CAIIA Status Report

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April 2016

Torts – Negligence Per Se and Causation

Credit to: Low, Ball & Lynch, San Francisco, CA

Anthony Toste v. CalPortland Construction et al.
Court of Appeal, Second Appellate District (March 2, 2016)

In many tort actions, plaintiff will argue that the defendant violated some statute or ordinance and was presumed "negligent per se," and thus at fault. However, although a finding of negligence per se may establish the defendant's negligence, this case made clear that there is still a question to be determined as to causation, and whether that negligence caused the plaintiff's injuries.

Plaintiff/Appellant's father, Dan Toste ("Toste"), died after Paul Michaelson, an employee of V&J Rock Transport, Inc. backed up a construction truck and hit Toste during a road paving project. Toste, the project general contractor, had been standing behind the truck, in a blind spot, at the time of the accident. Michaelson, an employee of V&J Rock Transport Inc., was providing truck hauling services for the asphalt supplier, CalPortland. Following the accident, Michaelson agreed to take a drug test, testing positive for marijuana. He claimed he had smoked two days prior to the accident to treat a headache.

Following trial of the wrongful death action, the jury returned a defense judgment in favor of respondents, specifically finding that although Michaelson was negligent, his negligence was not a substantial factor in causing the harm suffered. Toste appealed, contending that the verdict was not supported by the evidence and that the jury was mis-instructed.

The Court of Appeal affirmed the judgment on the causation issues, holding that negligence alone is insufficient to create liability unless that negligence was a substantial factor in causing the accident. Here, the case was submitted to the jury based on three theories of negligence: (1) that Michaelson violated federal or state law and was negligent per se; (2) that he drove a truck with a faulty backup alarm; and (3) that he backed up in a negligent manner.

Plaintiff's primary theory of liability was negligence per se, relying on Federal Motor Carrier Safety Regulation 49 C.F.R. § 382.213(a), which states that "no driver shall report for duty or remain on duty requiring the performance of safety sensitive functions when the driver uses any drug or substance identified in 21 C.F.R. § 1308.11 Schedule I." As marijuana falls within that classification, Plaintiff's position was that if Michaelson violated the federal safety regulation by using marijuana, it is irrelevant whether he drove safely, or indeed, whether he was actually impaired at the time of the accident.

The Court of Appeal noted that a finding of violation of the statute was not sufficient to establish causation unless the jury also determined that Michaelson's use of marijuana was a substantial factor in causing the accident.

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

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200
harperclaims@hotmail.com

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California Association of Independent Insurance Adjusters, Inc.

President's Message

Paul Camacho

Hello everybody! As far as I can tell, Spring launched because it snowed in the mountains and buried my daffodils. I can count on snow when they just start to come out of the ground, and then again when they bloom. Now we can look forward to April 15, Tax Day in the United States. Are you looking for all your receipts as the accounting firm is burning the midnight oil? Unfortunately, it is not a public holiday and business goes on as usual so we can pay our taxes.

There is a song with the lyrics "Who are you? Who who, who who" written by Pete Townshend and performed by the Who. Do you remember when I commented on the camouflaged claims person that arrived for an appointment with no business card? The person said that due to multiple business affiliates, none were printed?

I received a call from a fellow claims professional and was told that they have been in a similar situation. In their case, they were directed not to identify their firm, but the one they were responding upon behalf of. This to me creates an interesting situation as to how you make your appointment to handle this loss?

Is it ethical to call as Bob Onthespot from ABCDE Claim Service *(pretend name)* when you are really from FGHI Claim Service *(also pretend name)* of which you are licensed? If I am the insured or claimant, I may not let you past my door without some reasonable proof of identity and involvement in the claim. *The reason I carry a business card with my license number is to verify who I am and the opportunity for anybody to check my license status with the DOI.*

When my cable/satellite TV technician arrives for a home appointment, I am usually greeted with a person in a logo shirt, a photo ID on a lanyard and all kinds of advertising on the vehicle. I will let that person in, because I want to watch the Giants baseball game. So, "Who are you? Who who, who who"

You will recall our Mid-Term Meeting is all set to go on April 8 in San Diego. The CAIIA is offering a 3 hour DOI approved class on ethics at that time. I hope you have registered and will see you there.

