

Bigbee v. Pacific Telephone and Telegraph: Cramming Politics into a Phone Booth

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INTRODUCTION: BEGINNING WITH REAGAN'S CRUSADE

In May 1986, President Ronald Reagan addressed the American Tort Reform Association (ATRA), which had been founded earlier that year by his White House Aide, former Republican Congressman James K. Coyne.¹ The ATRA is a nonprofit organization, a coalition of businesses, municipalities, associations, professional firms, and others with the primary goal of “civil justice reform.”²

The theme of Reagan’s speech to the packed hall in the American Chamber of Commerce was the urgent need for tort law reform. Reagan declared: “More recently, however, tort law began to go terribly wrong. Twisted and abused, tort law has become a pretext for outrageous legal outcomes -- outcomes that impede our economic life, not promote it.”³ The remainder of his speech was a recounting of outrageous legal outcomes. The first “loony outcome,” was his version of the California Supreme Court’s decision in *Bigbee v. Pacific Tel. & Tel. Co.*:⁴

¹ RONALD REAGAN, President’s Message to American Tort Reform Association, Address Before the American Tort Reform Association (May 30, 1986), in PUB.PAPERS, July 1986, 693-695; American Tort Reform Association, About ATRA, *available at* <http://atra.org/about/> (on file with author).

² The American Tort Reform Association (ATRA) was founded in January 1986. According to its website, ATRA’s agenda is to promote legal reform via legislative channels in the following areas/goals: health care liability reform; class action reform; promotion of jury service; abolition of the rule of joint and several liability; abolition of the collateral source rule; limits on punitive damages; limits on noneconomic damages; production liability reform; appeal bond reform; sound science in the courtroom; and stopping regulation through litigation. ATRA, Mission Statement (2004), *available at* <http://www.atra.org/about/>. (last visited on March 3, 2004).

³ RONALD REAGAN, President’s Message to American Tort Reform Association, Address Before the American Tort Reform Association (May 30, 1986), in PUB.PAPERS, July 1986, at 693-695.

⁴ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947 (Cal. 1983).

In California, a man was using a public telephone booth to place a call. An alleged drunk driver careened down the street, lost control of her car, and crashed into the phone booth. Now, it's no surprise that the injured man sued. But you might be startled to hear whom he sued: the telephone company and associated firms. That's right, according to Chief Justice Rose Bird of the California Supreme Court, a jury could find that the companies responsible for the design, location, installation, and maintenance of the telephone booth were liable. ... I suppose all this might be amusing if such absurd results only took place occasionally. Yet today they have become all but commonplace.⁵

By the time Reagan spoke of the *Bigbee* case, more than fourteen years had passed since the crash into the telephone booth and three years since the California Supreme Court issued its decision. Reagan's version of *Bigbee* was technically correct, but misleading, nonetheless.

For one, it is important to appreciate at the start that the injured man did not just walk away from the telephone booth. Charles Bigbee had suffered very serious injuries, including the loss of his right leg and physical disability in his left.⁶ And contrary to Reagan's implication, Bigbee sued all those he felt contributed to his accident, including the more "likely suspects," such as the alleged drunk driver, as well as Hollywood Turf Club at Hollywood Park, who he claimed had served alcohol to the driver that night. Furthermore, Bigbee never claimed that all phone booths were dangerous. Rather, he claimed that because this particular booth was very close to a six-lane thoroughfare and because its door was defective, he was unable to escape when he saw the car careening toward him. In addition, the California Supreme Court noted that the very same

⁵ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947 (Cal. 1983). Bigbee notes that Reagan and his assistant Attorney General, Richard Willard, also gave speeches before the Small Business Legislative Conference and the National Institute of Municipal Law Officers referring to the "outrageous" *Bigbee* case. *The Liability Insurance Crisis, 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs*, 99th Cong. 98 (July 23, 1986) (prepared statement of Charles Bigbee).

⁶ Medical Records, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (C.T., non-paginated).

telephone booth had already been struck by a car approximately twenty months before Bigbee's accident.

To Reagan's credit, he did not actually say that a jury had found the phone booth companies liable. Indeed the *Bigbee* decision simply reversed the lower courts' grant of summary judgment for the defendants. Nevertheless, Reagan did not clarify that the decision only paved the way for a jury trial, in which the decision might go either way. Perhaps his aim with the *Bigbee* anecdote was not to place the blame for "absurd results" on runaway juries or litigious plaintiffs, but to attack Chief Justice Rose Bird. After all, in setting out "loony outcomes" in other jurisdictions, Reagan did not refer to any other judges by name.⁷ Yet, he neglected to mention that the vote in *Bigbee* had been a clear majority of 6-1 of the California Supreme Court.⁸

In the 1980's, tort reformers frequently cited *Bigbee*, more commonly referred to as the "phone booth case" to explain their cause.⁹ The news media, too, seemed fascinated by the case, and often aired Reagan and other tort reformers' comments about the case.¹⁰ While the McDonald's "scalding coffee" case is a common anecdotal case today to illustrate perceived problems with runaway juries and greedy attorneys, *Bigbee* has been called its equivalent in 1980's.¹¹ But the case did not attain notoriety simply

⁷ RONALD REAGAN, President's Message to American Tort Reform Association, Address Before the American Tort Reform Association (May 30, 1986), in PUB. PAPERS, July 1986, 693-695.

⁸ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947 (Cal. 1983).

⁹ See, e.g., Robert G. Berger, The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions, AM. U. L. REV. 285, 321 (1988).; Gary T. Schwartz, Symposium, Modern American Tort Law: The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 GA. L. REV. 601 (1992) (noting that *Bigbee* was an anecdotal case by tort reformers during the 1980's).

¹⁰ See, e.g., Editorial, *Capping the Courts*, WALL ST. J., Dec. 3, 1985, at 9. Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OH. ST. L.J. 329 (1987).

¹¹ See, e.g., Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U.L. REV. 1207 (1996). (calling *Bigbee* a "landmark case"). See also Center for Justice and Democracy, *Mythbuster: The McDonald's Coffee Case and Other Fictions*, available at

because the facts of the case (as to be explained later) resonated with the average American. Rather, *Bigbee* achieved notoriety because Republican officials in the White House and Republican Party members in California appropriated *Bigbee* for their political and ideological aims.

THAT NIGHT IN THE TELEPHONE BOOTH

Late on the night of November 2, 1974, Charles Bigbee left his job at the L.A. City Hall, where the 33-year-old worked as a night-shift custodian from 4 p.m. to midnight.¹² He got into his car and drove to his neighborhood convenience store, Fortune Liquor, at 2208 Century Blvd..¹³ He was in very familiar surroundings. At the time, Bigbee lived at 3306 West 108th Street, about a mile away.¹⁴ He had lived no further than five miles from Fortune Liquor in the prior ten years.¹⁵ At Fortune, he bought a newspaper and a loaf of bread. Approximately twenty minutes after midnight, 33-year-old Bigbee, having finished his shopping, left the store and stopped at the telephone booth just outside, to make a telephone call to his girlfriend Sheila Croxton.¹⁶ This was Charles' custom.¹⁷ He hoped to be invited over. Sheila lived nearby.¹⁸ If Sheila was not awake or not amenable, Bigbee would go home instead.¹⁹

http://www.centerjd.org/free/mythbusters-free/MB_mcdonalds.htm (calling the Bigbee case the McDonald's case of the 1980's).

