CAIIA Status Report

February 2013

California Department of Insurance Announces Approval of Auto Body Repair Regulations to Strengthen Consumer Protection

Regulations strengthen insurer accountability in auto body repair and use of aftermarket parts

SACRAMENTO - Insurance Commissioner Dave Jones announced that the Office of Administrative Law (OAL) approved amended regulations submitted by the California Department of Insurance (CDI) regarding the use of non-original equipment manufacturer (OEM) replacement crash parts, generally known as aftermarket parts. These regulations were sought by Commissioner Jones to further protect California consumers from physical and financial harm caused by defective or inferior aftermarket parts and to enhance insurer accountability in the claims process.

"The amendments build on existing protections by requiring insurers to settle automobile insurance claims using repair standards described by the Bureau of Automotive Repair, and not the insurer's own standards of repair," said Commissioner Jones. "This also places greater accountability on the insurer when they require use of an aftermarket replacement part so that damaged automobiles are repaired properly and safely."

After investigating complaints from consumers and automobile repair shops and evaluating the law, CDI drew the conclusion that defective or otherwise non-compliant aftermarket parts continued to infiltrate the repair process due to insurers' failure to perform the necessary steps to ensure public safety. CDI had been made aware of defective aftermarket bumper reinforcements, hood latches, and other safety related parts being required by insurers that otherwise were not compliant with current repair standards. CDI had also been made aware of substantial costs borne by automobile repair shops and their customers associated with installing defective or poorly fitting parts required by insurers. Performing repairs that do not comply with current repair standards or placing an inferior aftermarket part in a vehicle may cause the vehicle's value to depreciate. Defective parts may cause injury or even death if they malfunction.

Prior to beginning the formal rulemaking, CDI listened to stakeholders representing consumers, insurers, automobile repair shops, distributors, and automobile manufacturers. CDI also held a pre-rulemaking workshop in November 2011, which included strong representation of many stakeholders involved in the process.

Specifically, this rulemaking will strengthen and enhance current law by:

- Requiring an insurer to pay for the costs associated with returning a defective part and the cost to remove and replace the defective part with a compliant non-OEM part or an OEM part;
- Requiring the current insurer's warranty be expressly stated in the estimate of repair generated by the insurer;
- Requiring an insurer to cease use of a part known to be non-compliant, and to notify the part distributer within thirty (30) days;

Published Monthly by California Association of

Employer Organization of Independent Insurance Adjusters

Inside this issue.....

Changes to Auto Body Repair Regs.	Pg. 1
President's Message	Pg. 2
Note & News from Members	Pg. 3
Insurance Fraud Rings	Pg. 4
Wrongful Death & # of heirs	Pg. 5
Bumper Cars– assumption of risk	Pg. 6
Emotional Distress	Pg. 7
CCC Announcement	Pg.. 8
On the Lighter Side	Pg. 9

CAIIA Newsletter

CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiia.org
Email: info@caiia.com
Tel: (818) 953-9200

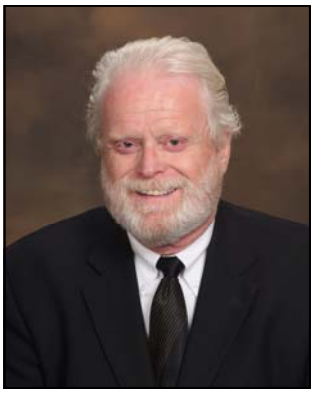
Editor: Sterrett Harper
Harper Claims Service, Inc.

Status Report Available

by Email and Web Only.

To add other insurance professionals to our e-mail list, please e-mail a request to statusreport@caiia.com

President's Message



W.L. (BILL) McKenzie
CAIIA President

"Ask not what your country can do for you, but what you can do for your country." That was from the Inauguration Speech by John F. Kennedy on January 20, 1961. Ask not what the California Association of Independent Insurance Adjusters can do for you, but what you can do for your Association.