Thanks for taking the time to read, see you next month.

Paul R. Camacho, ARM, RPA
President – CAIIA 2015-2016
Mission Adjusters
Paul@missionadjusters.com

SUBROGATION: WHAT, HOW, WHEN & *VATUVEI*

Credit to Pearlman, Borska & Wax, Encino, CA

Subrogation is the statutory right to recover from a third party tortfeasor, the workers' compensation benefits (indemnity payments and medical expenses) paid to and on behalf of an injured worker (IW) by the employer and/or its insurance carrier.

The Labor Code provides the following three alternative civil procedures for the enforcement of these reimbursement rights: (1) filing a Subrogation Complaint, in which the third party tortfeasor is named as a defendant, (2) intervening in an independent lawsuit filed on behalf of the IW and (3) imposing a lien on an IW's judgment against the third party at any time before the award is satisfied.

The option of choice depends upon numerous factors, including the facts of the accident, the comparative negligence of the IW and/or the employer, the nature of the resulting injuries and the extent of the workers' compensation lien.

California Code of Civil Procedure § 335.1 basically provides a two-year Statute of Limitation for all lawsuits alleging personal injuries or death caused by the wrongful act or negligence of another. Therefore, Subrogation Complaints are to be filed within two years from the date of the subject occurrence.

Pursuant to Code of Civil Procedure § 387 and Labor Code § 3853, an employer and/or its insurer can intervene, with leave of the court, in an IW's civil lawsuit against the allegedly negligent party. By filing a Complaint-in-Intervention, the intervenor becomes a party to the action and has the same procedural rights and remedies as the original parties. According to the latter code section, intervention may occur "at any time before trial on the facts." This statutory provision was recently restricted by the Appellate Justices in the unpublished case of *Vatuvei vs. Citrus and Allied Essences, Ltd.* In this third party lawsuit, which was filed in October 2011, plaintiff Vatuvei alleged he contracted a lung disease while employed by Mission Flavors & Fragrances, Inc. between 2000 and 2010, as a result of being exposed to a food additive named diacetyl.

In the Complaint, it is alleged the defendants, including Citrus and Allied Essences, Ltd., were sued for negligence and strict liability based upon theories of manufacturing defect, design defect, and failure to warn. In its Answer to the Complaint, Citrus raised the affirmative defense of the employer's comparative negligence, thereby claiming the defendant is entitled "to set off any workers' compensation benefits" received by the IW.

This litigation was calendared for Trial in mid-July of 2014, while Mission's workers' compensation insurance carrier, ACE Fire Underwriters, filed in June 2014 a Notice of Lien pursuant to Labor Code § 3856. According to this document, the insurer's ongoing lien totaled $124,000.00 at the time. The Orange County Superior Court Judge then continued the Trial to January 5, 2015.

By late-2014, Citrus was the sole remaining defendant in this lawsuit, while Vatuvei's attorney had agreed to withdraw the causes of action for strict liability based upon manufacturing defect and design defect.

On December 22, 2014, just two weeks prior to the Trial date, ACE Fire Underwriters filed an ex parte application seeking leave to intervene in the underlying action. Citrus opposed the request on the grounds the application was untimely and that granting the motion would result in prejudice because the proposed Complaint-in-Intervention contained theories that had already been withdrawn by Vatuvei's counsel.

On December 23, 2014, the Trial court denied ACE's ex parte application, concluding the motion was untimely and prejudicial, especially since it was brought years after the action had been filed and just two weeks during the holiday season before the Trial was to commence. The Judge specifically ruled the causes of action referenced in the proposed Complaint-in-Intervention "would necessitate additional discovery, Trial preparation, and potentially additional witnesses, including experts." For all these reasons, the Trial Judge summarily denied the employer's petition and proceeded to try the lawsuit, which resulted in a jury verdict in favor of Vatuvei in excess of $2.6 million. The jurors attributed negligence of 60% to the defendant and 40% to the employer.