¹² Answers of Plaintiff to Interrogatories of Defendant at C-1, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (D.C. Decker).

¹³ Century Blvd is 100th St. in Inglewood, California. Fortune Liquor was about a 15 minute drive from Los Angeles City Hall. Century Blvd. is one of the busiest business corridors in this part of Los Angeles.

¹⁴ Answers of Plaintiff to Interrogatories of Defendant at A-1, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (D.C. Decker).

¹⁵ Answers of Plaintiff to Interrogatories of Defendant at A-1, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (D.C. Decker).

¹⁶ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹⁷ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹⁸ Answers of Plaintiff to Interrogatories of Defendant, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (D.C. Decker).

¹⁹ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

Even at midnight, there were several people in the store and in the parking lot.²⁰ Outside Fortune, there were two telephone booths. He chose the one not occupied. This booth was located near the wall of the store on the sidewalk about 15 feet from Century Blvd.²¹ Sheila was awake. As the two spoke, Bigbee saw a car, which the police later determined to be a 1972 Ford driven by Leola North Roberts. The car was weaving through three eastbound lanes.²² It careened off the street and jumped the curb toward Bigbee. Bigbee saw the car coming at him.²³ While trying to open the door to escape, Bigbee said the door (which folded inward) jammed. Trapped inside, he threw his coat over his head. When the car struck the booth, the glass shattered around him and cut into his body.²⁴ The defendants later disputed that Bigbee ever had the time to escape or that he even tried to open the door. Yet it is undisputed that others who were in harm's way succeeded in avoiding the car's path.²⁵ For example, Michael Zellis was waiting to use Bigbee's telephone booth. Upon seeing the car approaching, he fled from its path.²⁶ Zellis was unhurt. A man in the other telephone booth (further from the street) also escaped the car's path, as did several other people in the parking lot. Bigbee did not, and he recalled later that he immediately knew, from seeing his torn body, that he would lose his right leg. In pain, he recited the Lord's Prayer over and over, until someone

²⁰ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

²¹ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947 at 949 (Cal. 1983).

²² Respondent's Brief at 6, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (D.C. Decker Co.).

²³ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

²⁴ *The Liability Insurance Crisis, 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs*, 99th Cong. 98 (July 23, 1986) (prepared statement of Charles Bigbee).

²⁵ Appellant's Opening Brief, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

²⁶ Appellant's Opening Brief, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

ultimately freed him from the phone booth.²⁷ By the time the ambulance came, Bigbee was unconscious. Bigbee was taken to Centinela Hospital. It was about 1 a.m.²⁸ Doctors there amputated his right leg about 4 inches above the knee and managed to save his left leg, transferring skin grafts to cover gaping holes caused by glass shards.²⁹

Bigbee's girlfriend Sheila was frantic. While on the phone with Bigbee, she had heard Bigbee's scream and then a long moan.³⁰ Sheila's guess was that he had been shot. Crime was not rare in the neighborhood. Sheila got into her car and drove around the neighborhood until she spotted the police cars three miles away from her apartment.³¹

Inglewood Police officer Ronny Woods was the first officer at the scene.³² After caring for Bigbee, Woods then dealt with the car driver, whom he testified later to be obviously intoxicated.³³ Leola Roberts, a middle aged woman, had been driving from the Hollywood Turf Club, on the grounds of the Hollywood Park racetrack. The last race had been at 11:30 p.m.³⁴ Unhurt in the accident, she was also sent to Centinela Hospital for a blood alcohol test, but no test was taken.³⁵ Roberts denied purchasing or drinking alcohol that night. Bigbee's attorney later surmised that no test was taken because police

²⁷ *The Liability Insurance Crisis, 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs, 99th Cong. 98* (July 23, 1986) (prepared statement of Charles Bigbee).

²⁸ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at B-2, Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing).

²⁹ Answers of Plaintiff to Interrogatories of Defendant, Bigbee v. Hollywood Turf Club, Inc. (No. SWC 34005) (D.C. Decker).

³⁰ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

³¹ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

³² Police Report, Bigbee v. Hollywood Turf Club, Inc. (No. SWC 34005) (C.T., non-paginated).

³³ Bigbee v. Pac. Tel. & Telegraph Co., 665 P.2d 947 (Cal. 1983).

³⁴ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at 6, Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing).

³⁵ Cross-Defendants' Answer to the Cross-Complaint for Declaratory Relief at 5 (Araserv). (quoting Roberts deposition).

officers knew that her son was an LAPD officer.³⁶ In her wallet, next to her driver's license, was her son's card.³⁷

The accident did not make the newspapers the next day. And attorneys for the case recall today that Bigbee's accident did not become newsworthy until the California Supreme Court granted certification to hear Bigbee's appeal, more than nine years later.³⁸

BIGBEE'S DECISION TO SUE

As a city employee, Bigbee had Blue Cross health insurance, and he qualified for federal disability insurance of \$272 a month.³⁹ He also received a one-time payment from the city of \$500 under a dismemberment policy.⁴⁰ Despite this insurance, he was unable to cover the entirety of his medical costs. Indeed his unpaid *un-reimbursed* medical bills amounted to more than \$1,500,⁴¹ over 20% of his yearly janitor's salary of \$7,374.57.⁴² He was behind in his bills and cash-strapped, aggravated by the fact that he was physically unable to go to work and severely depressed.⁴³ Collection agencies hounded him for bills requesting as little as \$50, two years overdue.⁴⁴

Each time Bigbee went to the hospital for treatment, he feared that it would be his last opportunity. Because he was unable to work, he expected that his Blue Cross Health

³⁶ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

³⁷ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

³⁸ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004); Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

³⁹ Answers of Plaintiff to Interrogatories of Defendant, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (D.C. Decker).

⁴⁰ Answers of Plaintiff to Interrogatories of Defendant at B-16, B-17, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (D.C. Decker).

⁴¹ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at A-7, *Bigbee v. Hollywood Turf Club* (No. SWC 34005) (Western Harness Racing). Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at C-2, *Bigbee v. Hollywood Turf Club* (No. SWC 34005) (Western Harness Racing).

⁴² Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at C-2, *Bigbee v. Hollywood Turf Club* (No. SWC 34005) (Western Harness Racing).

⁴³ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at B-10, C-1, *Bigbee v. Hollywood Turf Club* (No. SWC 34005) (Western Harness Racing).

⁴⁴ Medical Records, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005) (C.T., non-paginated).

Insurance would expire in a matter of months.⁴⁵ Yet, he needed ongoing medical care.⁴⁶ When he first left the hospital, he had casts on his left leg and right stub. Later he would need an artificial leg; a wheelchair; and a knee brace for his left leg.⁴⁷ Bigbee's stump would blister and the injury in his left leg, agitated by the strain of the prosthetic leg would bother him for the rest of his life.⁴⁸

According to his own attorney and those who took Bigbee's deposition, Bigbee was ill-educated and at times not very articulate.⁴⁹ But when they met, attorney Tom Cacciatore, who would take Bigbee's case, recalled that Bigbee had a good sense of humor and Cacciatore found him both tough and charming.⁵⁰ Bigbee had always worked and had never been in any criminal or law-related trouble.⁵¹ Bigbee was a native of Dayton, Ohio.⁵² At the time of the accident, Bigbee had been in Los Angeles for about ten years. When he first came to town, Bigbee wound up living in Inglewood on the advice of a cab driver. He told Cacciatore that he got into a cab, and asked the driver

⁴⁵ According to Bigbee's attorney, Bigbee treasured his Blue Cross health insurance card. He carried it, wrapped in plastic in his wallet, so as not to look worn out. Bigbee was afraid that he might be refused admission at treatment at a hospital without the card. Telephone Interview with Thomas P. Cacciatore (May 24, 2004).

