ADMISSIBILITY OF EXPERIMENTAL EVIDENCE

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INTRODUCTION

The issues and strategies involved in personal injury litigation have generated extensive discussion of legal literature. One area of extreme importance to litigators which has not received great attention is the appropriate standards for admitting into evidence the results of experiments. (But see: Colchett, *Experimental Evidence in Products Liability*, 44 State Bar Journal, 866 (1969).) The role of such evidence is extremely important in that experiments can aid the court and the jury in a better understanding of the technical testimony introduced by the parties.

The Court of Appeal in *Culpepper v. Volkswagen of America* (1973) 33 Cal.App.3d 510, 109 C.R. 110 described the standards for admitting experiments into evidence as follows at page 521:

> Admissibility of experimental evidence depends upon proof of the following foundational items: (1) the experiment must be relevant (Ev. C. §210, 351); (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence (Citations), and (3) the evidence of experiment will not consume undue time, confuse the issues or mislead the jury (Citations).

Since conditions (1) and (3) apply to all evidentiary questions, most judicial discussion has centered on a determination of when experiment conditions are substantially similar to the conditions of the accident. This article will discuss the current state of the law regarding the admissibility of experiments into evidence through an examination of cases discussing the aforementioned criteria

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RELEVANCY AND THE APPLICATION OF THE SUBSTANTIALLY SIMILAR CONDITIONS STANDARD

As stated previously, the *Culpepper* decision listed three separate elements to determine whether experiments are properly admitted into evidence. In reviewing the application of this test, however, it becomes apparent that the elements of the *Culpepper* test are not really separate and distinct. Rather, the determination of whether the experiment was conducted under substantially similar conditions to that of the accident is really a preliminary question which must be answered prior to determining whether the evidence is relevant. This view is also shared by Judge Jefferson. *See* Jefferson, California Evidence Benchbook, 2d Ed. §21.5 (1978). Thus, the issues of substantial similarity of conditions and relevancy are properly considered together.

Under California Evidence Code section 350, only relevant evidence is admissible. Except as provided by statute, all relevant evidence is admissible. (Evid. Code, §351.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, §210.)

Given the vague nature of the relevancy standard, most determinations of whether evidence of experiment is admissible are based on a determination of whether the test conditions were substantially similar to the accident conditions. In *Beresford v. Pacific Gas and Electric Co.* (1955) 45 Cal.2d 738, 290 P.2d 498 the California Supreme Court reviewed the standard for determining when an experiment is substantially similar to accident conditions. It stated as follows at page 748:

> The conditions surrounding a test or experiment of this nature *need not be identical* with those existing at the time of the occurrence in question provided there is substantial similarity. (Citation omitted.) The admission of such evidence is largely a matter of discretion with the trial court, and such a test is merely a circumstance to be considered in connection with other evidence in the case. (Citation omitted.) [Emphasis added.]

Yet the determination of what evidence bears "substantial similarity" is often difficult on an abstract level. It is therefore necessary to examine some of the leading cases on the issue of substantial similarity and experiments to determine how the standard is applied. (Other leading cases on the issue which are not discussed are: *People v. Carter* (1957) 48 Cal.2d 737, 312 P.2d 665;

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Long v. *Cal-Western State Life Insurance Co.* (1955) 43 Cal.2d 871, 279 P.2d 43; *People* v. *Terry* (1974) 38 Cal.App. 3d 432, 113 C.R. 233; *Schauf* v. *So. Cal. Edison Co.* (1966) 243 Cal.App.2d 450, 52 C.R. 518; *Zollars* v. *Barber* (1956) 140 Cal. App.2d 502, 295 P.2d 561; *Chambers* v. *Silver* (1951) 103 Cal.App.2d 633.)

