CAIIA Status Report

NOVEMBER 2006

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Damages - Proper Measure of Loss of Use

Metz v. Soares, Court of Appeal, Third District - September 13, 2006

Generally, the measure of damages for loss of use of personal property is the reasonable rental value of the property for the period in which a plaintiff was wrongfully deprived of its use. This case addresses whether this rule applies in situations where the owner was not using the property prior to the loss.

Plaintiff John Metz collected classic cars, including a 1971 Jaguar XKE. In 1998, Metz brought the Jaguar in for repairs to Defendant Louie Soares, dba Olympic Tune Up. The vehicle stayed in Soares' possession for four years. During that time, the car was exposed to the elements, ruining the engine and rendering the car a total loss. Metz accepted a settlement check from Soares' insurer for approximately $25,000. This check was to compensate Metz for destruction of the Jaguar.

Thereafter, Metz believed this amount to be inadequate. Metz sued Soares alleging damages for loss of use. Specifically, he claimed loss of use at a reasonable value of $300 per day. The case proceeded to trial. A jury found Metz had no loss of use damages. Metz appealed. The Third District Court of Appeal affirmed.

On appeal, Metz contended that the trial court erred in instructing the jury: "To recover damages for loss of use, plaintiff must prove the number of days of lost use until the time plaintiff was paid the replacement value." Metz argued he was entitled to the reasonable daily rental value of the car, regardless of whether he had used it or not. The Court of Appeal disagreed.

The evidence at trial had been that Metz had owned the car since 1977. In 1993, he acknowledged that he took the car "out of service," and only drove it occasionally. At the time that Metz brought it to Soares' shop in 1998, it did not run. While the car was in the shop, it was registered with the D.M.V. as "non-operational." The Third District ruled that if Metz had not been using the car for a long period of time, then he could not establish that Soares' conduct proximately caused loss of use. The Court held that Metz could not recover because he had a right to use the car. Rather, Metz needed to establish that he needed the car, and was prevented from using it by the defendant. Here, Metz did not prove he sustained an actual loss of use. Therefore, the Court of Appeal ruled that the trial court correctly instructed the jury, and the judgment was consistent with the evidence.

COMMENT

This case establishes that a Plaintiff cannot collect damages for loss of use when the property had not been used for some time. It is, therefore, important to discover how much the property was used prior to loss.

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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■ PRESIDENT'S MESSAGE

The 2006 CAIIA convention held at the Sheraton Grand Sacramento has just concluded and once again it was a great time for catching up with our business friends and meeting new ones. As the newly installed President (I giggle to myself whenever I say that), I see many challenges ahead this coming year not the least of which will be finding enough interesting material to fill an entire page in The Status Report. Thank goodness for large font.

Confuscious once said that a superior man is modest in speech but exceeds in action. Therefore, I hope my actions this coming year will speak for themselves.

Since the CAIIA became completely volunteer some years ago, we all know of the challenges faced trying to keep it running while at the same time attending to our own businesses. I think tremendous things can be said about a group of individuals when we all stepped forward and took on the responsibility to keep the CAIIA healthy and prosperous. Earlier today I sent an email to our new Board requesting volunteers for the various committees. I am proud to report before I even had a chance to finish this article, everyone responded almost immediately and the positions are now filled.

We extend our thanks to all of you who were able to take the time from your busy schedules to be at the convention. We especially thank the vendors who helped sponsor this year's event. Without their sponsorship we would not be able to keep the cost to attend the conventions to a minimum. We would like to acknowledge those vendors, Able Restoration, American Technologies, Assured Relocation, Belfor USA Group, Inc. and Servicemaster.

Like those who I am following, I am honored to have been nominated and voted into the office to serve as the President for the 2006-2007 term. I thank you for all of your faith and support as I take over the reigns from Steve Wakefield, of Ronald Bolt & Associates. I look forward to serving with our executive Board members, Peter Schifrin of Schifrin, Gagnon & Dickey, Inc., Pete Vaughan of Vaughan & Associates, and Sam Hooper of Sam Hooper & Associates. I also look forward to working with our Board Directors, Maribeth Danko of Seacliff Claims, Thad Eaton of Eaton & Johnson, Frank Zeigon of M & Z Claims Service, Phil Barrett of Barrett Claims Service, Robert Fox of Robert Fox Adjusters and Jeff Stone of Stone & Associates.