⁴⁶ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at B-6, Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing).

⁴⁷ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at B-5, B-6, Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing).

⁴⁸ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at B-5, Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing). Bigbee was despondent about his ability to ever return to work. "Nobody wants to hire handicapped like me." Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at C-3, Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing).

⁴⁹ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003); Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁵⁰ Telephone Interview with Thomas P. Cacciatore, Attorney for Charles Bigbee (Feb. 12, 2004).

⁵¹ Bigbee had never been in any serious trouble, although he did have his driver's license temporarily suspended when he had not paid his traffic tickets. Answers of Plaintiff to Interrogatories of Defendant at B-13(a); B(9); B-13(b), Bigbee v. Hollywood Turf Club, Inc. (No. SWC 34005) (D.C. Decker). In addition, Bigbee had been involved in a hearing before the Worker's Compensation Board for an injury to his back which occurred while he was working in a City vehicle. Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc., Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing).

⁵² Answers of Plaintiff to Interrogatories of Defendant, Bigbee v. Hollywood Turf Club, Inc. (No. SWC 34005) (D.C. Decker); Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

where the n**s lived. The driver took him to Inglewood, still a predominantly African-American neighborhood today.⁵³

THE PERSONAL INJURY LAWYER:

Thomas P. Cacciatore was Bigbee's attorney. Bigbee's selection was a good choice at a good time. Although Cacciatore was only 28, he had some trial experience on both sides of personal injury cases.⁵⁴ In fact, when Bigbee came to see Cacciatore, Cacciatore was wrapping up his first big tort case. At the time it was the largest amount ever awarded against the City of Los Angeles. He had settled when the case was on appeal for about \$200K.⁵⁵

Cacciatore was admitted to the bar in 1972. Upon graduating from law school, he volunteered for the District Attorney's campaign of fellow Italian American attorney Vincent Bugliosi with hopes of joining the D.A.'s office.⁵⁶ After the end of the campaign, Cacciatore passed the bar on the second try and joined the in-house staff of Traveler's Insurance Company.⁵⁷ After fifteen months of working for the company, and having saved \$2,300 living with his parents, Cacciatore decided to open a practice with a friend.⁵⁸

Bigbee found Cacciatore through an attorney who attended his church. Because this man was a criminal lawyer, he referred Bigbee to Cacciatore, who was his partner at their law firm.⁵⁹ High on his recent successes, Cacciatore was in the right state of mind to

⁵³ Answers to Interrogatories Propounded to Defendant Western Harness Racing, Inc. at A-7, Bigbee v. Hollywood Turf Club (No. SWC 34005) (Western Harness Racing); Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁵⁴ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁵⁵ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁵⁶ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁵⁷ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁵⁸ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁵⁹ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

take Bigbee's case and pursue it with passion. Cacciatore drove to the scene of the accident soon after his first meeting with Bigbee. According to Cacciatore, he could "see the theory of liability" once he got to the scene of the accident. And as he now recalls, "if you pay attention [to the arguments]" the ultimate outcome in favor of Bigbee was obvious and correct."⁶⁰ That so much controversy would develop over the case surprises him to this day.

Cacciatore filed a complaint in Torrance Superior Court, on behalf of Bigbee, on October 9, 1975.⁶¹ His Second Amended Complaint was filed on August 21, 1978.⁶²

THE "LIKELY" SUSPECTS AND THE DRAMSHOP LAW

In his first cause of action Bigbee alleged negligence against Leola Roberts, driver of the car that stuck the telephone booth. Bigbee's third cause of action alleged negligence on the part of Hollywood Turf Club, Inc.(owner of Hollywood Park); Western Harness Racing, Inc. (coordinator of harness race events and lessee); and Araserv⁶³, Inc. (food service and concession operator) on the grounds that these defendants had allegedly caused Roberts to become intoxicated.⁶⁴

Dramshop Theory of Liability

Even before Bigbee reached the courts, Bigbee's suit had a special place in California legal history. The accident occurred during a seven-year window (1971-1978)

⁶⁰ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁶¹ Brief of Respondents at 3, Bigbee v. Super. Ct., 155 Cal. Rptr. 545 (1979) (No. 62383) (Pacific Telephone & Telegraph Co. and Western Industrial Services).

⁶² Brief of Respondent at 2, Bigbee v. Super. Ct., 155 Cal. Rptr. 545 (1979) (No. 62383) (Western Electric Co.).

⁶³ Cross-Defendants' Answer to Cross-Complaint for Declaratory Relief at 2 (Araserv). (Western Harness Racing Club issued a cross-complaint against Araserv on the theory that a contract between them stated that Araserv agreed to indemnify for any lawsuits arising out of the concession facilities).

⁶⁴ Cross-Defendants' Answer to Cross-Complaint Declaratory Relief (Araserv). at 5; Notice of Motion to Strike, Bigbee v. Hollywood Turf Club, Inc. (No. SWC 34005) (Araserv). (concession agreement between Araserv, Inc., and Western Harness Racing).

during which, as a result of the *Vesely v. Sager*⁶⁵ decision, California vendors of alcohol could be held responsible in cases in which they served obviously intoxicated customers who subsequently inflicted injuries on a third party.⁶⁶ In 1978, in *Coulter v. Super. Ct.*,⁶⁷ the California Supreme Court of California became the first court to impose additional liability on a *social* host for harm caused by an intoxicated adult guest.⁶⁸ However, in response to that decision, the California Legislature immediately amended the statute on which the *Vesely* and *Coulter* decisions were based, expressly abrogating the judicial outcomes in both of these cases.⁶⁹ Therefore, if the accident had occurred only a few years earlier or later, a cause of action against any of these vendors at Hollywood Park might have been futile.

According to Bigbee's causes of actions against Hollywood Race Track, Hollywood Turf Club, Inc., Araserv, Inc. and Western Harness Racing, Inc., those defendants contributed to Bigbee's accident by serving or (facilitating the service of) alcohol to Leola Roberts. Just before witness depositions were taken, the parties settled for \$25K.⁷⁰ In fact, Roberts herself paid half and the remaining defendants paid the other

⁶⁵ 486 P.2d 151 [hereafter *Vesely*].

⁶⁶ The California Supreme Court held in *Vesely v. Sanger*, 486 P.2d 151 (Cal. 1971) that a commercial vendor was subject to liability to third parties who were hurt by vendors' sale of alcohol to an obviously intoxicated person. The courts based its decision on California Civil Code Section 25602, which read in relevant part: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of misdemeanor."

⁶⁷ *Coulter v. Super. Ct.*, 577 P.2d 669 (Cal. 1978) [hereafter *Coulter*].

⁶⁸ *Coulter v. Super. Ct.*, 577 P.2d 669 (Cal. 1978).