DECISIONS LIBERALLY ADMITTING EXPERIENTAL EVIDENCE

One of the leading California cases dealing with the introduction into evidence of the results of an experiment is *Beresford* v. *P.G.&E., supra*. This was an action against PG&E for damages for destruction of plaintiff's property by fire when a tree fell across defendant's power line bringing the power line into contact with telephone lines leading into plaintiff's lodge resulting in the fire. Plaintiff claimed that the falling of the tree in high winds could have been foreseen and the danger could have been forestalled or alleviated by insulating the top line wires and by reducing the voltage thereon. This argument was based on a series of experiments conducted by two electrical engineers in which they tested whether power escaping from telephone lines and into a telephone switchboard could break down the protective equipment and cause a fire. Defendant claimed error in the trial court's decision to allow the experts to testify about their experiments. The *Beresford* Court ruled that the evidence was admissible. In doing so stated at page 748:

> [I]t must appear that the conditions or circumstances were in general the same in the illustration case and the case in hand . . the determination whether the conditions were sufficiently similar to make the experiments of any value in aiding the jury is a matter resting on the sound discretion of the judge.

The *Beresford* Court went on to quote from *People* v. *Levine* (1890) 85 Cal 43, 22 p. 962 as follows:

> The proof of the result of experiments was equally as open to the defendant as the prosecution; and if other experiments would have shown a different result from that shown by the experiment proved by the prosecution, the defendant had ample opportunity to show the fact . . . The results [of the experiment in this case] was not conclusive, but a mere circumstance to be considered in connection with the other evidence in the case. It was both competent and admissible; its weight was for the jury to determine.

Thus, in ruling in favor of the plaintiff, the California Supreme Court took a permissive approach towards the admissibility of experiments into evidence.

Culpepper v. *Volkswagen of America, Inc., supra*, is a fairly recent decision in which the plaintiff was allowed to introduce in evidence testimony and films of experiments conducted by experts. In *Culpepper*, the plaintiff claimed that her car was defectively designed so that when she turned her car sharply it rolled over. Plaintiff's experts testified to conducting various vehicle tests and showed a film of one of the tests. The expert concluded that any car that would roll over on a flat, smooth road is defectively designed.

The Court of Appeal affirmed the verdict for the plaintiff and rejected defendant's contention of error in the admission of evidence of driverless vehicle tests. Defendant claimed plaintiff failed to demonstrate the similarity of conditions and circumstances to those involved in the accident. Before admitting the film in evidence, an extensive *in camera* hearing was held in which the expert was examined and cross-examined by three defense attorneys. Defense counsel were allowed to review the film and argue the matter.

The expert testified that the purpose of the tests was to have a fixed steer put into the vehicle rather than relying on the human driver and to find out at what point the V.W. would roll over. The film demonstrates the speed and turning maneuver at which a Corvair and a '66 V.W. would roll over. The test consisted of putting a mechanical device in the car so as to cause it to make a sharp turn. The V.W. was towed by a truck and let go at 35 m.p.h., 45 m.p.h. and 42 m.p.h. At 42 m.p.h. the V.W. rolled over.

The *Culpepper* Court relied on the case of *Miller's National Insurance Co.* v. *Wichita Flour Mills Co.* (Kan.1958) 257 F 2d 93. The *Culpepper* Court noted that evidence of tests and experiments has been allowed in Federal Courts in order to illustrate the principles involved in determining whether a defect exists and to help the jury understand the experts' testimony, *without* the California requirement that the test be conducted under substantially similar conditions. The *Culpepper* Court then held, "evidence of experimental tests should likewise be admissible in California Courts in products liability cases as an aid to the fact finder, provided the Trial Judge finds the statutory criteria exists." (At p. 522 citing *Beresford, supra.*)

In conclusion, the *Culpepper* Court noted that the trial court allowed V.W. to introduce at least four films depicting tests conducted by V.W. and that these tests were not offered for the purpose of showing the exact circumstances and conditions which existed in this accident case but *for demonstrative purposes*. Notwithstanding the fact that there were differences in the test films the trial judge, according to the *Culpepper* Court, correctly believed the films would be of assistance to the jury in deciding the liability issue.