SHARON GLENN
President - CAIIA 2006-2007

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

Case of the Month: *A Water Pipe Failure*

We were asked to investigate the cause of a stand pipe connection failure in the fire protection and sprinkler system of a major high rise building, located in Los Angeles. The failure occurred at the penthouse level when a section of horizontal 6 inch diameter pipe pulled out of a "Gruvlok" coupling. As you would imagine, an open 6 inch pipe puts out a lot of water. Damage was extensive-was it caused by a faulty installation, a manufacturing defect, or some other cause?

The sections of the pipe on both sides of the failed coupling and the "Gruvlok" coupling were examined. Corrosion was not an issue. The dimensions and location of the rolled grooves which retained the coupling in place were within the manufacturer's specifications. The groove diameter was 0.013 to 0.043 inches smaller than required (making the groove depth greater), and the groove width was .005 to 0.015 inches wider than required. These discrepancies did not affect the integrity of the joint. The plastic, rubber-like gasket that was installed inside the "Gruvlok" coupling did not show any "pinching" or other distortion that would indicate that it had been installed incorrectly.

The pipe line had been spray painted after the installation. The marks of the hanger that were not painted were used in identifying the correct orientation of the pipes and couplings.

The presence of paint in the bottom of the grooves was not an indication of faulty installation. The coupling was in two halves that were bolted together around the plastic, rubber-like gasket and then tightened. There was an intentional gap between the metal coupling and the bottom of the groove on each end of the pipe. This gap was to allow for movement and misalignment of the two sections of the pipe being joined by the coupler.

If a coupling is incorrectly assembled, the mistake is usually discovered the first time the system is filled and pressurized.

When the fire protection piping system was installed, it was inspected and hydrostatically tested for a minimum of two hours at 335 psi. This test was passed without leaks and a certificate of occupancy was issued . The system did not leak for over five years.

The term "water hammer" is used to define destructive forces, pounding noises and vibration which develop in a piping system when a column of noncompressible liquid flowing through a pipe line at a given pressure and velocity is stopped abruptly. Tremendous forces generated at the point of impact or stoppage can be compared, in effect, to that of an explosion. To quote Wikipedia, "Moving water in a pipe has kinetic energy proportional to the mass of the water in a given volume times the square of the velocity of the water."

If a pipe is suddenly closed, the water is still moving and builds up a high pressure shock wave. Quoting Wikipedia again, "In domestic plumbing this is experienced as a loud bang resembling a hammering noise. Water hammer can cause pipelines to break or even explode if the pressure is high enough…In the home water hammer often occurs when a dishwasher, washing machine, or toilet shuts off water flow, resulting in a loud bang or banging sound."

When water hammer occurs, a high intensity pressure wave travels back through the piping system until it reaches a point of relief, such as a large diameter riser or piping main. The shock wave will then surge back and forth between the point of relief and the point of impact until the destructive energy is dissipated in the piping system.

In commercial applications the common cause of water hammer is the quick closing of electrical, pneumatic, spring-loaded valves, as well as quick hand closure of valves. The speed of the valve closure time, especially during the last 15% of the valve closure, is directly related to the intensity of the surge pressure. The resultant water hammer shock wave travels back and forth in the piping system at a rate of 4,000 to 4,500 feet per second.

Although noise is generally associated with the occurrence of water hammer, water hammer can occur without audible sound or noise. Quick closure always creates some degree of shock, with or without noise. Therefore, the absence of noise does not indicate that water hammer or shock is nonexistent in a water distribution system.

To return to the story, three days before the coupling failure, the fire protection and sprinkler systems were recertified by a new vendor. This required testing of the fire pump and the flow of water through the various pressure-reducing valves. If you are in a hurry, it is difficult to slowly close valves.

Our conclusion was that during the testing of the fire protection system, overly aggressive valve closures created a water hammer condition that stressed the standpipe to an early failure. The failure was not caused by an incorrect installation or defective materials.

CAIIA *Calendar*

CAIIA Keynote Speaker Luncheon
Friday, November 10th
1500 S. Raymond Avenue
Fullerton, CA (off the 91 Fwy)
Contact Frank Zeigon at (714) 777-4462

Duty to Defend - Insured's Settlement

Mark Noya v. A.W. Coulter Trucking, Inc., Court of Appeal, Second District - October 5, 2006

An insured whose insurance carrier has refused to provide a defense is normally free to conclude a settlement with the plaintiff. This case concerns whether an insurer who refused to defend an additional insured has a right to intervene in litigation to contest a settlement.

