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The top 10 cases for trial attorneys in personal-injury cases

TEN IMPORTANT CASES THAT ARE REPEATEDLY ENCOUNTERED AND CAN BE BOTH A SWORD AND SHIELD

One of the most important tools in every trial attorney's arsenal is the knowledge and understanding of the key cases that can be used as both sword and shield. Here we highlight our selection of the top ten cases with which every successful plaintiff's trial attorney should be familiar.

The task of selecting the "top 10" cases at any given time is difficult and subjective, and this list is certainly not intended to be exhaustive. We carefully considered the issues we have repeatedly encountered in our practices over the last few years, and have found these cases to be the most helpful.

1. General and subcontractor liability

Privette v. Superior Court (1993) 5 Cal.4th 689 and its progeny, *Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638; *SeaBright Ins. v. US Airways* (2011) 52 Cal.4th 590 and *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198.

Franklin Privette was a schoolteacher who also owned a rental duplex that was in need of a new roof. He hired a reputable roofing company to reroof his duplex, and left all the work and decisions to that company. Twenty-seven years later, we are still dealing with the ramifications of the doctrine that bears his name and its progeny.

The *Privette* doctrine typically arises when there is a property owner who hires a general contractor who thereafter hires subcontractors to perform different parts of the job, and someone is injured while on the job. The entities who will ultimately remain as defendants in the case depend on the facts and circumstances.

In *Privette*, the plaintiff, Jesus Contreras, worked for the roofing company, and was injured when he fell off a ladder while attempting to carry buckets of hot tar up to the roof.

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Although he tried to sue Privette, the California Supreme Court held that the homeowner was not liable for Contreras's injuries. Over the years, this doctrine has been extended to apply to general contractors as well. There are, however, important exceptions to this doctrine:

- **Negligent exercise of retained control.** *Privette* does *not* bar claims where the *negligence of the hirer* is independent to that of the hired party, such that the general contractor *retains control and affirmatively contributed to the harm* suffered by the hired party's employee. (*Hooker v. Dep't of Transportation* (2002) 27 Cal.4th 198, 203; CACI 1009B.) "[I]f a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, *it is only fair to impose liability on the hirer*." (*Hooker v. Dep't of Transportation*, *supra*, 27 Cal.4th at 213, italics added.) Always look for independent negligence on the part of the general contractor and/or other subcontractors. Who retained ultimate control and supervision of the work site? Who was in charge of inspections? Who was responsible to ensure that the worksite complied with OSHA and other regulations? Were there sufficient equipment and tools available? Was there overlap between duties?
- **Non-delegable duty.** Some duties simply cannot be delegated to a subcontractor. These include a *publicly regulated activity carried on under public franchise*. "Where an activity involving possible danger to the public is carried on under public franchise or authority, the one engaging in the activity may not delegate to an independent contractor the duties or liabilities imposed on him by the public authority . . . ." (*Snyder v. Southern California Edison Co.* (1955) 44 Cal.2d 793, 798.)

This applies to public utilities, motor carriers, truck operators, and any other entities that operate under a public franchise or authority. In such circumstances, a hirer is liable for the torts of its independent contractor when conducting an activity "which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others." (*Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 652.) The *Vargas* court recognized: "Public licenses generally require compliance with statutory or regulatory prerequisites, most often for the purpose of ensuring public safety. [Citations.] *If the duties imposed on a public licensee could be delegated to a third party without any governmental oversight, a public licensing scheme would be meaningless because a licensee could avoid the responsibilities imposed by the license simply by engaging an independent contractor*." (*Id.* at 652-53, italics added.)

2. The admissibility of out-of-court hearsay statements

People v. Sanchez (2016) 63 Cal.4th 665.

This case signals a dramatic shift in the admissibility of out-of-court hearsay statements through expert testimony. Traditionally, experts had much more leeway under the hearsay rule. In *Sanchez*, however, the Supreme Court made clear that experts cannot testify as to "case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at 686.) Case-specific facts "are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at 686.) A case-specific fact could be anything from a 15-foot skid mark measured on the roadway to hemorrhaging in the eyes that was noted during an autopsy.

