court also allowed damages for "general disruption of their lives and the invasion of their privacy," psychiatric illness and treatment, and future medical monitoring costs.[16] The appellate court affirmed most of the holding,[17] reversing only the costs of medical monitoring and the post-judgment order for costs and interest.[18] The supreme court granted review.[19]

II. TREATMENT

The California Supreme Court granted review to consider four issues: (1) whether damages for emotional distress based on fear can be recovered in the absence of physical injury; (2) whether Firestone is liable for intentional infliction of emotional distress; (3) whether a plain-

---

were their neighbors. *Id.*

11. *Id.* at 976, 863 P.2d at 801-02, 25 Cal. Rptr. 2d at 556-557. Multiple chemicals were found, of which at least two, benzene and vinyl chloride, are carcinogenic. *Id.*

12. *See supra* note 9.

13. *Potter*, 6 Cal 4th at 975-76, 863 P.2d at 801-02, 25 Cal. Rptr. 2d at 556-57. Firestone's environmental engineer sent a memorandum to all plant managers detailing proper waste management procedures. *Id.* Although there was apparently an initial attempt at compliance, the cost of using a proper waste disposal site generated mass noncompliance. *Id.* Additional memos were sent, explaining that the noncompliance was in violation of state law, but the improper waste disposal continued due to the high costs of complying with the law. *Id.*

14. *Id.* at 977, 863 P.2d at 802, 25 Cal. Rptr. 2d at 557. The trial court determined that Firestone was the only contributor of waste at Crazy Horse because the chemical makeup of the contaminants found in the water was identical to that of the chemicals disposed by Firestone. *Id.*

15. *Id.* at 976, 863 P.2d at 802, 25 Cal. Rptr. 2d at 557.

16. *Id.* at 978, 863 P.2d at 803, 25 Cal. Rptr. 2d at 558.

17. Potter v. Firestone Tire and Rubber Co., 225 Cal. App. 3d 213, 15 Cal. App. 4th 490, 274 Cal. Rptr. 885 (1990).

18. *Potter*, 6 Cal. 4th at 979, 863 P.2d at 804, 25 Cal. Rptr. 2d at 559.

19. Potter v. Firestone Tire and Rubber Co., 806 P.2d 308, 278 Cal. Rptr. 836 (1991).

tiff can recover for the costs of future medical monitoring where there is no present physical injury; and (4) whether comparable negligence principles apply.[20]

In addressing the plaintiffs' negligence action for fear of cancer, which the court noted was an issue of first impression,[21] the court first addressed whether the plaintiffs had sustained physical injury.[22] The court raised the issue of impairment of the immune system or cellular damage which has not manifested into an illness or disease and whether such harm is nonetheless a present injury. However, the court did not decide the question, noting that the plaintiffs did not challenge the appellate court ruling that there is not present injury "unless there is evidence that it is probable that the disease will occur."[23]

Considering whether the absence of physical injury destroys a claim for emotional distress, the court noted that it had previously rejected a physical injury requirement for emotional distress claims.[24] The court reiterated its decision to "discard the requirement of physical injury," stating that "the classification is both overinclusive and underinclusive when viewed in the light of . . . screening false claims,"[25] and that the requirement "encourages extravagant pleading and distorted testimony."[26] The court concluded that "imposing a physical injury requirement represents an inherently flawed and inferior means" of limiting the class of plaintiffs and setting guidelines.[27]

Although the court eliminated the physical injury requirement, it recognized the need for limitations on the right to sue for fear of cancer. Thus, the court required a plaintiff claiming fear of cancer after being exposed to toxic substances to prove, using scientific and medical evidence, that their risk of cancer is "more likely than not."[28] The court discussed four policy reasons for its holding, noting first that exposure to toxic substances is an everyday occurrence, and thus, "all of us are

---

20. *Potter*, 6 Cal. 4th at 973-74, 863 P.2d at 800, 25 Cal. Rptr. 2d at 555. The court did not review the award for disruption of the plaintiffs' lives, or the claim that the award for "psychiatric illness" was erroneous. *Id.* at 980, 863 P.2d at 804, 25 Cal. Rptr. 2d at 559.

21. *Id.* at 981-82, 863 P.2d at 805, 25 Cal. Rptr. 2d at 560.

22. *Id.* at 981-84, 863 P.2d at 805-07, 25 Cal. Rptr. 2d at 560-62.

23. *Id.* at 984 n.8, 863 P.2d at 807 n.8, 25 Cal. Rptr. 2d at 562 n.8.

24. *Id.* at 985, 863 P.2d at 808, 25 Cal. Rptr. 2d at 563. As examples, the court cited Burgess v. Superior Court, 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal. Rptr. 2d 615 (1992), and Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). *Potter*, 6 Cal. 4th 985, 863 P.2d at 808, 25 Cal. Rptr. 2d at 563.

25. *Potter*, 6 Cal. 4th at 987, 863 P.2d at 809, 25 Cal. Rptr. 2d at 564 (quoting *Molien*, 27 Cal. 3d at 928, 616 P.2d at 813, 167 Cal. Rptr. at 831).

26. *Id.*

27. *Id.* at 988, 863 P.2d at 810, 25 Cal. Rptr. 2d at 565.