In *Hasson* v. *Ford Motor Co.* (1977) 19 Cal.3d 530, 138 C.R. 705, 564 P.2d 857, the Supreme Court allowed into evidence the results of experimental tests, citing the criteria set forth in *Culpepper*. In *Hasson*, the underlying theory of the complaint was that the accident was caused by a brake failure resulting from a heat-induced vaporization of the brake fluid. The accident occurred prior to *Li* v. *Yellow Cab Co.*, (1975) 13 Cal.3d 804, §119 C.R. 858, 532 P.2d 1226 and defendant contended that the driver was guilty of contributory negligence and that the brake failure was due to driver abuse. Both plaintiff and defendant introduced into evidence testimony of experts who based their conclusions upon, among other things, the results of braking tests administered to a vehicle similar to the one driven by the plaintiff.

The accident facts in *Hasson* were as follows: the vehicle was four years old at the time of the accident. No brake difficulties had been experienced prior to the accident. Before the plaintiff began driving the car it had not been driven for several hours, but at the time of the accident it had been driven for about one-half hour in moderately busy suburban traffic. While in traffic it had made several stops and had slowed down several times on downgrades. There

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was testimony that the vehicle speed during this period had not exceeded forty miles per hour and was usually slower The air temperature was in the eighties The testimony was that the driver attempted to slow the vehicle as it proceeded down Mount Olympus but without advance warning the pressing of the brake pedal to the floor did not reduce the car s speed The driver tried to use the emergency brake and to shift into reverse to slow it down but these measures were ineffective and the car crashed into a fountain Forty-five minutes after the accident, investigating officers found application of force to the brake pedal resulted in firm and normal pressure No skid marks were found

The testimony of the experts for both plaintiff and defendant focused on the nature of the vehicle's brake fluid An examination of the brake fluid which was removed from the vehicle revealed that it readily absorbed contaminates, such as water vapor This contamination of the fluid caused the progressive reduction of the temperature at which it boiled and vaporized The test also disclosed that the fluid was dark in color, further indicating the presence of impurities, and that the liquid s boiling point had fallen to approximately 300 degrees These tests were unchallenged by the defendants

Defendant contended that no brake failure had occurred, or that if one had occurred, it was due to the plaintiff s contributory negligence Further, the defendant maintained that the results of their tests indicated that the brakes could not have failure unless subjected to severe abuse Ford retained a test driver who performed braking tests on a vehicle similar to plaintiff s under various conditions, including those of the accident Attempts were made to duplicate the model of the plaintiff's vehicle, and for one of the tests, to simulate, insofar as possible, the degree of system wear, load, outside temperature, speed, route and driving and traffic pattern experienced by the plaintiff s vehicle both before and during the accident

As noted above, the plaintiff s experts emphasized the degree of contamination of the brake fluid as a factor in causing the accident There is no mention in the case with respect to the makeup of the brake fluid used in the experimental tests as to contamination The plaintiff s tests showed that vaporization would occur in the contaminated brake fluid at 248 degrees Fahrenheit In the tests conducted by Ford s experts fluid temperatures in excess of 300 degrees Fahrenheit were achieved The chemical makeup of this fluid, as stated, was not mentioned in the case

In holding that the evidence of these tests were properly admitted the *Hasson* Court stated at page 550

> Though it was obviously impossible to duplicate every facet of the Hasson accident, we think these tests in the aggregate were sufficiently designed and their administration sufficiently controlled to contribute materially to a search for the accident's cause We, therefore, conclude that this experiment evidence was admissible under *Culpepper*
>
> Moreover, though the tests results are concededly subject to more than one reasonable interpretation, they do *permit* the inference that only excessively hard use of the brakes would give rise to the temperatures required to vaporize the Hasson vehicle's brake fluid Despite plaintiff s contrary testimony, the jury was entitled (although by no means obligated) to conclude that, had the car been driven with ordinary care over the accident route under the conditions described, the brakes would not have overheated to the point of failure Thus, these test results constitute substantial, albeit circumstantial, evidence of James negligence