Meanwhile, ACE filed its appeal, which was just decided by the Court of Appeal against ACE Fire Underwriters. In their decision, the Appellate Justices ruled as follows:

(1) When the issue of the employer's negligence is introduced into an employee's lawsuit against a third party, the mere filing of a lien is insufficient to protect the employer's subrogation rights;

(2) When the defendant included the affirmative defense of the employer's comparative negligence in its Answer to Vatuvei's Complaint, the employer should have filed a Complaint-in-Intervention;

(3) Once the affirmative defense of the employer's comparative negligence has been raised by the defendant, there is a conflict of interest between the claimant and the employer, whereby a Complaint-in-Intervention must be filed in order to protect its subrogation rights;

Continued from page 1
Here, the jury found that although Michaelson was negligent, his use of marijuana was not a substantial factor in causing the traffic fatality because there was no drug impairment. The Court reviewed ample evidence the jury could have relied upon in reaching this conclusion, including testimony of a co-worker who saw Michaelson minutes before the incident, and observed no signs of impairment, testimony that Michaelson had transported and unloaded two prior loads, and that the CHP officers investigating the inciden and interviewing Michaelson observed no signs of impairment.

There was also evidence from which the jury could have reasonably concluded that the manner in which Michaelson operated the truck was not a substantial factor in causing the harm suffered, and evidence that the backup alarm on the truck was functioning properly and that had Toste been attentive, he would have heard the backup alarm and sensed the movement of the truck as it jostled in position before backing up.

Thus, based on the evidence presented, "[t]he jury reasonably could have concluded that the traffic fatality was caused by Toste's inattentiveness and careless conduct, rather than Michaelson's marijuana use.

In a second part of the decision, the Court of Appeal addressed the awarding of expert fees to the defendants that were disputed by plaintiff. Prior to trial, there was a $15,000 offer to compromise from CalPortland, as well as two offers to compromise from Defendants V&J Rock Transport and Michaelson, the first in the amount of $200,001 and the second in the amount of $700,001. V&J's and Michaelson's first offer was conditioned on a finding of good faith settlement, but their second was not. After trial, the defendants were awarded expert witness fees as a cost item based on Plaintiff's failure to accept the § 998 offers.

On appeal, Plaintiff contended that these offers to compromise were conditional and failed to track the language of section 998, and that they were therefore invalid. The Court, however, found that although the earlier V&J Rock Transport and Michaelson offer to compromise was conditional and invalid, because of the good faith settlement issue, both their second offer and the sole offer from CalPortland were proper, conditioned on nothing other than plaintiff's dismissal and a general release. Further, an otherwise clear offer is not rendered invalid simply because it does not track precisely the language of the statute.

By virtue of obtaining a defense verdict, respondents were entitled to recover all non-expert costs regardless of whether the costs were incurred pre-offer or post-offer. As to the recovery of expert costs pursuant to section 998, however, the legislature's recent amendment of that statute corrects an ambiguity that had previously allowed Defendants to recover both pre-offer and post-offer expert witness costs. This change went into effect while *Toste* was pending on appeal. Although the trial court had awarded expert costs to CalPortland as well as V&J Rock Transport and Michaelson, all of CalPortland's expert costs were incurred post-offer. Consequently, there was no need to disturb that aspect of the trial court's ruling. Because V&J Rock Transport and Michaelson's expert fee award did include pre-offer costs, however, that award was reversed and remanded to the trial court to recalculate in light of the changed statute.

COMMENT

Negligence alone is insufficient to create liability unless that negligence was a substantial factor in causing the accident. A plaintiff must still show causation. Also keep in mind the recent changes in recovery of expert fees under section 998, and that any section 998 offer to be valid cannot be conditioned on a good faith determination.

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(4) Although Labor Code § 3853 allows intervention "at any time before Trial on the facts," Code of Civil Procedure § 387 requires "timely application";
(5) The right to intervene should be asserted within a reasonable time, so as not to prejudice the rights of the other parties;

(6) The question of delay is a question of fact to be left to the sound discretion of the Trial Judge; and

(7) A Complaint-in-Intervention should not be allowed when it would delay the prosecution of the underlying lawsuit or require a re-opening of the case for further discovery.