An entire law-school class could be spent analyzing *Sanchez*. For purposes of a personal-injury case, the main takeaway is that great diligence is required in preparing for trial. It is important for counsel to independently establish the facts on which their theory of the case depends. Early in discovery, examine all case documents and identify any potential hearsay statements that an expert may potentially rely upon. Although some of these documents are likely admissible as a business record, many statements in the report may be inadmissible. To avoid any potential *Sanchez* objections, consider taking the depositions of witnesses identified in documents with personal knowledge of case-specific facts, including police officers, eye witnesses, doctors, nurses, first responders, etc. Before trial, figure out which witnesses need to testify in order to present the necessary case-specific evidence to the jury. An expert may then testify about those case-specific facts since they were supplied by someone with personal knowledge.

3. Course and scope of employment

Moradi v. Marsh USA (2013) 219 Cal.App.4th 886.

This case is obviously near and dear to our hearts because we handled the case after it was resurrected on appeal. Judy Bamberger, who was employed as a salesperson by an insurance broker, used her personal vehicle for business travel, often traveling to prospective clients, making presentations, going to seminars, following leads, and transporting company materials. Her company reimbursed her for business mileage. On the day of the incident, she used her vehicle to transport herself and some co-workers to a company-sponsored program at a middle school, and then returned to the office at the end of the day. On her way home, she decided to stop for some frozen yogurt and then planned to attend a yoga class. En route to the yogurt shop, she turned left immediately in front of the plaintiff's motorcycle. Both she and her employer were sued for the plaintiff's extensive injuries and losses.

Her employer filed a motion for summary judgment, claiming that under the "going and coming" rule, Judy was not acting within the scope of her employment when she turned left to get yogurt. Under the "going and coming" rule, employers are exempt from liability for tortious acts committed by their employees while they are on their way to and from work because "employees are said to be outside of the course and scope of employment during their daily

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commute." (*Id.*, 219 Cal.App.4th at p. 894.) The trial court granted the motion, and the plaintiff appealed. The court of appeal held that under the "required vehicle" exception to the "going and coming" rule, the employee was acting within the scope of her employment at the time of the incident, and the doctrine of respondeat superior applied.

The critical inquiry by the court was whether the employee's use of her vehicle gave *some incidental benefit* to the employer. The "required vehicle" exception "can apply if the use of a personally owned vehicle is either an express or implied condition of employment . . . or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.'" (*Id.* at 895, citations omitted.) Judy's use of her vehicle gave the company some incidental benefit, and at the time of the incident, the vehicle was full of work supplies for the next day. The fact that she was stopping for personal errands such as yogurt and a yoga class was not unforeseeable, and was in fact necessary for her comfort, convenience, health, and welfare.

As in most of these cases, employees with limited insurance policies do not want to be the sole defendant, and often will provide helpful information to ensure that their employers remain as defendants. In *Marsh*, Judy provided a helpful declaration in opposition to her employer's motion for summary judgment attesting to the facts that the court of appeal relied on in reaching its decision. It is important, therefore, to reach out to the employee's attorney early and often, and obtain the necessary discovery responses and deposition testimony to establish the "required vehicle" exception to the going and coming rule. Remember: *uncover facts to establish that the employee's use of his or her own vehicle gave some incidental benefit to the employer.*

4. Assessing the value of medical care

Howell v. Hamilton Meats & Provisions, Inc. (2011) 52 Cal.4th 541 and its progeny, *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308; *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311; and *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266.

Knowing the intricacies of *Howell* and its progeny is crucial to prevent under-compensation for your client and a potential windfall for the defendants. Under *Howell*, a plaintiff with health insurance, may not recover economic damages that exceed the amount paid by the insurer for the medical services provided. Stated simply, the full billed amount is not itself relevant as to past medical services. This has also come to include future medical services and noneconomic damages. (See *Corenbaum*, 215 Cal.App.4th 1308.)