⁶⁹ The Legislature added as subdivision (c) to section 25602: "(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* P.2d 151], *Bernhard v. Harrah's Club* (16 Cal.3d 313 [128 Cal.Rptr. 215, 546 P.2d 719]) and *Coulter v. Superior Court* [21 Cal.3d 144, 145 Cal.Rptr. 534, 577 P.2d 669] be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person." Also added to section 25602 as part of the same enactment was subdivision (b), which provides that no person who commits a misdemeanor pursuant to subdivision (a) ". . . shall be civilly liable to any injured person . . . for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage."

⁷⁰ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

half.⁷¹ As Cacciatore puts it today, this settlement provided Bigbee what attorneys call “traveling money.”⁷² There were now enough resources available to pursue the defendants that would make *Bigbee* a famous case.

THE “UNLIKELY” SUSPECTS

Although the remaining defendants engaged separate counsel, these “unlikely suspects” were, in Cacciatore’s words, a “unified front.”⁷³ Pacific Telephone operated the telephone communications system in Los Angeles County. Western Electric designed and supplied telephone equipment, such as phone booths, to phone companies such as Pacific Telephone. The Decker company engaged in the business of maintaining, installing, fabricating and constructing telephone booths pursuant to a contract with Pacific Telephone. Western Industrial was in the business of maintaining, repairing and refurbishing telephone booths and facilities. Pacific Telephone was the center of these relationships. At the time, Pacific Telephone was the only company permitted to operate telephone lines and telephone booths in Los Angeles County.

The Pay Phone Booth Business

In 1974, the year of Bigbee’s accident, the pay phone was a growing multi-million dollar business.⁷⁴ Two defendants, Pacific Telephone and Western Electric, had a century-year-old partnership in the business of the public coin telephone booth: the first pre-pay automatic telephone booth by Bell Labs utilized a Western Electric patent.⁷⁵ The

⁷¹ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁷² Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁷³ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁷⁴ Steven P. Galante, Pay-Phone Firms’ Frustration: Connecting with Profitability, WALL ST. J., Jan. 27, 1986, at 27.; James A. White, What Has Happened to Pay Telephones? Change, of course, WALL ST. J., Sept. 8, 1983, at 1.

⁷⁵ In 1889, the first public coin telephone was installed by William Gray in Hartford. In 1898, the Western Electric No. 5 Collector, the first automatic prepay station went into use in Chicago deposit of coins before placing a call. In 1901, Western Electric and Gray Telephone Pay Station Co. signed agreement for Gray

two businesses had an enormous impact on the national economy partly because Pacific Telephone, once part of Ma Bell, had a regional monopoly.⁷⁶ In 1984, the FCC deregulated the pay phone industry. Start-up pay phone firms entered the industry hoping to make millions from dimes, but most failed.⁷⁷ In 1986, the *Wall Street Journal* observed that large capital costs, vandalism, high telephone tariffs, as well as shoddy equipment and unscrupulous manufacturers, contributed to this failure.⁷⁸

More recently, however, the number of pay phones has dropped from a peak of 2.6 million in 1998 to about 1.8⁷⁹ million in 2003,⁸⁰ although even now many people, including the poor and homeless, and those who are not credit-worthy, continue to depend on pay phones. But in the 1970's, before deregulation and cell phones, Bigbee and many others in his lower-middle class neighborhood in Inglewood depended heavily on pay phones, particularly outdoor pay phones that were always open. Indeed, it was not unusual that Fortune Liquor's two phone booths would be occupied at midnight on a

to manufacture coin collectors for the Bell System using both Gray and Western Electric patents. In 1905, first outdoor coin telephone by Bell System was built. AT&T, Highlights in Pay Phone History, *available at* http://www.earlytelephones.com/Pages/payphone_history.htm (on file with author).

⁷⁶ By WWII, there was a phone booth boom. The pay phone provided main phone service for traveling soldiers and families. In 1960, Bell system installed its one millionth pay telephone and the significance was not lost on the U.S. Treasury Department. In 1964, when the Treasury Department planned to change the metallic composition of its coins, it consulted with Bell to ensure that the new coins would work in existing pay phones. AT&T, Highlights in Pay Phone History, *available at* http://www.earlytelephones.com/Pages/payphone_history.htm (on file with author).

⁷⁷ Steven P. Galante, Pay-Phone Firms' Frustration: Connecting with Profitability, WALL ST. J., Jan. 27, 1986, at 27.; James A. White, What Has Happened to Pay Telephones? Change, of course, WALL ST. J., Sept. 8, 1983, at 1.

⁷⁸ Steven P. Galante, *Pay-Phone Firms' Frustration: Connecting with Profitability*, WALL ST. J., Jan. 27, 1986, at 27.

⁷⁹ Although the pay phone industry is deregulated, of the 1.8 million pay phones in US 75 percent are owned by three of the largest telecommunications companies in the nation: Verizon, SBC, and Qwest. Independent owners, from barbershops to large businesses make up the remaining 25 percent. Jeannine N. Befidi, *Pay Phones: The End of an Era for Some, but Not for All*, COLUMBIA NEWS SERVICE, Mar. 7, 2003, *available at* http://www.jm.columbia.edu/student_work/cns/2003-03-07/33.asp (on file with author)..

⁸⁰ According to the National Clearinghouse, pay phone numbers have declined to around 1.6 million. In 2002, 1.9 million and in 2001. 2.1 million.

Friday, while others, like Michael Zellis waited their turn.⁸¹ Cacciatore recalls that Bigbee never had a home telephone during the time he knew Bigbee. Instead, Cacciatore kept almost two dozen phone numbers for Bigbee's neighbors and friends in his rolodex.⁸² When the attorney needed to speak with his client, Cacciatore would often try seven or eight of those numbers, in hopes of catching Bigbee there, or to leave a message for Bigbee to call him back.⁸³

THE DEFENSE

One of the attorneys for the defendants was Mark Berry, now a partner at Bowman and Brooke. Just out of law school, Berry was a first-year associate at Lawler, Felix, & Hall representing Western Electric.⁸⁴ *Bigbee* was Berry's first case as an attorney. According to Berry "on the face of the complaint, [the suit] almost sounded like a joke" and "ludicrous."⁸⁵ With respect to Berry's clients, the plaintiff's theory was that as the product supplier of telephone booths to Pacific Telephone and Telegraph Company, Western Electric was responsible for the design of the telephone booth, particularly as it would seem important later -- the door. It seems to Berry now that it was a classic example of an "injury looking for a liability."⁸⁶ When his supervising attorney, a partner at the firm, handed him the complaint, he noted that Berry, despite his inexperience, could handle this on his own. Until 1983, when he left the firm after almost a decade, Berry never stopped working on some aspect of the *Bigbee* case.⁸⁷

⁸¹ Telephone Interview with Thomas P. Cacciatore, Attorney for Charles Bigbee (Feb. 12, 2004).