As a volunteer association, each and every member of the Association is asked to participate in the organization by serving on the Board, by assisting the Board Members and other Members in seeking out new members, by helping sponsor events, holding those events, and participating in the educational events hosted by CAIIA. Every year Sterrett Harper sends out requests for volunteers to participate in the Combined Claims Conference in Long Beach, and the Northern Combined Claims Conference in the Sacramento area. We are again approaching the Combined Claims Conference in March 2013, and I am sure that Mr. Harper will be sending out e-mails asking for volunteers to assist in manning our booth, which is a great time and place to promote the organization and equally to promote yourself as an educated and well versed insurance adjuster in the State of California. In the years that I have actively been involved in this organization, I have been asked to sit on the Board, along with helping and participating in the educational opportunities sponsored by CAIIA. There was only a minute hesitation when I was asked to become more actively involved by becoming the Secretary-Treasurer, then ascending the ladder to become the President. However, without the help of the members of this Association, none of the Board Members or the officers could ever have what one might deem to be a successful year.

I personally want to thank Paul Camacho of Mission Adjusters, who has been so willing to assist me in putting together our Spring Meeting in the Lake Tahoe area to be held on April 25 & 26, 2013. It was pointed out at our October Meeting that the By-Laws dictate that we change venues from the south to the north, and vise versa, for our meetings. Because the last meeting was held in Southern California, I asked Paul and our Past President, Jeff Caulkins, if they could assist me in putting together a Spring Meeting in the northern California area, and it was suggested Lake Tahoe as it had been several years since we last met in the Lake Tahoe area. I am still working on the hotel.

Because of the weather, the meeting will be held a little later than normal, on the 26th of April 2013. As is typical, I anticipate that we will have a gathering on Thursday evening, the 25th. Friday morning we will have our education meeting, and after lunch we will have our business meeting. I will send out detailed information once I have signed the Contract with the hotel, etc.

In reviewing prior Status Reports I note there are always recurring themes that stand out as loud and clear year after year from virtually every President who has written a letter. We talk about the value and benefits of being a member of the CAIIA, membership involvement and participation in Association events, education and more education. In future months in the Status Report you will see registration information for the Combined Claims Conference 2013 to be held in March in Long Beach, and our Spring Mid-Term Meeting in April 2013. Our Mid-Term this year will fol-

Continued from page 2

I can't stress enough how thankful I am that when I ask for volunteers to sit on Committees so many people volunteered without hesitation. I am sure Sterrett Harper will have the same gratitude when he seeks volunteers for the manning of the booth at the Combined Claims Conference in Long Beach, and the Northern California Combined Claims Conference.

I look forward to seeing all of you at the Combined Claims Conference in Long Beach, and at the upcoming Spring Mid-Term Meeting in Lake Tahoe where we can enjoy each other's company and discuss the challenges we all fact operating our businesses, working with our clients, and working with the policyholders.

W.L. (Bill) McKenzie, RPA

Notes and News from Members

Lewis Ross

Lew Ross, President of the CAIIA 1976-77, died on April 5, 2012. He was 84 years old. The Executive Office was just informed recently. Lew had his business in Santa Ana before retiring to Huntington Beach, CA. He served during World War II. Lew was married for 66 years. Our heartfelt condolences to Lew's family and friends.

Don Ferguson

The Executive Office received a call from long time member Don Ferguson. He has retired and is now living in Concord, CA His phone number is 925-270-3485. He is doing well for an 86 year old. He welcomes contact from his long time friends of the CAIIA.

New Sales Tax Rates, effective 1/1/13

With a new sales and use tax rate effective for California, we thought you may want to have this quick link to the Board of Equalization web site showing the sales and use tax rate in cities and counties throughout the state. Property adjusters must include a calculation of the sales tax expense for materials in our estimates.