It is therefore, apparent from the *Hasson* case that the Supreme Court of California has taken a very liberal stance with regard to the admissibility of the results of experimental tests This view is consistent with the statement in Cotchett, *Experimental Evidence in Products Liability, supra,* which in discussing the admissibility into evidence of experimental tests states at page 873 "It is the practice of a growing number of courts in attempting to produce thoughtful, judicious decisions, to admit into evidence any rational proof that may possibly eliminate the issues in litigation "

In another recent decision, *Endicott v Nissan Motor Corp* , (1977) 73 Cal.App 3d 917, 141 C R 95 a crash test film was admitted into evidence over the plaintiff s objections This was a product liability case arising out of a rupture of an allegedly defective seatbelt in the plaintiff s car that broke when the plaintiff's car struck an embankment and the car overturned The plaintiff contended that the rupture of the seatbelt had enhanced his injuries The crash test film, supplied by the defendant, showed Datsuns similar to the plaintiff's equipped with the same seatbelts and driven headon into a concrete barrier with dummies approximately the same weight as plaintiff In the film, the belts did not rupture but, nonetheless, the upper torsos were thrown about so violently so as to strongly suggest the possibility of severe upper torso injuries As a result of his accident, the plaintiff suffered a subluxation of the lower back The plaintiff's medical expert viewed the film and then expressed the opinion that such severe flexion could produce the back injury but it was not likely

Plaintiff's counsel objected to the film as being highly prejudicial because of the repeated, violent exhibitions of probable injury even when the belts held, plaintiff's counsel also claimed that the simulated accident conditions were dissimilar to those of the actual accident He pointed out that in the accident the plaintiff s vehicle was traveling 50 to 60 miles per hour and struck a dirt embankment followed by rollover of the vehicle. The similar series of crash tests consisted of a headon crash into a concrete barrier Because such a concrete barrier has less give than a dirt embankment it was necessary to adjust the speed of the test vehicles to something less than the plaintiff s actual speed in order to simulate the actual crash This was done by crashing vehicles into the barrier at various speeds until front end damage was produced similar to that which actually occurred in the plaintiff's vehicle This condition resulted at tests of speeds close to 30 miles per hour The test vehicles were not rolled over The defendant's expert testified that the initial forces affecting the vehicle and its occupants in a headon collision with an embankment would be the same as those in the crash sequence depicted

The trial court allowed the film in evidence Plaintiff claimed that the film did not duplicate the accident conditions because the seatbelt and

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the L bracket interacted to bring about the rupture during the rollover maneuver. Defendant's expert, however, testified the belt could not tear on the upper edge of the L bracket regardless of the vehicle's position.

The decision in *Endicott* is, therefore, another example where, in the exercise of discretion, the court allowed a test film into evidence even though there was a dissimilarity of the conditions existing at the time of the actual event. In affirming the admissibility of the test film, the Court of Appeal stated at pages 930-931.

> Here, although the circumstances of the test were not precisely identical with those of the actual occurrence, a close approximation of the headon impact and the maximum force brought to bear on the seatbelt was reached. The test is highly relevant and tending to show that the seatbelt, if not abused, did not rupture under the force of the impact that actually occurred.

In *Yecny* v. *Eclipse Fuel Eng. Co.* (1962) 210 Cal.App 2d 192, 26 C.R. 402 following testimony with regard to the conditions under which an experiment was made, the plaintiff objected to evidence of the experiment on the ground that the conditions under which the experiment was made were not similar to the conditions at the time of the explosion involved in the accident. The experiment involved the burning of a product called "Dow Therm E." The trial court admitted the test results and instructed the jury as follows at page 203:

> In doing so I am not determining whether the conditions were similar or not. Those are matters which you must determine for yourself. I am simply passing preliminarily if there is a sufficient [sic] to permit the evidence regarding this experiment. It is for you ultimately to determine whether the conditions were the same or sufficiently similar to that, if the experiment has any evidentiary value.