⁸² Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁸³ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁸⁴ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

⁸⁵ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

⁸⁶ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

⁸⁷ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

Berry immediately filed a demurrer as did the other telephone-related defendants' counsel. Berry was successful. The trial court effectively held that even if the facts alleged on the complaint were true, they were insufficient to state a claim for which relief could be granted.⁸⁸

GETTING PAST THE DEMURRER: *BIGBEE I*

Cacciatore appealed to the California Court of Appeal, seeking a writ of mandate requiring the trial court to vacate its decision. The Court of Appeal agreed with Cacciatore. From its review of case law, the appellate court found that in cases factually similar to Bigbee's, plaintiffs were able to go beyond the demurrer stage, although not necessarily beyond summary judgment.⁸⁹ As a consequence of the Court of Appeal's decision, a trial date was set in the trial court and the discovery process began.

Five years had passed since the accident. For the parties involved, the facts were being rehashed over and over in pleadings and briefs but the fact had yet to be presented before a jury or otherwise weighed. It was litigation on the pleadings. The defendants were reluctant to settle when the plaintiff's legal theories were tenuous and the factual record ambiguous. Cacciatore, on the other hand, felt sure that if the case went in front of a jury, Bigbee would win. He welcomed the opportunity to go to trial.⁹⁰ Nevertheless, that the Superior Court judge had initially granted the demurrer and that one of the three Court of Appeals judges agreed with this decision signified to Cacciatore that he would continue to encounter skepticism from the bench.

DISCOVERY

⁸⁸ Bigbee v. Super. Ct., 155 Cal. Rptr. 545 (1979).

⁸⁹ William Endicott, *Governor Cites Cases in Assailing State Court*, L.A.TIMES, Feb. 14, 1985, at A3.

⁹⁰ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

Pre-trial discovery represented a significant risk for the defendants, not only because they would be forced to answer Cacciatore's questions and provide all relevant documents, but also because it would be time-consuming and costly. While Cacciatore believed that discovery would more likely to harm the defendants' case and provide much-needed information for Bigbee's side, Bigbee and Cacciatore were also under pressure. As soon as discovery was completed, the defendants would no doubt file a motion for summary judgment. Cacciatore developed three general theories of liability further informed by discovery. First, because of the defendant's negligent **design** of the telephone booth door, instead of opening smoothly, it had stuck when Bigbee tried to escape. Secondly, the defendants had chosen a **location** near a busy six-lane thoroughfare that was unreasonably dangerous for phone booth users. Finally, the defendants negligently failed to make appropriate **repairs** to the telephone booth after it had been struck in a prior car-accident.

Telephone Booth Door Design

The Fortune Liquor Store telephone booth was an aluminum and glass telephone booth, with a bi-fold accordion-style door on roller bearings.⁹¹ It was the type of phone booth, in which a "mild-mannered" Clark Kent would transform into Superman. Or the type within which teens, following the 1950's fad of Phone Booth Cramming, would compete to see how many could fit. The folding door provided vocal privacy. The door folded inward, important to premises-owners for example, who wanted to minimize the booth's total floor space. The door design was also an important safety refinement. In

⁹¹ Pay phone enclosures had existed for as long as phones were invented, but in 1910, the hinged folding door was one of the latest refinements. But there were many further refinements. Outward swing doors were hazardous to rushing commuters in train stations, however, so an inward opening door, such as the one in this case were developed.

1910, a hinged door of this sort was developed so as to prevent accidents in train stations when phone users opened outward-opening doors, in the process hitting rushing commuters⁹²

Cacciatore's allegation with respect to the design of the phone booth was that the phone booth's defective door had jammed, preventing Bigbee from escaping. Cacciatore calculated that Bigbee had at least as much time as Michael Zellis, the man waiting to use the phone. Zellis testified that he had six or seven seconds to escape and managed to do so.⁹³ Zellis confirmed Bigbee's account with Cacciatore. Zellis had seen Bigbee struggling with the door to escape, seconds before the phone booth was struck by Roberts' car.⁹⁴

The defendants had various objections to this theory. In particular, defendants were skeptical that the telephone booth door had "stuck," because Bigbee did not so allege, until Cacciatore filed his First Amended Complaint. In any event, the defendants believed they could not be liable, because in their view, the sticky door was not the proximate cause of Bigbee's injuries. They alleged that Leola Roberts' reckless (drunken) driving had been the proximate cause of Bigbee's injuries. This was not simply, or even only, a claim that Roberts' fault legally superseded any fault of those connected to the phone booth. Rather, it was more squarely a claim that the harm that

⁹² By 1983, pay phone booths of this style were becoming eyesores and money-losers. Smaller enclosures cost \$200 to install, over \$1000 for conventional booths. Replacing booths in Sun Belt states because of ovens, and Michigan because the snow jammed up the doors. In New York, phone booth owners claimed that callers were becoming too comfortable, setting up business there. James A. White, *What Has Happened to Pay Telephones? Change, of course*, WALL ST. J., Sept. 8, 1983, at 1.

⁹³ Brief of Respondent at 9-10, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (Western Electric Co.).

⁹⁴ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004); *But see* Brief of Respondent, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (Western Electric Co.). at 11 (Defendants were skeptical and noted in their briefs that Zellis had never given any sworn testimony about seeing Bigbee struggle with the door.)

occurred was outside the scope of any risk that defendants connected with the phone booth could foreseeably or fairly be seen to have taken. Specifically, attorneys for Pacific Telephone argued that “[n]o hazard is imposed by a sticky door other than a pinched finger, scuffed shoes, or possibly some inconvenience. Certainly the need to exit in order to escape the path of a wildly veering car, under the intense time and panic is not the sort of use to which one would expect a telephone booth to be put.”⁹⁵

Location of the Telephone Booth

As soon as Cacciatore visited the site of the accident, he realized immediately that one of his theories would be the negligent placement of the telephone booth.⁹⁶ Nevertheless, there were facts regarding the location that supported both sides.

Century Boulevard is one of Inglewood’s busiest commercial corridors, and could be legitimately considered a 6-lane highway.⁹⁷ The posted speed was 35 or 40 miles per hour. According to some accounts Roberts’ car was traveling as slow as 30-35 miles per hour⁹⁸ when it crashed into the phone booth. Witness Zellis, on the other hand said that it was more like 50 miles per hour.⁹⁹

At that speed, would Bigbee have been able to escape in time, even if the door had opened properly? If not, then this speed would undercut the claim based on the door’s design. On the other hand, if that speed was not unusual for Century Boulevard, then perhaps that bolstered Bigbee’s claim that the defendants were liable for not having foreseen crashes involving speeding cars. The phone booth was located about fifteen feet

⁹⁵ Brief of Respondents at 23, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (Pacific Telephone & Telegraph Co. and Western Industrial Services).

⁹⁶ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

⁹⁷ Appellant’s Opening Brief at 11, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

⁹⁸ Appellant’s Opening Brief at 11, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

⁹⁹⁹⁹ Respondent’s Brief at 6, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (D.C. Decker Co.). (quoting Perez Dep. at 25, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005).)

from the curb, against the wall of Fortune Liquor. There were no bumper posts separating people in the Fortune Liquor parking lot from the road, although a sidewalk separated the store from the street.¹⁰⁰ Several reconstructions were made of the area and both the Court of Appeal and later the Supreme Court attached a diagram to their decisions for clarification.¹⁰¹ The location of the telephone booth was of obvious import to both sides.