When the plaintiff is uninsured, however, assess the economic damages by looking for the "reasonable value" of the services rendered or expected to be rendered. (*Bermudez*, 237 Cal.App.4th at p. 1330.) In *Pebley*, the court addressed how to assess economic damages when an insured plaintiff opts for treatment with medical providers outside of his plan. The court held that such a plaintiff shall be considered uninsured for purposes of determining economic damages. In both of those situations, medical bills are relevant and admissible to prove the amount incurred and the reasonable value of the services provided.

It is important to know these cases because they provide the bedrock for calculating damages, they are often cited in motions in limine (e.g., to exclude evidence of available insurance or evidence whether treatment was rendered on a lien basis), and they can be relied upon to ensure that the proper language is used in jury instructions. It is also important to have an expert who can provide adequate testimony as to the reasonable value of medical care. Generally, the treating physician can prove this evidence.

5. Motions in limine

Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659.

Before your next trial, you may find yourself in what is becoming an all-too-familiar nightmare scenario: Twenty-eight motions in limine filed by defense counsel, including several attempting to preclude you from introducing certain evidence or experts at trial. What do you do? You remember this important case.

The plaintiffs worked in a building with a large and small elevator, and were injured when the elevator in which they were riding misleveled so that it stopped some distance above the level of the floor upon which they exited. At their depositions, they gave testimony that indicated that neither woman recalled which elevator they were on. One of the plaintiffs testified that she thought she was on the small elevator, but later stated that she was not sure which elevator she was on.

By filing a mountain of motions in limine, defense counsel successfully convinced the trial court to limit the plaintiffs' claims to the small elevator, preclude them from introducing any testimony or evidence relating to the larger elevator, and exclude the plaintiffs' elevator expert from testifying at trial. Not surprisingly, with plaintiffs' liability case gutted, the trial court granted a non-suit and a judgment of non-suit was thereafter entered.

In reversing the trial court, the court of appeal gave us an important primer on motions in limine, noting that over the years, such motions have become more prevalent and misused. The court found that many of the defendant's motions in limine were improper and/or inadequately presented, and noted the following:

- Motions in limine that seek to: a) "exclude any testimony of the plaintiff which is speculative," or b) any evidence "unless an appropriate foundation is established," or c) "to limit the opinions of [the] plaintiffs' experts to those rendered at depositions and in written

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reports" or d) to preclude the "plaintiffs from calling any witnesses 'not previously identified in [the] plaintiffs' discovery responses'" were all meaningless, improper motions that required the trial court to rule in advance in a vacuum – without the benefit of evidence presented at trial and at a time when the trial court cannot possibly intelligently rule on admissibility. Always remember: When the motions in limine are being heard, the trial has not yet begun; remind the trial judge to wait for the trial and refrain from making premature rulings before the evidence unfolds at trial.

- Testimony provided in depositions and information given in interrogatories do not give rise to issue preclusion; only responses to requests for admission do. It is therefore improper for a defendant to seek to preclude, through a motion in limine, testimony of a plaintiff at trial that is different from that offered in depositions or provided in interrogatory responses. New or different testimony at trial can be subject to impeachment, or further discovery, but cannot be precluded. "It is a misuse of a motion in limine to attempt to compel a witness or a party to conform his or her trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery." (*Id.*, 49 Cal.App.4th at p. 672.)
- It is improper for a defendant to turn a motion in limine into an Evidence Code section 402 hearing to preclude an expert from testifying without sufficient notice to the plaintiff's counsel and testimony at a hearing from such expert. "This outcome demonstrates another danger inherent in motions in limine if they are not carefully scrutinized and controlled by the trial judge." (*Id.* at 813.)
- "Matters of day-to-day trial logistics and common professional courtesy should not be the subject of motions in limine." (*Id.* at 810.) Instead, save the paper and make such requests orally to the trial judge.
- The granting of a motion in limine that denies a party the right to testify or to offer evidence is reversible per se.