The plaintiff enumerated nine specifications wherein the experiment differed from the conditions which existed at the time of the accident. These specifications were as follows: (1) the experimental model was slightly different having more tubes, but identical dimensions; (2) the experimental boiler was manufactured six years after the one involved in the accident; (3) the experimental model was located on level ground and not in a pit as in the accident; (4) the experimental model was new and had never been used; (5) the way the Dow Therm entered the fire box was different in the experiment than in the actual case; (6) in the experiment the Dow Therm was not ignited until the pressure was at 95 pounds, contrary to the evidence in the case; (7) the amount of vapor used experimentally could not duplicate vapor actually present in the case since that amount was unknown; (8) the experimental model was not connected to a smoke stack as in the accident; and (9) manual, not automatic, controls were used in the experiment.

Despite these differences, the *Court of Appeal in Yecny* held that evidence was properly admitted and stated at page 205.

> [T]he conditions of the experiment were sufficiently similar to the conditions in which they were being compared for the judge to admit the evidence and to leave it to the jury to determine, whether, as he said, "the conditions were the same or sufficiently similar . . " for the experiment to have any evidentiary value. Plaintiff seems to think the language of the judge indicated that he was abdicating his judicial power to determine the admissibility of the evidence. On the contrary, he was determining that in his judgment the conditions were sufficiently similar to admit the evidence of the experiment but the ultimate determination of the evidentiary value was for the jury.

Thus, the *Yecny* ruling as well as the other decisions discussed above indicate that the substantially similar standard is an extremely flexible one. They further indicate, that in practice as well as in theory, the requirement of substantially similar experiment conditions cannot be equated with conditions identical to that of the accident.

A LIMITING INSTRUCTION FOR ILLUSTRATIVE PURPOSES

Miller's National Insurance Co., supra, 257 F 2d 93 was an action by the owner of a grain elevator against various insurance companies. Plaintiff claimed that the breakout was caused by a dust explosion. Defendant claimed that there was no explosion and the cause of the breakout was a structural failure. The defendants objected to the introduction into evidence of pictures and testimony relating to the experiments upon the grounds that such experiments were misleading and were not performed under conditions substantially similar to those known to have existed at the time of the occurrence. The pictures displayed several experiments illustrative of the principles recognized and applied by the witness in reaching his opinion. There was no claim that the conditions and situations involved in the experiments were identical or substantially similar to those existing in the plaintiff's elevator at the time of the breakout. On cross-examination plaintiff's witness stated that they were not trying to build a model of the elevator, but were merely demonstrating principles.

The trial Court instructed the jury before each group of films was shown that "they were admitted only for the purpose of illustrating certain principles which the plaintiff contends are applicable in this situation." (At p. 96.) These instructions were repeated in the Court's final instructions to the jury. The Court of Appeals stated at page 96:

> It is clear that the experiments were presented to show principles and not to show that actually occurred. Defense counsel do not contend that an expert may not state the principles upon which he bases an opinion. Indeed, in a case such as this, expert testimony would be of little value unless such principles were both stated and tested by cross-examination. The demonstrative evidence which was used was merely a means to "enable or assist the witness to make an understandable communication of admissible matter with reasonable accuracy and expedition."

It further held that there was nothing to show any abuse of discretion by the trial court.

In view of the decision in *Miller's National Insurance Co., supra*, and the recognition of this case by the California Court of Appeal in *Culpepper* v. *Volkswagen, supra*, it can be argued that films of experiments may

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be introduced in evidence even if the conditions were not substantially similar providing that the jury is so instructed as to the limited purpose for which the films and testimony based upon the films is introduced. (See also 76 A.L.R.2d 402.)