Cacciatore asserted that Richard Lopez, a traffic engineer, was ready to testify that the phone booth was placed for highest visibility, to support Cacciatore's theory that many parties benefited financially from the dangerous location, to the potential detriment of the phone booth users.¹⁰² The defendants were outraged when Lopez was not thereafter designated as an expert, at which point they would have an opportunity to take his deposition. They claimed that this traffic engineer's testimony was "wishful thinking on Mr. Cacciatore's part."¹⁰³ The trial court judge was also upset that such testimony was not submitted to the court.¹⁰⁴ Moreover, defendants argued that the consequence of Cacciatore's location theory was that "any bus stop, mailbox, paper kiosk would have to relocate more than 15 ft [away from any road]"¹⁰⁵

¹⁰⁰ Appellant's Opening Brief at 21, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

¹⁰¹ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947 (Cal. 1983).; *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535 (1982).

¹⁰² Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹⁰³¹⁰³ Brief of Respondents at 47, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (Pacific Telephone & Telegraph Co. and Western Industrial Services).

¹⁰⁴ Judge Gorenfeld railed at Cacciatore: "It is not accompanied by any declaration of alleged experts. It would seem to me that your argument before the court really amounts to nothing more than a promise to the court that, at the time of trial, you are going to come in with all kinds of evidence that will overwhelm these defendants, but that is too late. R.T. at 17, lines 16-26. Brief of Respondents, 155 Cal. Rptr. 545 (1979) (No. 62383) (D.C. Decker Co.)

¹⁰⁵ Brief of Respondents at 10, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (Pacific Telephone & Telegraph Co. and Western Industrial Services).

Repair: Re-installation and Maintenance

Cacciatore's third theory -- negligent repair -- depended almost entirely on discovery because installation and maintenance records were entirely in the hands of defendants. One of Cacciatore's first document requests was the phone booth's maintenance record.¹⁰⁶ Cacciatore's interview with the owner of Fortune Liquor had revealed that a prior accident had occurred in February 1973, some 20 months before Bigbee's accident.¹⁰⁷ The owner could not remember the details, however. When the defendants resisted turning over the record, the court ordered its delivery. Although the record confirmed the 1973 accident,¹⁰⁸ the salmon-colored document had been cut, so that no evidence about pre-1973 conditions or repairs could be learned.¹⁰⁹ Cacciatore believes that all prior impact or maintenance had been torn off before being turned over to him.¹¹⁰

Still, it was important to Cacciatore's third theory that there was now confirming evidence that at least one prior accident had occurred. A defendant's own employees had recorded the small but important detail that the booth had been struck by a car, a hit-and-run driver. Unfortunately, because the driver in the accident had fled, there were no other details. Defendants claimed that the booth was struck by a car attempting to park. Cacciatore, on the other hand, suggested that the crash could have occurred from a car driving off the street, a scenario more closely analogous to the accident injuring Bigbee.¹¹¹ Finding evidence of the 1973 prior incident was an undeniable coup for

¹⁰⁶ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹⁰⁷ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹⁰⁸ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹⁰⁹ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹¹⁰ Telephone Interview with Thomas P. Cacciatore (Feb. 26, 2004).

¹¹¹ Appellant's Opening Brief at 23, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

Cacciatore. He could now argue that even if defendants conduct was reasonable in 1972 with respect to the telephone booth door's design and location, it was a different matter in 1974. He could argue that Defendants were put on notice after the accident that the location of the phone booth was dangerous. They also had the opportunity to make repairs to the damaged telephone booth in light of the nature of the accident. Defendants responded incredulously: "If a house is truck by lightning, is it negligent to rebuild it in the same spot if there is nothing about the location to indicate that it would be struck again?"¹¹² The parties further argued about the extent of the damage to the phone booth from the 1973 incident. While the defendants argued that there had been only minor damage, Cacciatore discovered that the booth had been ripped from its concrete slab, requiring partial reinstallation of the booth, as well as the installation of bumper posts between the parking lot and the phone booths, thereby at least somewhat protecting phone booth users from vehicles in the parking lot.¹¹³ At the time of that installation the defendants did not place bumper posts between the street and the telephone booths. This fact cut both ways. Given the recognized danger of cars crashing into telephone booths, perhaps the defendants were remiss in not installing such posts to prevent car crashes *from the street*. On the other hand, perhaps that the defendants installed the bumper posts between the cars in the parking lot and the phone booth, but had not installed such bumper posts to prevent cars striking the telephone booth from the street demonstrated that they did not imagine any such risk.

¹¹² Brief of Respondents at 40, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (Pacific Telephone & Telegraph Co. and Western Industrial Services).

¹¹³ Appellant's Opening Brief at 3-85(b), *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383); Appellant's Opening Brief at 22, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

Finally, with respect to negligent maintenance, Cacciatore alleged that the defendants were careless in not giving proper guidance to their contractors. For example, Cacciatore argued that the lack of training manual instruction on the hazardous placement of telephone booths was negligent.¹¹⁴ Cacciatore deposed a phone booth repairman (a Mr. Perez) who told him there was no training information in the Manual provided by Pacific Telephone to those responsible for installing and maintaining booths.¹¹⁵ Defendants, however, claimed that there was some, albeit general information in the Pacific Telephone Manual, including wording as to choosing a safe location and avoiding broken, uneven pavements.¹¹⁶ But Cacciatore discovered that Perez had been given no training or instruction even after the Feb 1973 accident¹¹⁷ Cacciatore claimed that the lack of instruction, even after the prior incident, showed a conscious disregard for the hazardous location.¹¹⁸

Foul Play in Discovery?

There were underlying tensions between the attorneys. The defendants had a hard time believing that Bigbee, who earlier made no such allegation, had suddenly recalled years later that the phone booth door had jammed (the “sticky door” argument). They were also frustrated by Cacciatore’s unsuccessful search for the experts he claimed would buttress his theories. Bigbee, in their eyes, was, in Berry’s words, a “poor guy at the wrong place at the wrong time,”¹¹⁹ a victim who now sought compensation regardless of

¹¹⁴ Appellant’s Opening Brief at 47, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383). (quoting Perez Dep. at 58, lines 25; 59, line 1, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005).

¹¹⁵ Perez Dep. at 61, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005).

¹¹⁶ Brief of Respondent at 11, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 62383) (Western Electric Co.). (quoting CT 375, 97).

¹¹⁷ Perez Deposition at 61, lines 6-10, *Bigbee v. Hollywood Turf Club, Inc.* (No. SWC 34005). at 61, lines 6-10.

¹¹⁸ Appellant’s Opening Brief, *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979) (No. 52383).

¹¹⁹ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

who was truly to blame. But Cacciatore was also wary. As mentioned, he suspected that the maintenance records had been tampered. He also learned from his client and Sheila Croxton, the girlfriend Bigbee called the night of his accident, that a man had visited Croxton and initiated a conversation with her about the accident.¹²⁰ According to Cacciatore, a man who they later determined to be Jack De Loure, a Pacific Telephone claims investigator, visited Sheila Croxton at her home and asked to check the phone. De Loure was dressed in a Pacific Telephone jumpsuit as if he were a repairman.¹²¹ De Loure then began a casual conversation about the accident and inquired as to what Sheila knew. Cacciatore never reported this incident to the court, but he believes that this “*sub rosa* investigation” involve[ed] all kinds of violation of ethics rules,” and demonstrated the extent of horsepower the phone company was willing to expend to win the case.¹²²

STALLING AT SUMMARY JUDGMENT

Trial was scheduled for September 29, 1980. Bigbee and Cacciatore, however, would encounter another hurdle to their jury trial in the form of a motion for summary judgment.¹²³ On July 29, 1980, the four defendants filed a joint motion for summary judgment, noticing a hearing on that motion for August 13, 1980.¹²⁴ At the plaintiff’s request that his counsel be given additional time to prepare, the hearing was continued to August 27, 1980. Defendants’ attorneys agreed to the continuance. Mark Berry later regretted that the defendants did not object,¹²⁵

¹²⁰ Telephone Interview with Thomas P. Cacciatore, Attorney for Charles Bigbee (Feb. 12, 2004).