This case arose out of a collision that occurred October 31, 2001 when a big rig truck owned by A.W. Coulter Trucking, Inc. collided with oncoming traffic in a construction zone. The collision killed two young mothers and the driver of a truck, and injured two other persons. Mark Noya filed a wrongful death and personal injury action against A.W. Coulter Trucking, Inc. as well as Modern Continental Construction Company, which had been hired by CalTrans to perform work in the area of the accident, and CalTrans. Modern was insured by Zurich American Insurance Company. CalTrans tendered its defense to Zurich as an additional insured under the Modern policy. Zurich refused the tender.

The plaintiffs settled with Coulter and reached separate settlements with Modern and CalTrans. The agreement between the plaintiffs and CalTrans provided for a stipulated judgment against CalTrans totaling $29 million with a $1,250,000 partial satisfaction of the judgment, and a covenant not to execute on the remainder. CalTrans then gave to plaintiffs the right to any money for its claim for breach of contract and bad faith against Zurich. At that point, Zurich filed an ex parte application to intervene in the case. Zurich further advised CalTrans that it would assume the defense of CalTrans under a reservation of rights. The trial court denied the motion to intervene as untimely because it was made after the matter had been settled. The stipulated judgment against CalTrans was thereafter entered. Zurich appealed from the order denying its motion to intervene.

The Court of Appeal affirmed. It noted that Zurich had a right to intervene because it had a direct and immediate interest in the lawsuit. Further, Zurich ultimately may have been required to pay the judgment against CalTrans. However, here, Zurich consistently denied coverage and refused to provide CalTrans with any defense. Under the circumstances, CalTrans was entitled to make a reasonable, non-collusive settlement without Zurich's consent, and to seek reimbursement of the settlement amount, plus any damages for breach of contract and breach of the covenant of good faith and fair dealing from Zurich.

Here, Zurich took no steps to participate in the litigation on behalf of CalTrans until several years had passed and the settlement agreement had been reached between CalTrans and the plaintiffs. Allowing intervention at this late point could delay or impede the resolution reached by those parties and interject coverage issues in the litigation. The Court therefore felt the trial court was within its discretion in denying intervention. The Court concluded that Zurich's late request for intervention was prejudicial because it would jeopardize the settlement reached by the parties after years of litigation. The Court characterized Zurich's agreement to defend CalTrans under a reservation of rights as "too little, too late" to justify intervention.

The settlement agreement between CalTrans and the plaintiffs did not contain an assignment, but did give the plaintiffs the right to prosecute CalTrans' action against Zurich. This gave them the financial interest in any claims that CalTrans had against Zurich. Finally, the Court noted that Zurich could contest the amount of the settlement in any subsequent action for bad faith. While the settlement was presumptively reasonable, the Court noted that Zurich could present evidence to rebut that presumption. The judgment was therefore affirmed denying intervention.

COMMENT

Obviously, Zurich will have a very difficult time overcoming the presumption of reasonableness as to the settlement. Thus, this makes their refusal to defend CalTrans a decision that will be primarily evaluated on whether their coverage position was correct.

Torts - No Vicarious Liability For Personal Errand of Employee

Baptist v. Robinson, Court of Appeal, Sixth District - September 21, 2006

The doctrine of "respondeat superior" imposes vicarious liability on an employer for the torts of an employee acting within course and scope of employment. The doctrine applies whether or not the employer is negligent or has control of the employee. This case is an interesting test of what constitutes "course and scope."

Defendant Robinson was employed as an assistant winemaker for co-defendant Thomas Fogarty Winery (Winery). Robinson's supervisor, Michael Martella, was the head winemaker at the Winery. Martella and the owner of the winery had an oral agreement, which allowed Martella to make his own label of wine using the facilities at the Winery. Martella, in turn, permitted Robinson to begin making small amounts of his own wine. Robinson did so for two to three years.

In 2003, the Winery owner instructed Martella to tell Robinson to

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Prepared by Low, Ball & Lynch, Attorneys at Law

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discontinue his personal wine-making and to remove any personal barrels. Martella decided to wait to tell Robinson until after the Fall 2003 harvest. In October 2003, Robinson learned of some Syrah grapes for sale at a winery in a nearby town. He arranged to purchase some of the grapes for his own use. Robinson then borrowed a T-bin from the Winery, and placed it in the back of his pick-up truck. The next morning at 5 am, before he was on duty at the Winery, Robinson took off in his truck to pick up the grapes. During the trip, the T-bin fell out on a freeway. Plaintiff Ronald Baptist was injured when his motorcycle collided with the T-bin.