Interestingly, the court suggested that instead of the parties filing over 20 motions in limine before every trial, a more appropriate use of both the trial court's and the trial counsel's time would be if the trial counsel *orally* presented issues that could be raised in motions in limine at a pretrial conference, and then presented a stipulation on those issues that were *not* contested. So before your next trial, resist the urge to file meaningless, improper motions in limine. Instead, try to work out stipulations in advance with opposing counsel, orally present concerns or upcoming issues to the trial court, and file only those few worthy motions that are appropriate and necessary.

6. Jury and attorney misconduct during trial

Smith v. Covell (1980) 100 Cal.App.3d 947.

Covell addresses multiple situations involving juror and attorney misconduct and succinctly speaks to a number of trial issues, which are valuable to every trial attorney. *Covell* involved a rear-end motor vehicle collision. At trial, the defense argued that the plaintiff's lower back injuries were not caused by the collision. A jury returned a verdict in favor of the plaintiff for $10,000 and a verdict of zero for the plaintiff's husband on a loss of consortium claim.

After the verdict, it was discovered that throughout the trial and during deliberations, a number of jurors made improper statements. One juror related a previous injury he had to the one suffered by the plaintiff, another juror voiced a general opposition to personal injury lawsuits, and several other jurors discussed their disapproval for loss of consortium claims. The court held that each of these acts, "whether viewed separately or collectively, . . . deprived [the] plaintiffs of a fair, impartial jury trial and warrant reversal." (*Id.* at 955.)

The court also discussed three specific acts of improper conduct by defense counsel. *First*, the court held that it was improper for counsel to insinuate facts that are not supported by the evidence. (*Id.* at 958.) *Second*, without making any showing of relevance, defense counsel was not permitted to make suggestions regarding the plaintiffs' wealth. (*Id.* at 960.) *Lastly*, defense counsel was "not to comment on [the] defendant's failure to call a witness where the parties had an equal opportunity to call the witness." (*Id.* at 957.)

7. Establishing a standard of care

Dillenbeck v. City of Los Angeles (1968) 69 Cal.2d 472. While responding to a police radio broadcast ordering units to proceed to the site of a suspected bank robbery, Officer Weber crashed into the decedent's car when he went through an intersection. The trial court excluded from evidence certain safety bulletins called "Daily Training Bulletins," of the Los Angeles Police Department. On appeal, the California Supreme Court reversed, and held that such safety bulletins were admissible based on three theories:

- The safety bulletins constituted evidence of the *standard of care* applicable to the course of conduct of Officer Weber as he was responding to an emergency. Even guidelines, which could be considered less than a directive or merely discretionary, could constitute *employee safety rules* that an employee should follow.
- Such bulletins should also be admissible to *cross-examine the employee* (Officer Weber) as to his knowledge and familiarity with the employer's employee safety rules. If the employee knows about the rules and does not follow them, the jury is entitled to assess such conduct compared to that of a reasonably prudent man possessing such knowledge. If, on the other hand, the employee denies knowledge of such bulletins or rules, such ignorance could also be construed by the jury as negligence.
- The bulletins could also contain evidence of plaintiff's (decedent's) lack of contributory negligence. In *Dillenbeck*, the

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safety bulletins informed police officers that certain drivers would be unable to hear sirens or see lights at intersections.

It is essential, therefore, to obtain in discovery all safety bulletins, training materials, and any daily notices prepared and disseminated by employers to train and inform their employees. Although such employers will always subsequently try to claim that such materials were merely "guidelines," not rules, and always subject to the discretion of the employee, these materials are nonetheless admissible.

8. Depositions before trial

Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal.App.4th 1006.

This is an important case to have a copy of whenever you are at a deposition, and defense counsel inevitably starts objecting to questions on the basis of "relevance" or because of his/her belief that the question is "not reasonably calculated to lead to the discovery of admissible evidence," and then instructs the witness to not answer the question. Such were the antics of defense counsel in *Stewart*, and the plaintiff's counsel brought a motion to compel on an ex parte basis, which was granted by the trial court.