Pete Vaughan
Vaughan & Associates
836 B Southampton Rd, #301

New Limit to Length of Depositions

Beginning January 1, 2013, depositions in California state cases will be limited to seven hours. Previously, there was no presumptive time limit for the completion of depositions under the California *Code of Civil Procedure*. The new time limit has the potential to change the landscape of discovery in California state court cases and will pose new challenges to both plaintiff and defense counsel.
To view the complete article, please click HERE.

Court of Appeals Confirms That Insurance Fraud Rings Cannot Use Anti-SLAPP Remedy Against Actions Brought Under Insurance code 1871.7

Credit to Mannin & Kass, Ellrod, Ramire4z, Trester, Los Angeles, CA

California is home to many unique statutes, creating special remedies in such fields as insurance, the First Amendment and environmental protection. Two of those unique remedies clashed in the recent case of *People ex rel. Fire Insurance Exchange, et al., v. Anapol, et al.*, 2012 Cal. App. LEXIS 1237 (December 6, 2012), with California's insurance fraud fighting statute coming out on top.

The defendants-attorneys in *Anapol* are accused by a homeowners' insurance carrier of operating an insurance fraud ring that chased wildfires, generating thousands of false insurance claims for alleged damages from smoke and ash to houses on the peripheries of major California wildfires. The insurer is using a unique California remedy, Insurance Code section 1871.7, to attack this fraud ring. This statute allows an insurer to aggregate together all the false claims presented by a fraud ring into one lawsuit, utilizing the economies of scale that normally only benefit the fraud rings.

Section 1871.7 is a variant of the *qui tam* statute, a Civil-War-era tool used by the United States government to combat insurance fraud. Under Section 1871.7(b), the mere presentation of a false insurance claim is grounds for awarding damages up to three times the amount of the false claim, plus a civil penalty and attorney's fees, regardless of whether the insurer pays anything on the false claim. A violation of this statute is complete at the time the false claim is presented, so the insurer need not prove reliance on the false claim, or show payment on the false claim, to establish the right to recover. With hundreds of false claims routinely included in a single lawsuit, the fraud ring operators face tens of millions of dollars in penalties, assessments and attorney's fees if they lose.

In mounting their defense against the insurer's lawsuit, the *Anapol* defendants attempted to employ another unique California remedy, the anti-SLAPP statute, Code of Civil Procedure section 425.16. While other states have anti-SLAPP statutes, none of them goes as far as California's statute in protecting free speech rights. California's statute requires a plaintiff bringing a cause of action within the scope of the anti-SLAPP statute to present enough evidence to show that he will probably prevail on his claim, within the first 60 days after filing the complaint, without discovery.

The statute - which, by its terms is required to be construed broadly - gives a very heavy presumption in favor of a defendant who invokes its protections. So heavy is the presumption that no party is allowed to take any discovery while an anti-SLAPP motion is pending, and if an anti-SLAPP motion is denied, the losing defendant has a right to an immediate appeal, imposing a further stay on all proceedings while the appeal is pending.

So, the game for defendants is to articulate an argument to bring a cause of action within the scope of protections of Section 425.16. The reward for articulating such an argument is a two-year delay in proceedings, while the motion and then the appeal are litigated to conclusion.

The scope of Section 425.16 protects communications made in or in connection with legislative, executive or judicial proceedings (including lawsuits), statements made in a public forum about a public issue, and conduct in furtherance of the right of petition or free speech in connection with a public issue.

The *Anapol* defendants argued that the presentation of insurance claims were communications within the scope of Section 425.16 because they were made in connection with the defendants' plan to sue the insurer for bad faith if the insurer did not pay the claim. The defendants pointed to earlier cases that had extended anti-SLAPP coverage to such things as letters sent by lawyers on behalf of injured parties, threatening to sue if the party injuring their client did not desist. The trial court and the Court of Appeal rejected this argument.