Baptist and his wife filed a complaint for personal injuries and loss of consortium against Robinson, the Winery, and the manufacturer of the T-bin. As against the Winery, Plaintiffs alleged that the Winery was Robinson's employer and that Robinson was operating the vehicle in the course of his employment at the time of the accident. The Winery filed a motion for summary judgment. The trial court granted the Winery's motion. Plaintiff appealed. The Sixth District Court of Appeal affirmed.

In their appeal, Plaintiffs contended that the Winery was vicariously liable for Robinson's actions. Specifically, Plaintiffs alleged there were triable issues as to whether the Winery (through Martella) had authorized the conduct that caused the accident; whether the conduct was a reasonable outgrowth of Robinson's job duties; and whether the Winery ratified Robinson's conduct. In the alternative, Plaintiffs argued that the Winery was directly negligent for failing to instruct employees on how to use T-bins.

The Sixth District acknowledged that the respondeat superior doctrine is to be interpreted broadly. However, if an employee's tort is personal in nature, mere presence at the place of employment before or after the incident will not give rise to a cause of action against the employer. There must be a causal nexus between the duties of the employment and the conduct causing injury. Further, an employee is not deemed to be in the course and scope of employment when he is going to or coming from the workplace.

Here, the Court of Appeal found significant that the truck Robinson was driving at the time of the accident was his own. Further, he was on the way to purchase grapes for his own use. The accident occurred during early morning hours, before Robinson's start time at the Winery. No one at the winery was aware Robinson had taken a T-bin. Interestingly, Robinson did not tell anyone about the accident at the winery, because he did not believe it concerned the Winery. While Martella knew Robinson was making his own wine, no one at the Winery, including Martella, authorized or permitted Robinson to take the Winery's T-bins to pick up and haul grapes for his own use. Therefore, the Court of Appeal found no causal nexus between Robinson's job duties and the conduct causing injury. The Court also rejected the direct negligence theory, because there was no evidence that T-bins had ever been used for transport of grapes off the premises. The Court of Appeal, therefore, affirmed judgment in favor of the Winery.

COMMENT

This case provides a thorough analysis of the factors to be considered in determining whether an employee is in the course and scope of his or her duties for purposes of applying the respondeat superior doctrine.

Methamphetamine Contaminated Property Act: New California Law

Submitted by American Technologies, Inc.

On January 1, 2006 a new California law was enacted to help protect the public from exposure to toxic chemical residues from methamphetamine laboratory (Meth lab) operations. This new law is called the Methamphetamine Contaminated property Act of 2005. The law was written in response to numerous complaints from renters and property buyers who were unaware of the past existence of a Meth lab or felt that cleanup of drug lab residues was inadequate. Many toxic chemicals are used to produce methamphetamine including acids, caustics, solvents, mercury, phosphorus, lead and other chemicals, depending on the production recipe. Prior to the new law, property owners were left with the cleanup responsibility after law enforcement busted the Meth lab. In many cases, property owners simply painted over residues on walls and other surfaces without proper decontamination.

Under the new law, the Department of Environmental Health (DEH) is notified by law enforcement of the location of the Meth lab. A property lien is then filed by the authorities until the cleanup is performed under a plan written by a Certified Industrial Hygienist and approved by the DEH. According to the law, any company performing the cleanup must possess a hazardous materials endorsement on its contractor's license. In addition, all company personnel working on the cleanup must be trained in handling hazardous materials.

Note: Meth labs are typically discovered in homes, apartments, and hotel/motels.

Insurance Commissioner John Garamendi Announces Arrests of Four Suspected of Staging More than 100 Auto Collisions in Bay Area; Auto Collision Ring Dubbed "Operation Phantom Menace"

Alameda County suspects nabbed on multiple counts of insurance fraud, conspiracy and grand theft

SAN FRANCISCO – Insurance Commissioner John Garamendi today announced the early morning arrests of four suspects in a staged auto collision ring that allegedly caused more than 100 collisions in the Bay Area resulting in more than $2 million in losses to insurers.