¹²¹ Telephone Interview with Thomas P. Cacciatore, Attorney for Charles Bigbee (Feb. 12, 2004).

¹²² Telephone Interview with Thomas P. Cacciatore, Attorney for Charles Bigbee (Feb. 12, 2004).

¹²³ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535 (1982).

¹²⁴ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535 (1982).

¹²⁵ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

(Berry said, “I remember standing in that court in Torrance, agreeing that plaintiff could have more time to get those experts. I agreed on a continuance because I didn’t want to get reversed on appeal, but then at the hearing [there were] no affidavits.”)

To support their motion for summary judgment, the defendants submitted declarations and documentary evidence in the form of maps and photographs of the scene to refute Bigbee's allegations that the location of the booth was intrinsically hazardous or that the risk of the booth being struck by a car careening off the road was known to defendants. In addition, they suggested that Cacciatore had not presented the necessary evidence to support claims of negligent design or negligent repair. For example, they claimed that Cacciatore was unable to find a traffic engineer or expert to testify as to the dangerous location, or evidence to support the allegation that the door had stuck.¹²⁶

The Superior Court granted summary judgment and the Court of Appeal affirmed on June 23, 1983, by a 2-1 vote.¹²⁷ Despite this setback, Cacciatore decided to appeal the summary judgment to the California Supreme Court. He may have been emboldened by the Justice Vincent Dalsimer's lone dissent in the Court of Appeal.

Justice Dalsimer disagreed with the majority's finding for two reasons. First, he argued that Division 2 of the Second District Court of Appeal in *Bigbee I*¹²⁸ (overruling the demurrer), had come to a different conclusion regarding the case law than the majority in the instant appeal (*Bigbee II*). Consequently, Dalsimer concluded that the Court had impermissibly overruled a decision of the same District Court of Appeal.¹²⁹ In addition, he believed that the majority had misinterpreted the law by requiring excessive

¹²⁶ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535 (1982).

¹²⁷ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535, 543 (1982) (holding summary judgment was appropriate because "[t]he facts relative to this issue are essentially undisputed. The declarations, maps and photographs filed by defendants show that the telephone booth was situated 15 feet from the curb on Century Boulevard close to the wall of a liquor store, and that Century Boulevard is straight and level in the vicinity of the accident. These facts provide no basis for inferring more than a nominal degree of hazard to persons using the booth, no close connection between the conduct of defendants and the injury suffered, no moral blameworthiness on the part of the defendants, and no likelihood of preventing future harm by imposing liability.")

¹²⁸ The court sat in Division One of the Second District Court of Appeal.

¹²⁹ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535, 550 (1982).

specificity in the type of foreseeability required to create liability on the part of Defendants. Justice Dalsimer held that the law did not require the defendants to foresee the exact circumstances of Bigbee’s phone booth accident.¹³⁰ Rather, Dalsimer believed that “[t]he questions concerning the duty to safely locate the telephone booth and the duty to design, manufacture, and maintain the telephone booth so that the door will operate properly are inextricably bound together in this case.”¹³¹ Moreover, although Dalsimer believed that a car crashing into the telephone booth was “patently foreseeable, even if it were not, such lack of foreseeability would not as a matter of law foreclose liability.”¹³² When, as in the circumstances surrounding Bigbee’s accident, there was any room for a reasonable difference of opinion with respect to foreseeability, summary judgment was inappropriate.¹³³ Dalsimjer would have a trier of fact, such as a jury, decide.

The California Supreme Court granted certification to hear the appeal. This alone was a momentous occasion; the California Supreme Court hears a very small percentage of the cases appealed from the Courts of Appeal. Cacciatore speculated that the Justices were persuaded to hear arguments because Justice Dalsimer, a well-liked Brown appointee, dissented. Berry, on the other hand speculated that *Bigbee* was a vehicle for the California Supreme Court’s ideological goals, during the Court’s “heyday for product liability claims.”¹³⁴

THE BIGBEE DECISION

The California Supreme Court issued its decision in June 1983 and reversed the lower court decision granting summary judgment to the defendants. Six Justices

¹³⁰ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535, 551 (1982).

¹³¹ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535, 550 (1982).

¹³² *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal. Rptr. 535, 550-551 (1982).

¹³³ *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535, 551 (1982).

¹³⁴ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

constituted the majority, with Chief Justice Rose Bird writing the opinion.¹³⁵ Justice Kroninger, a temporary appointee to the state Supreme Court, wrote a concurring and dissenting decision.¹³⁶ By removing the barrier of the summary judgment grant by the Court of Appeal, Bird paved the way for a trial, at which a jury might *then* decide either for or against Bigbee.

According to Bird's opinion, the law was settled that a basic duty existed with respect to the invitor-invitee relationship between a telephone company and a user.¹³⁷ In addition, independent contractors, such as Western Industrial and D.C. Decker, had analogous or commensurate duties toward their partner's invitees.¹³⁸

According to the opinion, the issue was a "simple one," "Is there room for a reasonable difference of opinion as to whether the risk that a car might crash into the phone booth and injure an individual inside was reasonably foreseeable under the circumstances set forth?"¹³⁹

What Kind of Foreseeability is Required?

Key to the Court's reasoning in this case was the type of foreseeability required. Bird rejected a narrow, detail-specific foreseeability. A jury need not find that the defendants could foresee an *intoxicated* driver crashing into a phone booth located on Century Blvd, but rather whether a jury could foresee any driver crashing into a man

¹³⁵ Justices Mosk, Kaus, Broussard, Reynoso, and Bancroft concurred. Bancroft was assigned by the Chairperson the Judicial Counsel. *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 953 (Cal. 1983).

¹³⁶ Justice Kroninger believed that summary judgment was proper with respect to the finding that no duty of location existed. He agreed that the relevant defendants might face liability with regard to the maintenance of the sticky door: "the sticky door, if it existed, increased plaintiff's danger by frustrating effective use of his own self-protective faculties." *Bigbee v. Pac. Tel. & Telegraph Co.*, 183 Cal.Rptr. 535 (1982).

¹³⁷ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 950 n.8 (Cal. 1983).

¹³⁸ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 950 n.8 (Cal. 1983).