Therefore, the Appellate Justices concluded the Trial Judge did not abuse her discretion by denying ACE's ex parte application to intervene in the pending litigation. In order to protect the subrogation rights of an employer or its insurer, it is essential for a Complaint-in-Intervention be filed soon after the issue of the employer's concurrent negligence has been raised. Needless to say, timing is everything in life and in subrogation.

SUING FOR MONEY WHEN YOU HAVEN'T BEEN DAMAGED?

Credit to Manning & Kass, Los Angeles, CA

New Case Settles Dispute Over California's Insurance Fraud Law

We learned in our first day of torts class that to sue for money, you need to show a duty, a breach of that duty, causation and damages or harm. When it comes to suing for insurance fraud in California, damages or harm are no longer required.

California has a novel and powerful anti-fraud statute, Insurance Code section 1871.7, which allows insurance companies or third-party whistleblowers to sue defrauders. A successful plaintiff, which is usually an insurance company, receives three times the claim for compensation plus a penalty of $5,000-$10,000 per false claim.

For years, battle has been waged regarding whether liability attaches if and only if the person or company actually believed the false claim and paid money or whether the defrauder was liable as soon as the claim was submitted even if no money was paid. The answer is now clear.

While we have been largely successful at thwarting such a misinterpretation of the law, busy judges have misconstrued the law, leading to needless expenditure of money on meaningless discovery. In *People of the State of California ex rel Geico v. Janice Cruz, et al*, such a misapplication of the law led to the dismissal of Geico's case.

In *Geico*, the trial court granted summary judgment in favor of one defendant, finding that there was no showing of damages. Reversing the trial court and finding that the trial court erroneously applied the law, the appellate justices have resolved this issue once and for all: "We are similarly unpersuaded by Dr. Cruz's argument that she cannot be liable under [Insurance Code section 1871.7] because GEICO has not established it incurred any damages. As noted above, the Act does not require that a fraudulent claimant's scheme be successful to establish her liability; she need only knowingly present a false claim with the intent to defraud."

The Court further explained:

> "It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts."

In truth, while this case has wide reaching implications, it simply states the obvious. Insurance Code section 1871.7 is an attempted fraud statute. Individuals are held responsible for attempted fraud equally as much as if they successfully defrauded an insurance company. The trigger is the presentation of a false insurance claim. How do we know? It's in the statute!

The trigger for a cause of action under section 1871.7 is the violation of Penal Code section 550. Each subsection of Penal Code 550 states that the crime is complete upon submission of a false claim. Nowhere does it say that someone has to part with money or rely to their detriment.

Also, Insurance Code section 1871.7 creates two separate classes of plaintiffs who can sue. One is an insurance company who has had a false claim presented to it. The second is a "whistle-blower"; someone who has knowledge of fraud being perpetrated upon an insurance company. Such an outsider would never be damaged or part with money. If we were to require damages or detrimental reliance, we would essentially write out of section 1871.7 the ability for such whistle-blowers to sue.

Further, besides submission of a false claim, one can be liable under 1871.7 for capping—a doctor or lawyer paying for patients or clients. Capping does not require damages. Yet, one can sue under 1871.7 for capping.

Finally, since this is a qui tam action, the State of California may share in any penalties and assessments (not damages!) recovered from the defendant. Section 1871.7(g) provides one formula for dividing up these sums if the victim carrier paid money and a different formula if the carrier did not pay money to the person(s) submitting the false claim(s). One would have to completely ignore this provision to claim that one must part with money and rely to their detriment in order to state a claim under 1871.7.

The law is finally settled that Insurance Code 1871.7 does not require damages or detrimental reliance to prove liability or recover statutory penalties or assessments. This is an attempted fraud statute, holding both those submitting false claims and getting paid by an insurer and those who were not successful in their endeavor, equally responsible. This is akin to perjury. It is the lie under oath that is the crime, not whether someone believed the lie.