Investigators with the California Department of Insurance's (CDI) Fraud Division and the AB 1050 Bay Area Auto Fraud Task Force (BAAFTF), made the arrests of the four suspects who they believe comprised the collision ring dubbed "Operation Phantom Menace."

"The scheme allegedly used by these suspects is the poster child for insurance fraud," said Commissioner Garamendi. "The claims were faked and the chiropractic bills and property damages were faked, but the financial losses are very real for the consumers who picked up the tab."

This morning the BAAFTF – a task force comprised of CDI Fraud investigators, the California Highway Patrol (CHP), and the Alameda County District Attorney's office – served multiple location search warrants which included: three law offices, three chiropractic clinics and three residences. The suspects were arrested for multiple counts of insurance fraud, conspiracy and grand theft.

Arrested was Norberto "Chito" Diaz Mora (aka Chito Mora), 52, of Daly City, on 140 felony counts involving insurance fraud. Mora was the alleged ringleader or "capper" of this ring. Also arrested were three chiropractors: David Wu, 37, of San Francisco; Reza Aliakbar, 39, of San Jose; and Marcello Mehmandoust, 39, of Alameda. Each was charged with multiple felonies related to insurance fraud.

All four suspects were booked into the Alameda County Jail, with bail ranging from $100,000 to $250,000. If convicted, each suspect could be fined up to $50,000 and/or receive five years in prison or double the value of the fraud, whichever is greater.

The arrests are a result of a two-year undercover investigation by BAAFTF. It focused on this alleged organized crime group which staged false auto accidents and reported accidents that in fact never occurred. The suspects allegedly recruited people with policies covering bodily injury damages and instructed them to crash their vehicles in staged or paper-scripted collisions. (A paper- scripted collision is one in which there is no actual damage done to a vehicle. A false police report and/or insurance claim is filed indicating there was a collision when in fact there was not.)

The "capper" then recruited additional people to falsely claim that they were injured passengers in the vehicles at the time of the fictitious accidents. The alleged parties to the fictitious accidents would then make false insurance claims with insurance companies stating they were passengers in one of the involved vehicles and required chiropractic treatment for their alleged injuries.

The chiropractors allegedly involved in the conspiracy knowingly provided bills to the victims' insurance companies for services never rendered. In some cases the chiropractors met with undercover investigators between one and five times, and then submitted fictitious bills for more than 20 treatments which were never performed.

The BAAFTF began the investigation in August 2004. Two undercover investigators from the BAAFTF were introduced into the alleged ring and were able to identify several suspects. Law offices, chiropractors and an auto body repair shop were found to be involved with Mora, the suspect capper who was primarily responsible for orchestrating these fraudulent insurance claims.

The five staged collisions during the Phantom Menace Operation resulted in losses of approximately $75,000, which consisted of chiropractic bills, legal representation fees and claims for property damage.

BAAFTF's investigators estimate that the crime ring orchestrated more than 100 auto collisions throughout the Bay Area, with an estimated loss to insurance companies of $2.3 million.

The BAAFTF was assisted by the Special Investigations Units and claims offices of the following insurance companies: 21st Century Insurance, USAA Insurance, Liberty Mutual Insurance and Progressive Insurance. The National Insurance Crime Bureau also provided assistance and support in this investigation, which is still ongoing. The case is being prosecuted by the Alameda County District Attorney office's AB1050 team, Deputy District Attorney Kathleen Famulener, and Investigator Michael Oppido.

News of Members

SGD (Schifrin Gagnon and Dickey) announced a new location after 19 years at the same location. Their new Los Angeles Area Home Office is 9255 Corbin Avenue, Suite 200, Northridge, CA 91324-2401. Their phone numbers will remain the same as 818 909-9090 and the fax as 818 909-7365.

California Association of Independent Insurance Adjusters

CAIIA Keynote Speaker Luncheon

November 10, 2006

Four Points Sheraton
1500 S. Raymond Avenue ❖ Fullerton, CA 92831 (off the 91 Fwy.)
(714) 635-9000

Keynote Speaker Luncheon: 11:30 a.m. - 1:30 p.m.