The *Anapol* Court held that the presentation of an insurance claim in the normal course of business is not a pre-litigation communication like a cease-and-desist letter from a lawyer. While a lawsuit might follow the presentation of an insurance claim if the claim is denied, an insurance claim is first and foremost a demand for performance of a private contract, not a statement about a public issue, or an issue of public interest - regardless of how large was the wildfire that allegedly caused the insured's smoke and ash damages.

This decision and *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants*, 86 Cal. App. 4th 280 (2000) - an earlier decision also won by same team of lawyers, Dennis B. Kass and David J. Wilson, of Manning & Kass, Ellrod, Ramirez, Trester LLP - together make clear that California's unique protections for First Amendment rights cannot be used to block California's *qui tam* weapon for attacking insurance fraud rings.

Wrongful Death Claim– How many Heirs are out There?
Credit to Manning and Kass,Ellrod, Ramirez, Trester, Irvine, CA

We can all breathe a sigh of relief. The California Supreme Court has de-published the opinion in *Deon Ray Moody et al v. Gregory Bedford, Jr., et al* (2012) 202 Cal.App. 4th 745. But what does this mean? How do we safely settle wrongful death cases pre-litigation? Unfortunately, we are left with more questions than answers, but there are precautions we can take.

THE FACTS

In *Moody,* the insured was involved in a head-on collision, killing the passenger in the adverse vehicle. The decedent's daughter presented a wrongful death claim to the insurer for the amount of the policy limits. Responding to the insurer's inquiry as to whether there were other heirs, the claimant assured the adjuster that she was the sole surviving heir. She signed a declaration under penalty of perjury attesting to that fact; she signed a release agreement stating that fact; she had her attorney write letters stating this fact; and she signed the settlement draft stating that she was the sole surviving heir.

As soon as the ink dried on the settlement documents, the settling claimant's four other siblings came forward, demanding settlement for the wrongful death of their mother. The settling claimant lied about being the only heir in order to pocket all of the settlement money. Relying on this lie, the insurer paid the entirety of the policy limits.

THE MOODY DECISION

After the four siblings filed their wrongful death lawsuit, the trial court granted the defendants' motion for summary judgment, concluding that the insurer's pre-litigation settlement for the policy limits barred the siblings' wrongful death action. The appellate court reversed, allowing the four siblings to proceed with their action. The appellate court explicitly held that *if a defendant (carrier) wants protection from subsequent suits, they cannot settle pre-litigation; they must force the matter into litigation.*

In California, a wrongful death cause of action is statutory (Code of Civil Procedure §377.60) Only a single action for wrongful death can occur. and all heirs must join or be joined. *Romero v. Pacific Gas & Electric* (2007) 156 Cal.App.4th 211, 216. If an heir is omitted from a wrongful death action, they cannot then bring a separate or subsequent wrongful death lawsuit. In other words, the defendant cannot be "subjected to a second recovery by another heir 'of whose existence [the defendant] had no knowledge at the time of [the initial wrongful death] action.' [citation]. Instead, the wrongfully omitted heir may bring an action against the heir who brought the wrongful death action, in order to recover damages for the omission. [citation]." *Smith v. Premier Alliance Insurance Co.* (1995) 41 Cal.App.4th 691, 697.

In wrongful death lawsuits, one of two things happen. Typically all heirs sue for wrongful death. However, if one heir brings a suit and the others have not joined, they must be joined as nominal defendants, where they are put on notice of the lawsuit and can relinquish their rights or turn around and sue in this one action. In this way, one wrongful death action resolves the matter fully and no further wrongful death actions may be brought against the defendant. This is the so-called "one action rule."

In *Moody*, the appellate court found that "the one-action rule should not apply to pre-litigation settlements." So, if we want "one action rule" protection from future litigation, we need to force a person who is willing to settle without litigation, to assume the expense and inconvenience of litigation. Even in *Moody*, where the insurer obtained all sorts of assurances that there were no other heirs, the appellate court held that the insurer assumed the risk by settling without forcing litigation. The appellate court in Moody found that the one action rule requires a **lawsuit**, not simply a **claim**.