With case law settling this issue once and for all, the fight over whether someone suing under 1871.7 must show damages and detrimental reliance is finally over. This decision should help streamline discovery and especially thwart attempts at intrusive, irrelevant and expensive discovery directed at the insurance carriers.

Happy April Fool's Day!

Best Western PLUS Hacienda Hotel in Old Town San Diego

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Mention CAIIA by March 7, 2016 when calling for Reservations for conference rate of $149. (ϕ)

CAIIA Mid-Term Business Meeting

Thursday April 7th & Friday April 8th, 2016

CAIIA REGISTRATION FORM

Your Name _____ Spouse/Guest _____

Company _____

Address _____

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E-Mail _____

EVENT	COST	#TICKETS	TOTAL PRICE
MEMBER CONVENTION Package (*) (Includes Reception, Continental Breakfast, CE Class/Lunch/Meeting)	$ 150.00	#_____	$_____
Non-Member *Convention Package* (Includes Reception, Continental Breakfast, CE Class/Lunch)	$ 175.00	#_____	$_____
Spouse/Guest fee *Name*_____ *(Includes all but business meeting)*	$ 100.00	#_____	$_____
3 Hour CE Class Only (Includes Continental Breakfast, Presentation, Lunch)	$ 100.00	#_____	$_____
		Grand Total payable	$_____

SCHEDULED EVENTS

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event.
Complete a separate form for each registrant and additional guest.

		You	Spouse/Guest
4/07 –	6:30 P.M. Reception	[ ]	[ ]
4/08 -	8:00 A.M. Registration/Breakfast	[ ]	[ ]
4/08 –	9:00 A.M. Seminar	[ ]	[ ]
4/08 –	12:00 P.M. Lunch	[ ]	[ ]
4/08 –	1:30 P.M. Business Meeting (*)	[ ]	

Please make your checks payable to CAIIA or pay by credit card. Mail Registration Form & payment to:

Paul Camacho, ARM, RPA
c/o Mission Adjusters
PO Box 18444
South Lake Tahoe, CA 96151

Check one→	AMEX VISA M/C	3/4 Digit Security # (CV)	
Cardholder Name:		Signature:	
Card No:		Expiration Date:	
Card Address: (City/State/Zip)			

(*) Members only. *(ϕ)=Plus Tax, $7.00 Facility fee and $16 overnight parking…includes in-room high speed internet/wi-fi, refrigerator, microwave, etc..*

CAIIA 2016 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual education series including:

1) Certifications for the CA Fair Claim Settlement Practices (**FCSPR**) and Seminar on Special Investigation Unit Regulations (**SIU**) (CDI# 279573 for 2 CE hours). Recertification required every year.

2) Seminar for the Evaluation of Earthquake Damage (**SEED**). (CDI# 279570 for 8 CE hours). Recertification for EQ required every 3 years.

   a) Included in the **SEED** program is the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, §2695.40 through 2695.45 and Insurance Code 10089.3. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage as required for all adjusters who evaluate earthquake claims.

   b) Includes the **FCSPR** and SIU certifications at the **SEED** locations.

Register now for the seminar you wish to attend. Be sure and mark the appropriate location in the box to the right.

ATTENDEE NAME

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Co._____

Address_____

City _____ Zip _____

Phone_____

E-mail Address:_____

Fees (circle one): FCSPR/SIU SEED

CAIIA Member fee	$40.00	$100.00
Ins. Co. Employee fee	$50.00	$120.00
Non-Member I/A fee	$60.00	$199.00*

(SEED course includes fee for FCSPR/SIU Reg's)

Amount Enclosed - $_____

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Make checks payable to CAIIA, mail registration and payment to:

Richard Kern
CAIIA Education Provider Director
c/o SGD
3530 Camino Del Rio North, Suite 204
San Diego, CA 92108

~Questions? Call Richard Kern @ (619) 280-7702
or via email at : rkern@sgdinc.com

Schedule for SEED locations:

Registration	7:30 a.m.	to	8:00 a.m.
FCSPR & SIU Seminar	8:00 a.m.	to	10:00 a.m.
SEED Seminar	10:00 a.m.	to	5:00 p.m.