28. *Id.* at 990, 863 P.2d at 811, 25 Cal. Rptr. 2d at 566.

potential fear of cancer plaintiffs."[29] The court rejected opening the floodgates to such a wide class of plaintiffs. Second, the court considered the impact on the health care industry, stating that drug manufacturers would be unduly impeded in releasing new drugs if, when negative information causes a recall of a drug, they are subject to lawsuits from unharmed plaintiffs who, nevertheless, fear future harmful effects.[30] The third policy noted was concern that the sheer number of plaintiffs, including those to whom likelihood of cancer is not probable, would overwhelm insurers and work to the detriment of those likely to suffer physical injuries.[31]

After careful consideration of these concerns, the court noted that the "more likely than not" threshold was "sufficiently definite and predictable."[32] After adopting the "more likely than not" threshold, however, the court carved out an exception for oppressive, fraudulent or malicious conduct by the tortfeasor.[33] Considering the totality of the circumstances in the instant case, the court found that when Firestone knowingly continued its illegal waste disposal it "displayed a conscious disregard of the rights and safety of other," and fell within the exception.[34]

The court next considered the award of damages for intentional infliction of emotional distress and, using the standard adopted in *Christensen v. Superior Court*,[35] required that the plaintiff prove that the defendant "engaged in 'conduct intended to inflict injury or engaged in with the realization that injury will result.'"[36] Although the court found Firestone's conduct was extreme and outrageous, it concluded Firestone had not directed its conduct at these particular plaintiffs nor were they actually aware of the plaintiffs' presence, and thus the cause of action was not sufficiently supported.[37]

---

29. *Id.* at 991, 863 P.2d at 812, 25 Cal. Rptr. 2d at 567.

30. *Id.* at 991-92, 863 P.2d at 812-13, 25 Cal. Rptr. 2d at 567-68.

31. *Id.*

32. *Id.*

33. *Id.* at 997-99, 863 P.2d at 817-18, 25 Cal. Rptr. 2d at 572-73.

34. *Id.*

35. 54 Cal. 3d 868, 820 P.2d 181, 2 Cal. Rptr. 2d 79 (1991).

36. *Potter*, 6 Cal. 4th at 1001-04, 863 P.2d at 819-21, 25 Cal. Rptr. 2d at 573-76 (quoting *Christensen*, 54 Cal. 3d at 903, 820 P.2d at 181, 2 Cal. Rptr. 2d at 79; *see also* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 405 (9th ed. 1988) (noting that the tort of intentional infliction of emotional distress requires intentional or reckless conduct). *See generally*, 6 CAL. JUR. 3D *Assault and Other Wilful Torts* §§ 95-106 (1988).

37. *Potter*, 6 Cal. 4th at 1001-04, 863 P.2d at 819-21, 25 Cal. Rptr. 2d at 573-76.

The court next relied on the analysis of *Miranda v. Shell Oil Co.*[38] and determined that the estimated future cost of medical monitoring was an appropriate element of damages.[39] The court stressed that its holding did not "require the court to speculate about the probability of future injury" but, rather, merely the assessment of whether future medical supervision is appropriate.[40]

The final issue addressed by the court was whether comparative fault principles apply.[41] The defendants argued that the court should consider the increased risk of cancer where all four plaintiffs were long-time smokers.[42] However, the court clarified that increased likelihood of cancer was not the injury at issue, but rather *fear of cancer*.[43] The court then noted that defendants had failed to prove that any portion of plaintiffs' *fear of cancer* was attributable to their smoking, instead of the contaminated water.[44]

III. CONCLUSION

In *Potter*, the court reinforced its position that present physical injury is not required to recover damages for fear of future harm. However, the court limited its holding by requiring that such plaintiffs meet the "more likely than not" standard of probable future harm, thereby broadening the class of potential plaintiffs but imposing specific restrictions to prevent the doors from being completely open. Regarding the elements of intentional infliction of emotional distress, the court relied on previous holdings, emphasizing that defendant's conduct must be specifically directed at the plaintiff, or done with knowledge to a substantial certainty that the plaintiff would suffer. The court adopted the prevailing appellate position allowing medical monitoring damages, but rejected a broad application of comparative fault principles.

In sum, the decision in *Potter* both broadened the class of available plaintiffs by setting a standard allowing emotional distress claims in the

38. 17 Cal. App. 4th 1651, 15 Cal. Rptr. 2d 569 (1993).

39. *Potter*, 6 Cal. 4th at 1005, 863 P.2d at 822, 25 Cal. Rptr. 2d at 577.

40. *Id.* at 1008-09, 863 P.2d at 824, 25 Cal. Rptr. 2d at 579.

41. *Id.* at 1010-12, 863 P.2d at 825-26, 25 Cal. Rptr. 2d at 580-81.

42. *Id.* The court noted that cigarette smoke contains more than 2500 times the amount of benzene found in the plaintiff's water supply. *Id.*

43. *Id.* at 1010-12, 863 P.2d at 825-26, 25 Cal. Rptr. 2d 580-81.

44. *Id.* The court added, however, that smoking by the plaintiff may evidence whether the fear of cancer is "reasonable and genuine," noting the fact that a plaintiff had been a long-time smoker with no fear of cancer was relevant evidence for a jury to consider. *Id.*

absence of injury, but it also limited potential claimants by imposing a probability standard.[45]

MARJORIE ANN WALTRIP

45. *See* Scott Graham, *On the Straight and Narrow; The California Supreme Court maintained a steady, conservative course in its 1993 civil rulings*, THE RECORDER, Dec. 30, 1993, at 1.