LIMITATIONS ON THE TRIAL COURT'S DISCRETION

Notwithstanding the liberal approach in the aforementoned case, it is also important to examine cases in which the Court of Appeal has overruled the trial courts decisions to allow into evidence test results. These decisions illustrate, among other things, that the trial court's discretion is not without some limitation. In *Bettencourt* v. *Direct Transportation Co. Inc.* (1966) 210 Cal App.2d 405, 26 C.R. 623, the Court of Appeal ruled that tests designed to recreate the traffic accident at issue were improperly admitted. The plaintiff in *Bettencourt* sued the defendants after his son was killed when the son's vehicle was hit by a truck owned and operated by the defendant. The defendant's expert designed a series of experiments to recreate the accident and to prove that the defendant was not negligent. The Court of Appeal, in rejecting the use of the experiment, noted that there was not sufficient similarity between the conditions of the experiment and those of the accident as respects the visibility of the drivers.

Subsequent to the *Bettencourt* decision, the Court of Appeal in *Andrews* v *Barker Bros Corp.* (1968) 267 Cal.App.2d 530, 73 C.R. 284 again took issue with the admissibility of an accident recreation experiment. The plaintiff in *Andrews* had sustained injuries when he sat in a chair displayed in defendants' retail furniture store, and the chair collapsed under him. According to the plaintiff, he sat in the chair in a normal manner. The defendant's expert conducted a series of experiments on chairs of the same style. As a result of his tests, he concluded the plaintiff must have been sitting in the chair in an improper manner to cause it to collapse and thus the plaintiff was contributorily negligent.

In reviewing the trial courts decision to allow the experiments into evidence, the Court of Appeals discussed the evidentiary principles concerning experiments as follows at page 537.

> It is a settled rule that evidence of the results of experiments as to a disputed fact is not admissible unless the conditions for the experiment are *substantially identical* to those out of which the dispute arises. [Emphasis added.]

The Court of Appeal in *Andrews* went on to conclude the experiment was inadmissible, since the expert had based his experiment on the assumption that the plaintiff was negligent and that the chair was sound. Thus, *Andrews*, a pre-*Culpepper* decision, used a more stringent application of the *Culpepper* test than has been used in other decisions.

Finally, in *Solis* v. *Southern California Rapid Transit District*, (1980) 105 Cal.App 2d 382, 165 C.R. 285, the Court of Appeal again overruled a trial court's decision allowing in test results, citing the lack of substantial similarity between the conditions of the accident and the conditions of the experiment. In *Solis*, the plaintiff sued defendants after being struck by one of defendants' buses. In attempting to prove that the plaintiff was walking outside the cross-walk at the time of the accident, the defendant hired an accident reconstruction expert. The defense experiment consisted of putting the same bus that had been involved in the accident through a series of maneuvers designed to calculate the speed of the bus when the plaintiff was hit.

Despite the use of the same vehicle, the Court of Appeal held that the test evidence was inadmissible since the conditions surrounding the accident differed. In making its decision the *Solis* court relied on the following: (1) the difference in the weather conditions at the time of the experiment and the time of the accident; and (2) the defendant's failure to show that the bus was in substantially the same condition as on the date of the accident.

Thus, taken together, the aforementioned decisions indicate that the application of the substantially similar criteria is not totally predictable and that some Courts of Appeal are willing to question the trial court's broad discretion.

THE ROLE OF THE TRIAL JUDGE

As has been indicated previously in this article, the trial judge has broad discretion in determining whether to admit into evidence. The courts, as with other evidentiary questions, can exercise its discretion and exclude evidence of experiments or tests if the probative value of such evidence is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, §352.)