"Tortfeasors such as defendants will still be at liberty to settle wrongful death claims without the instigation of litigation; but if they do so, they will not have the procedural protection afforded by the one-action rule."

This line of reasoning puts carriers in an untenable position. Carriers often face wrongful death claims with "7 figure" exposure, but more limited policy limits. In order to protect their insureds from litigation and huge exposure, carriers agree to settle for the policy limits. Under *Moody,* the carrier must also tell the claimant to file a lawsuit against the insured before the claim can be settled. What happens if a claimant's attorney or a pro per claimant refuses to instigate litigation, and declares that if litigation is forced, they will not stop until they receive a "7 figure" judgment? Under *Moody*, the carrier's hands are tied. They either pay the policy limits and pray no one else comes forward or they force litigation.

POSSIBLE STEPS FOR SETTLING WRONGFUL DEATH CLAIM

Thankfully, though the appellate court ordered the *Moody* opinion published, the California Supreme Court ordered that it not be published and it therefore cannot be cited as precedent. But where does this leave us when we want to settle a wrongful death case pre-litigation? (continued on page 6)

Assumption of Risk in Bumper Car Injuries
Credit to Tyson and Mendez

Assumption of the Risk Expanded Against Plaintiffs in California

The California Supreme Court ruled in a 6-1 majority that a bumper car operator was not liable for injuries sustained by a rider claiming the rider assumed the risk of injury when she chose to engage in the activity. Such thrill-seeking activities carry an "inherent risk" similar to that of playing a sport.

The Court rejected the arguments of the plaintiff, Dr. Smriti Nalwa, who sued Santa Clara's Great America theme park after she broke her wrist while riding the bumper car ride with her son in 2005. The ruling overturned the 2011 San Jose-based 6th District Court of Appeal ruling which stated that amusement park patrons should be able to sue for such incidents.

"The risk of injuries from bumping was inherent in the [bumper car] ride, and under our precedents (the park) had no duty of ordinary care to prevent injuries from such an inherent risk of the activity," Justice Kathryn Mickle Werdegar wrote for the court.

Great America's lawyers argued that individuals who ride the bumper cars are similar to those who participate in sports such as football and skiing and under legal theory there is "an assumption of risk" in such activities.

This argument differs from previous findings that roller coaster operators have a substantial obligation to provide safety, because this case would have made park owners far more vulnerable to lawsuits. This concept was bolstered by a host of recreation business such as ski resorts and health clubs.

Mark Rosenberg, Dr. Nalwa's lawyer, said that amusement parks are now "off the hook" and warned "amusement park patrons are less safe today than they were yesterday." But Stephen Renick, Great America's lawyer asserts that the ruling "provides clarity" and in the future patrons should approach amusement park rides with the same caution as playing a sport.

(continued from page 5)

There are no other cases on point addressing whether a wrongful death matter can be settled pre-litigation and receive protection from subsequent lawsuits. If a case is not settled, the insured is sued, the plaintiffs receive a judgment for over the policy limits, and sues for bad faith due to failure to settle within the policy limits, will the *Moody* line of reasoning be followed, exposing a carrier to a large bad faith judgment?

Unfortunately, we are left without any answers to these difficult questions. The best we can do is look at possible options that best protect insureds and insurers alike:

1. Follow the *Moody* Court's lead and force the claimant to file a lawsuit. When faced with an obstinate plaintiff attorney or *pro per* plaintiff, a carrier may consider showing them the *Moody* decision to explain their reasoning for requiring the filing of a lawsuit and perhaps offer to pay for the court filing fees. After all it is the defendant and the insurer who are seeking protection afforded by filing the lawsuit.

2. Conduct thorough independent research. Public records should be searched for any sign of an undisclosed heir. Order a copy of the death certificate to see if other possible heirs are identified.