Meet & Greet / Registration: 11:30 - 12 Noon

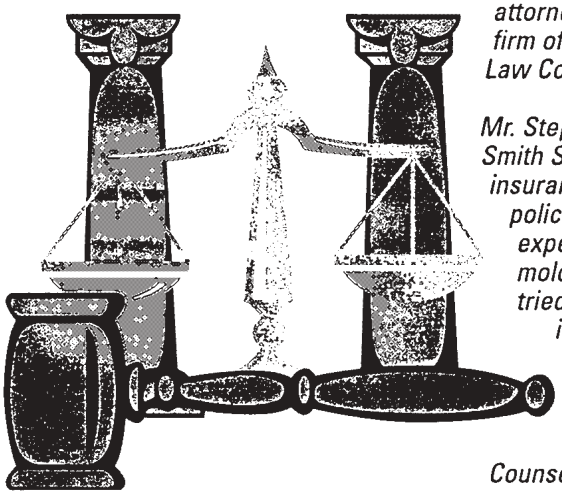
Lunch / Presentation: 12 Noon - 1:30 p.m.

Cost: $25.00 Members $30.00 Non-members

Topic: "How to Avoid Bad Faith When Handling a Potentially Fraudulent Claim"

Keynote Speakers: Herbert Dodell and Stephen E. Smith

Mr. Herbert Dodell practices in commercial business, property insurance matters, bad faith, errors and omissions among other specialties. He has represented Insured's in regards to appraisal proceedings under the insurance policy. Mr. Dodell is a member of the New York and California State Bar and has served as a deputy district attorney (LA) and Judge Pro Tempore. He was a Sr. Partner in the law firm of Dodell, Senkfor & Brown and is presently principal in the Dodell Law Corporation.



Mr. Stephen E. Smith is a property insurance lawyer. He is a partner of Smith Smith & Feeley LLP, an Irvine firm that specializes in handling insurance coverage disputes and litigation arising out of personal lines policies and commercial lines policies. Mr. Smith has extensive experience in claims and litigation involving fire, theft, water damage, mold, earth movement, earthquake and employee dishonesty. He has tried cases involving a wide variety of coverage and "bad faith" issues, and has represented insurers in numerous arbitrations and appraisal proceedings. Mr. Smith is a member of the California State Bar, American Bar Association (Tort, Trial and Insurance Practice Section), Orange County Bar Association (Insurance Law Section), Association of Southern California Defense Counsel and California Conference of Arson Investigators.

Register by November 1, 2006 by contacting Frank Zeigon at 714.777.4462, e-mail mandz@pacbell.net or fax 714.777.4507.

Name: _____ Company: _____

Telephone: _____ E-mail address: _____

Make checks payable to California Association of Insurance Adjusters (CAIIA) and mail to:
M & Z Claims Service, 18032-C Lemon Drive, PMB 164, Yorba Linda, CA 92886

Checks must be received by Nov. 1st. There are no refunds for cancellations or no-shows. Registrants may send a replacement to the luncheon.

Maxine and Her 5 New Boyfriends

I have become a little older since I saw you last, and a few changes have come into my life since then. Frankly, I have become a frivolous old gal.

I am seeing five gentlemen every day. As soon as I wake up. Will Powers helps me get out of bed.

Then I go to see John.

Then Charlie Horse comes along, and when he is here he takes a lot of my time and attention.

When he leaves, Art Ritis shows up and stays the rest of the day. He doesn't like to stay in one place very long, so he takes me from joint to joint.

After such a busy day, I'm really tired and glad to go to bed with Ben Gay. What a life! Oh yes, I'm also flirting with Al Zymer.

P.S.

The preacher came to call the other day. He said at my age I should be thinking of the hereafter. I told him, "Oh, I do it all the time. No matter where I am in the parlour, upstairs, in the kitchen, or down in the basement, I ask myself, "Now, what am I here after?"

A friend shared these clever insults from yesteryear:

"He has all the virtues I dislike and none of the vices I admire." – Winston Churchill

"A modest little person, with much to be modest about." – Winston Churchill

"I have never killed a man, but I have read many obituaries with great pleasure." – Clarence Darrow

"He has never been known to use a word that might send a reader to the dictionary." – William Faulkner (about Ernest Hemingway)

"Poor Faulkner. Does he really think big emotions come from big words?" – Ernest Hemingway (about William Faulkner)

"Thank you for sending me a copy of your book; I'll waste no time reading it." – Moses Hadas

"He can compress the most words into the smallest ides of any man I know." – Abraham Lincoln

"I've had a perfectly wonderful evening. But this wasn't it." – Groucho Marx

"I didn't attend the funeral, but I sent a nice letter saying I approved of it." – Mark Twain

"He has no enemies, but is intensely disliked by his friends." – Oscar Wilde