At the hearing, the trial judge's remarks to defense counsel before issuing sanctions should serve as a cautionary tale to all trial attorneys at depositions. He said: "So you're the Mr. Wolfe that sat in the deposition and instructed the witness not to answer questions because you didn't think they were relevant. Well that's not your role. You are ordered not to instruct the witness not to answer a question during any deposition in this case unless the matter is privileged. The proper procedure is to adjourn the deposition and move for protective order. You don't assume the role of judge and instruct the witness not to answer a question in a deposition. That is a huge no-no." (*Id.*, 87 Cal.App.4th at p. 1011.)

The Court of Appeal upheld the trial court's ruling, and in so doing, made the following important points:

- At a deposition, any party may obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter. Such relevance does not mean relevant for admission at trial; rather, it means relevant for *discovery purposes*. For discovery purposes, the information is relevant if "it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or *facilitating* settlement." (*Id.* at 1013, original italics.) These rules are applied liberally and broadly in favor of discovery because "(contrary to popular belief), fishing expeditions *are* permissible in some cases." (*Ibid.*, original italics.)
- At a deposition, counsel should *never* even object to relevance, as such objections should and must be held in abeyance until trial.
- Instead of instructing a witness not to answer, an attorney should suspend the deposition to enable him/her to move for a protective order on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party. Obviously, anyone bringing such a motion has a difficult hill to climb in order to prevail because of the liberal and broad rules allowing discovery.
- A good-faith effort to meet and confer regarding such a simple dispute need not be lengthy or overly detailed, particularly when time is short because of an upcoming trial date or the unavailability of opposing counsel.

9. Expert witness designation

Kennemur v. State of California (1982) 133 Cal.App.3d 907.

Sandbagging may be tempting, but it has consequences. *Kennemur* seeks to prevent sandbagging at the time of trial and to force all parties to show their cards early on. In this case, the court held that the plaintiff's expert was excluded from testifying on certain issues that the expert failed to provide in either the plaintiff's expert witness designation or when asked in his deposition.

Each witness list shall include, among other things, "*the general substance of the testimony which the witness is expected to give*." (*Id.*, 133 Cal.App.3d at p. 917, original italics.) The general substance of the testimony may be given in the witness exchange or at the expert's deposition – if the expert is asked about the substance of the facts and the opinions which the expert will testify to at trial.

It is important to note, however, that an expert witness may be permitted to testify on certain issues if opposing counsel is informed after the deposition of an opinion not previously disclosed. (*Easterby v. Clark* (2009) 171 Cal.App.4th 772.) The key is that both sides are entitled to reasonable notice of the specific areas of investigation by the expert, the opinions he has reached, and the reasons supporting his opinions.

To avoid *Kennemur* issues, attorneys should be careful in drafting the narrative statement in the expert designation. During the expert's deposition, it is important to fully question an expert witness regarding all of his or her opinions and the foundation for those opinions. Finally, make sure to end the deposition by asking the crucial *Kennemur* questions: Have we covered all opinions that you plan to render at the time of trial? Do you intend to do any further work before trial? Remind the expert and opposing counsel that if additional work is performed or additional opinions are reached before trial, that you request to receive notification of such facts and reserve the right to take an additional deposition prior to any trial testimony.

10. Joint and several liability

Espinoza v. Machonga (1992) 9 Cal.App.4th 268.

At first glance, this case may seem a bit daunting since a full page of this opinion is taken up with a myriad of math, numbers, and equations. But, hear us out on *Espinoza*. The plaintiff brought an action against two individuals and the county housing authority after a glass door shattered and struck the plaintiff's eye. Before arbitration, the housing authority reached a good faith settlement

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with the plaintiff for $5,000. Then, at the arbitration, it was determined that the plaintiff was 10 percent at fault and the housing authority and one of the individual defendants were 45 percent at fault. The arbitrator also awarded $6,242.94 in economic damages and $15,000 in noneconomic damages.

Since the housing authority defendant made a good-faith settlement, the question for the court was: How much does the remaining individual defendant owe? The court held that, under Civil Code section 1431.2, there is joint and several liability for economic damages, but not for noneconomic damages. The remaining defendant, therefore, received a small reduction on the economic damages owed and, ultimately, the plaintiff did not receive the full $15,000 in noneconomic damages.

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