3. Any settlement, whether pre or post litigation should include a carefully tailored release agreement noting that the settling party or parties are the sole surviving heir(s). Further, you may want to obtain a declaration under penalty of perjury noting that the settling party or parties are the sole surviving heir(s). Lastly, have the check made out to the person as sole surviving heir and have them sign as the sole surviving heir(s).

It seems that the only "sure way" to protect against a surprise second lawsuit from unknown other heirs is to force a party who is willing to settle to sue the insured. While it seems illogical and against public policy that favors settlements, the *Moody* court has warned us that this may be the only way to protect against future wrongful death lawsuits.

February 14th– let them know they are loved!

Torts – Negligent Infliction of Emotional Distress – Bystander Recovery
Fortman v. Forvaltningsbolaget Insulan AB
Court of Appeal, Second District (January 10, 2013)

Credit to Low, Ball and Lynch, San Francisco, CA

Closely related percipient witnesses may seek damages for emotional distress caused by observing a negligently inflicted injury on a third person. Such persons are required to be present at the scene of the injury-producing event at the time it occurs and aware that it is causing injury. This case considered whether a bystander who is aware a traumatic event was occurring, but not aware at the time that it was defendant's fault can recover.

Barbara Fortman and her brother Robert Myers went scuba diving off the coast of Catalina Island. A few minutes into the dive, Myers signaled to Fortman that he wanted to ascend. He then sank to the bottom of the ocean floor, landing on his back. Myers's eyes were wide open, but he was not responsive. At that point, Fortman thought her brother had a heart attack. However, after an investigation and report from the Sheriff's department, she learned that a plastic flow-restriction insert manufactured by defendant Förvaltningsbolaget Insulan AB had become lodged in Myers's second stage regulator preventing him from getting enough air to breathe while underwater.

Fortman and Myers's heirs filed suit. Fortman sought to recover emotional distress damages, alleging that while her "brother was being fatally injured by defendants' defective and unsafe products . . . [she] was present at the time and place of the occurrences described herein, and contemporaneously observed, witnessed, and saw that her brother's eyes bulged out of his head and that he was unresponsive to her signals, and perceived that her brother had stopped breathing and was being fatally injured by said products." The defendant filed a motion for summary judgment. The trial court granted summary judgment, and Fortman appealed.

The Court of Appeal affirmed. The Court reviewed the history of bystander recovery of emotional distress injuries. The Supreme Court in Thing v. La Chusa (1989) 48 Cal.3d 644 had established three mandatory requirements to state a claim for negligent infliction of emotional distress (NIED) under the bystander theory of recovery. First, the plaintiff must be closely related to the victim. Secondly, plaintiff must be "present at the scene of the injury-producing event at the time it occurs and... then aware that it is causing injury to the victim." Lastly, plaintiff must have suffered serious emotional distress as a result. The Court felt that plaintiff could not establish the second requirement. While Fortman may have seen her brother suffer injuries, it was undisputed that she did not have a contemporaneous, understanding awareness that the defendant's defective product was causing her brother's injury. In fact, Fortman thought that her brother's injury was caused by a heart attack.

Plaintiff had relied on accident cases since Thing had been decided, in which bystander liability had been allowed, in support of her claim. However, the Court noted that in all cases where bystander recovery was allowed, the plaintiff was able to show that they contemporaneously perceived the injury causing event. For example, a woman who observed an airplane crash, felt the explosion, and then arrived home to find her home engulfed in flames and her husband and child in side. Or, in another case where a man arrived on scene after emergency personnel were already present, but a fire was still causing damage to her home, and "possibly still causing injury to his many relatives inside." In each of these cases, the plaintiff contemporaneously understood that the event that they were witnessing was causing injury to a close relative. (continued on page 9)

COMBINED CLAIMS CONFERENCE

LONG BEACH CONVENTION CENTER | MARCH 12-13, 2013

SILVER ANNIVERSARY CELEBRATION
MINING FOR KNOWLEDGE

The Combined Claims Conference (CCC) is a two-day program offering continuing education for CPCU, RPA, MCLE, CIPI, CALI, WCCP and the California Department of Insurance for independent adjusters, attorneys, investigators and brokers.