In reviewing the application of §352 and the admissibility of experiments into evidence, the appellate courts have generally deferred to the trial judge's discretion. The Court of Appeal in *Culpepper* took a very broad approach when it stated at page 522 citing *Glupt* v. *Miller* (1945) 26 Cal 2d 680, 685, 160 P.2d 832, 836:

> Under Section 352 of the Evidence Code, the trial judge has almost total discretion in admitting the results of demonstrations, experiments and tests, and his decision in this area will only be reversed when it is clearly abused

Few courts, it appears, would take issue with this statement. Those cases in which the trial judge was overruled involved experiments where there was serious and obvious deficiency in the expert's methodology. Lacking such an error, the trial judge's ruling on admissibility is unlikely to be overruled.

CONCLUSION

In conclusion, the tendency of the California Courts is to admit evidence of experiment as an aid to the Court and the jury in arriving at judicions. To be admissible, it must be shown that the evidence is relevant, the conditions of the experiments were substantially the same as in the accident; and the evidence will not consume undue time, confuse the issues or mislead the jury. These determinations rest on the sound discretion of the trial judge and unless there is a clear abuse the trial judge's decision will generally not be overruled.

In addition, there is authority for the admission of test results for the purpose of illustrating principles, even where the conditions during a test were not substantially similar to those existing at the time of the actual occurrence. In such a case, the jury should be instructed as to the

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you, the defendant under these circumstances had a higher duty of care than the plaintiff. Crossing the street the plaintiff need only conduct himself as the average, reasonable, prudent person, the "C" student. His head was not connected to his body by a swivel and he need not act as if it were. He had a lower standard care to begin with because his conduct could not really endanger others. The fact is that the evidence demonstrates that he looked in the many directions from where danger could occur before be began his movements, whereas the defendant only had to look in one direction and control his vehicle so as to avoid the very accident that occured.

BELITTLING PLAINTIFF'S INJURIES

Often the defense attempts to belittle the extent of the plaintiff's injuries by emphasizing that merely one part of the plaintiff's body was injured, or for that matter just a portion of that part. Plaintiff should emphasize throughout the case and in argument that the injury is more than just a sum of the parts, it is an injury to the entire human being. A successful technique for doing so is the following argument:

"If we assume for a moment that instead of damaging the lumbar portion of the plaintiff's back, the low-back area, the defendant's negligence damaged his watch. Let's suppose that the watch wasn't even entirely destroyed, but merely damaged in a way that it would lose 5% of its accuracy in indicating the time. Such a watch would lose 1.2 hours per day. If the watch was worth $200.00 would it be fair to say that after the injury the watch was worth $190.00 and was only damaged $10.00? A watch that loses 20% each hour and cannot be fixed to tell correct time is worthless. It has been damaged 100% in reality, hasn't it?

"The plaintiff's low back cannot be fixed. Just as a violinist needs his hands totally intact, and a philosopher his brain and thought process thoroughly intact, the plaintiff needed his back, not only to earn a living and support his family, but for reasons of self respect and self dignity." ■

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Editorial
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counsel to request opposition if it is deemed necessary. This is a desirable practice, since it is appropriate to deny relief summarily in many cases.

This summer, the Legislature enacted Code of Civil Procedure sections 1088.5 and 1089.5 as urgency measures, effective immediately. They provide that where the petitioner does not request that an alternative writ be issued (which would require a hearing), the petition need not be served before it is filed. The court can take no action on the request for relief, however, until proof of service is filed, and then only after the respondent has had 30 days to answer or otherwise respond.

On their faces, these new statutes seem to conflict with Rule 56(b). (But see Code Civ. Proc., §1089.) Counsel filing or opposing a petition should check with the clerk of the district involved to see which time framework is being enforced, and watch for possible changes in the Rules of Court. ■

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limited purpose for which the test results are admitted. The trial judge has greater liberality with respect to the admission of experimental evidence where such evidence is used to rebut the other party's experimental evidence or to impeach or corroborate a witness.

Thus, so long as experiments are conducted in a scientifically sound *manner and there is a good faith* attempt to recreate the conditions of the accident or event, the results are admissible. ■