Schedule for Reg's Only locations:

Registration	8:30 a.m.	to	9:00 a.m.
FCSPR & SIU Seminar	9:00 a.m.	to	11:00 a.m.

(Anyone wishing to come to the SEED locations for only the Reg's recertification program should note the earlier start time)

FCSPR, SIU & SEED SEMINAR (check one)

_____**May 17, 2016**
Brea: Embassy Suites
900 E. Birch St.
Brea, CA 92821 *map link*

FCSPR/SIU ONLY SEMINARS:

_____**May 17, 2016**
Brea: Embassy Suites
900 E. Birch St.
Brea, CA 92821 *map link*

_____**June 7, 2016**
Chatsworth: SGD, Inc.
(Los Angeles) 9171 Gazette Ave.
Chatsworth, CA 91311 *map link*

_____**June 9, 2016**
Fresno: Law Offices of McCormick Barstow
7647 N. Fresno Street *map link*
Fresno, CA 93720

_____**June 16, 2016**
San Diego: S&J Builders
10815 Wheatlands Ave *map link*
Santee, CA 92071

_____**June 29, 2016**
Emeryville: HSNO Conference Center
1330 Broadway
Suite 400 (4th Floor)
Oakland, CA *map link*

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**CAIIA agrees to offset any membership dues for Non-CAIIA Independent Adjusting Firms joining the CAIIA within 30 days, up to $80.00 total for each adjuster attending with a cap of $160.00 per firm.*

ON THE LIGHTER SIDE...

My goal for 2015 was to lose just 10 pounds. Only 15 to go.

Ate salad for dinner! Mostly croutons & tomatoes. Really just one big, round crouton covered with tomato sauce. And cheese. FINE, it was a pizza. I ate a pizza. It was really good pizza.

I don't mean to brag but.....I finished my 14-day diet in 3 hours and 20 minutes.

A recent study has found that women who carry a little extra weight live longer than men who mention it.

Kids today don't know how easy they have it. When I was young, I had to walk 9 feet through shag carpet to change the TV channel.

Senility has been a smooth transition for me.

I may not be that funny or athletic or good looking or smart or talented....I forgot where I was going with this.

I love being over 50. I learn something new every day.....and forget 5 others.

A thief broke into my house last night.....He started searching for money so I woke up and searched with him.

My dentist told me I need a crown. I was like: I KNOW !, Right?

I think I'll just put an "Out of Order" sticker on my forehead and call it a day.

April Fool's Day trivia

The custom of setting aside a day for the playing of harmless pranks upon one's neighbor is recognized everywhere.

April fish

In Italy, France, Belgium, and French-speaking areas of Switzerland and Canada, 1 April tradition is often known as "April fish" (*poissons d'avril* in French or *pesce d'aprile* in Italian). This includes attempting to attach a paper fish to the victim's back without being noticed. Such fish feature prominently on many late 19th- to early 20th-century French April Fools' Day post-cards.

Ireland

In Ireland it was traditional to entrust the victim with an "important letter" to be given to a named person. That person would then ask the victim to take it to someone else, and so on. The letter when finally opened contained the words "send the fool further".

England

During the 18th and 19th centuries a popular prank in London involved inviting unsuspecting victims to come view the annual ceremony of washing the lions at the Tower of London. Early versions of the prank promised the curious that the lions were going to be washed in the moat. Later versions told the gullible to seek entrance to the Tower at the "White Gate" (there being no such gate). Whatever the details were, the hopeful sightseers would make the journey to the Tower in vain, because there was no annual lion-washing ceremony.


TOWER OF LONDON

Please to Admit the Bearer and Friend,

TO VIEW THE

ANNUAL CEREMONY

OF WASHING THE LIONS,

On WEDNESDAY, APRIL 1st, 1807.

N.B. It is requested that no Gratuity will be given to the Attendants.

*** Visitors admitted only at the White Gate.

No. Percy B. Greville.