You must be employed in the following fields in the insurance and claims industry to qualify for the CCC "qualified" rate: Independent Adjuster, Insurance Carrier, Risk Management, Appraiser, Private Investigator, Workers' Compensation Claims Professional, Attorney or Agent/Broker. All others register at the "all others" rate.

CCC QUALIFIED RATES:

Register By December 31:
One-day: $75.00 (either Tuesday or Wednesday)
Two-day: $125.00

Register by February 28:
One-day: $95.00 (either Tuesday or Wednesday)
Two-day: $175.00

After February 28 or On-site registration:
One-day: $125/day (subject to availability)

All-others:
One-day: $200 (either Tuesday or Wednesday)
Two-day: $400

Discount Pricing Available:
Pay for five registrations and get one free.
Pay for 10 registrations and get three free.
Pay for 15 registrations and get five free.

EXHIBITOR AND SPONSORSHIP OPPORTUNITIES ARE AVAILABLE NOW!
Please visit the website for details on the program, exhibitor, sponsor and golf tournament details, hotel information and a link to register online. All registration will be online for the 2013 conference.

Combined Claims Conference
P.O. Box 255431
Sacramento, CA 95865-5431
www.combinedclaims.com
info@combinedclaims.com
(714) 321-3847

On the Lighter Side...

MURPHY'S OTHER 15 LAWS

1. Light travels faster than sound.
This is why some people appear bright
until you hear them speak.

2. A fine is a tax for doing wrong.
A tax is a fine for doing well.

3. He who laughs last, thinks slowest.

4. A day without sunshine is like,
well, night.

5. Change is inevitable, except
from a vending machine.

6. Those who live by the sword get
shot by those who don't.

7. Nothing is foolproof to a
sufficiently talented fool.

8. The 50-50-90 rule:
Anytime you have a 50-50 chance
of getting something right, there's
a 90% probability you'll get it wrong.

9. It is said that if you line up all
the cars in the world end-to-end,
someone from California would be
stupid enough to try to pass them.

10. If the shoe fits, get another one just like it.

11. The things that come to those who wait,
may be the things left by those who got there
first.

12. Give a man a fish and he will eat for a day.
Teach a man to fish and he will sit
in a boat all day drinking beer.

13. Flashlight: A case for holding dead batteries.

14. God gave you toes as a device
for finding furniture in the dark.

15. When you go into court, you are putting
yourself in the hands of twelve people,
who weren't smart enough to get out of jury
duty

(continued from page 7) Similarly, the Court looked at medical malpractice cases. Historically, plaintiffs have not been able to recover emotional distress on a bystander theory, even if they were present when their relative was undergoing treatment, if they did not perceive at the time of treatment that their relative suffered harm caused by a medical error.

Finally, the Court noted that in products liability cases since Thing, bystander liability was only allowed in cases where the plaintiff was able to observe the injury causing event and perceive that the malfunctioning product or equipment was itself the cause of pain or injury to their relative. The Court also offered examples of products cases where there might be such contemporaneous perception, such as where a plaintiff observes a back yard barbecue tank explode, injuring a loved one, or saw a ladder collapse, causing injury to a relative. In situations like that, the plaintiff would have the necessary contemporaneous awareness of the causal connection between the defendant's product as causing harm and the resulting injury to the close relative.

While noting that the Thing decision had drawn "arbitrary" lines restricting bystander recovery, the Court of Appeal stated that nevertheless, those lines were binding. The Court of Appeal affirmed the granting of summary judgment.

COMMENT

This case discusses the bystander cases and the requirement of contemporaneous observance. It is an excellent case for a discussion of all of the cases in this area and will give the reader an understanding of where the lines are drawn in these types of cases.