¹³⁹ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 951 (Cal. 1983).

standing in a phone booth.¹⁴⁰ Nor need the jury find that such a crash was “more probable than not”; the test instead is “whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.”¹⁴¹ It was clear that Bird believed this was a danger that that the defendants should have been aware of when she said: “... it is not uncommon for speeding and/or intoxicated drivers to lose control of their cars and crash into poles, buildings or whatever else may be standing alongside the road they travel—no matter how straight and level that road may be.”¹⁴²

The Bigbee Footnote

In footnote 14, Bird discussed various factors (the so-called *Rowland* factors) that the California Supreme Court in 1968 had established as key considerations in determining the contours of California tort law. With respect to *Bigbee*, she emphasized two. First, the policy of “preventing of future harm cut in favor of liability.”¹⁴³ Second, “an imposition of liability would not be unduly burdensome to defendants given the probable availability of insurance for these types of accidents which defendants themselves maintain do not recur with great frequency.”

This sort of analysis was very ominous to enterprise defendants, however, because in a vast array of situations it could be said that they were better positioned than victims to prevent the accident and that they could better afford the insurance that would pay for accidents that happened anyway.

THE BIGBEE SETTLEMENT

¹⁴⁰ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 952 (Cal. 1983).

¹⁴¹ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 952 (Cal. 1983) (quoting 2 Harper & James, *Law of Torts*, §18.2 at 1020).

¹⁴² *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 952 (Cal. 1983).

¹⁴³ *Bigbee v. Pac. Tel. & Telegraph Co.*, 665 P.2d 947, 953 n.14 (Cal. 1983).

Given the California Supreme Court's opinion, it was not surprising that the defendants then decided to settle the case. To be sure, they might have convinced a jury that, given the small risk of harm and the convenience benefits of having readily visible places to make calls, the phone booth's location was not unreasonable. Moreover, they might have convinced the jury that, despite the prior crash into this very booth, it was unduly burdensome to have expected them to have provided effective barriers against an out-of-control vehicle, especially given the implication that similar barriers would be in turn be required at a huge number of other phone booths. And, finally, they might also have been able to convince the jury that, even if the phone booth door did jam on account of poor maintenance, Bigbee would have been unable to escape even if it had not. But given the seriousness of Bigbee's injuries and the sympathy that a reliable, working class employee of the city might gain from the jury, the defendants must have concluded that it was wiser to pay what was required to end the matter.

On the plaintiff's side, it was now nearly a decade since the night of the accident, and Bigbee was surely eager to get some money and have the matter put behind him. After all, his at least initial vindication by the California Supreme Court must have been quite satisfying, and like nearly all tort claimants, in the end, a reasonable settlement must have looked better to him than further delays and the prospect, however small, of possibly losing entirely if the case were actually tried to a jury.

The amount of the settlement is confidential, and the parties are pledged not to reveal the sum, even now. According to Berry for the defense, it was "not an insubstantial sum."¹⁴⁴ Yet, Bigbee did not retire. Despite his disability, several years after the accident, Bigbee returned to work for the City of Los Angeles, although with

¹⁴⁴ Settlement amount was confidential at the request of Pacific Telephone & Telegraph.

diminished physical duties. According to Cacciatore, although Bigbee could have lived on his settlement and government benefits of social security and disability, Bigbee wanted to return to work.¹⁴⁵

THE RESPONSE TO BIGBEE

Berry says that he was a hero at his firm up until the California Supreme Court agreed to hear the case.¹⁴⁶ Before then, Berry had made a series of successful motions both at the superior court and the Court of Appeal. But the Supreme Court's decision to consider the matter was not a good sign, and the eventual outcome "left [him] with a cynical feeling about appellate courts." Moreover, Berry said that his personal dealings with both Bigbee and Cacciatore "burned," making him upset for years.¹⁴⁷

Although the case would always be memorable to the parties involved, this dispute did not initially have the makings of an urban legend. First, there had been little notice of the accident when it originally occurred. None of the newspapers, even the local ones, bothered to report the event the next day. The plaintiff was an unknown custodian involved in a bizarre but lonely accident in which no one had died. The attorneys were young and little known, even in legal circles. Finally, the case had never reached, and would never reach, the trial stage. Unlike the McDonald's scalding coffee case, Bigbee's recovery could not be said to be the result of a "runaway jury." Consequently this case did not have the salacious details of an excessive award.

Indeed, the "phone booth case" only gained fame two or three years after the California Supreme Court issued its 1983 decision. It was then that the case became a focus of politicians and business interest groups angry with the California Supreme Court

¹⁴⁵ Telephone Interview with Thomas P. Cacciatore (May 24, 2004).

¹⁴⁶ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

¹⁴⁷ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

and its leader, Chief Justice Rose Bird. These critics railed against what they perceived to be a torts crisis. And the phone booth case was one of the key examples that these politicians and reformers repeatedly pointed to in their diatribe against plaintiffs' attorneys and "liberal" judges like Rose Bird.

Context: The 1980's Tort Reform Movement and the Crusade Against Chief Justice Rose Bird

Tort reformers in the 1970's began complaining of a "litigation explosion" throughout the country, especially in California.¹⁴⁸ In California, the adoption of strict product liability and comparative negligence increased the number of complaints that would be heard.¹⁴⁹ By the mid-1980's, even though the shift to modern tort law had predated most of the Bird Court's decisions, tort reformers were quick to portray the crisis as exacerbated by decisions like *Bigbee*.¹⁵⁰

The year 1986 was "viewed as the peak of the insurance crisis, a time when the cost of liability insurance skyrocketed and the availability of coverage for some products and services disappeared altogether."¹⁵¹ If the "flagship case for outrage in the 1980's" was the *Bigbee* decision¹⁵² the flagship judge for outrage was Chief Justice Rose Bird.¹⁵³

The Most Despised Judge in the Country

¹⁴⁸ Legal experts suggest that the 1960's, either 1960 or 1965 is the beginning of the modern tort law. Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U.L. REV. 1207 (1996).

¹⁴⁹ See generally, Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455 (1999).

¹⁵⁰ Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U.L. REV. 1207 (1996).

¹⁵¹ Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U.L. REV. 1207 (1996).

¹⁵² E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U.L. REV. 1207, at 1220-1221 (1996). (observing the "flagship case for outrage in the 1980's" was *Bigbee*).

¹⁵³ Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U.L. REV. 1207, at 1220-1221 (1996). (observing the "flagship case for outrage in the 1980's" was *Bigbee*).

Chief Justice Rose Bird was appointed to the State Supreme Court by Democratic governor Jerry Brown in 1977.¹⁵⁴ Before and during her time on the bench, her political beliefs and her torts decisions were attacked by powerful interest groups. But the campaign directed to general public highlighted her capital punishment decisions because, as one reporter noted, “voters could readily grasp one stark fact: Bird had voted consistently to reverse death penalty judgments ... ”¹⁵⁵

During this time, California Attorney General, George Deukmejian became a spokesman for many of the interest groups opposed to Chief Justice Bird. A reporter who covered California politics during those years and subsequently wrote a book about this period notes that attacks against Bird increased noticeably in the years the years that Deukmejian campaigned for the California Governor’s seat.¹⁵⁶ Indeed, Deukmejian promised during his gubernatorial campaign that, once governor, he would work to have her ousted from the Court.¹⁵⁷ Former California Supreme Court Justice William Clark, appointed by former Governor Ronald Reagan and later Reagan’s Chief of Staff, played a key role in making the ousting of Bird a national Republican Party objective.¹⁵⁸

The Governor’s Take: Bigbee as a “Negative Business Impact” Case

¹⁵⁴ Betty Medsger, *The New Right Attack on Chief Justice Rose Bird and the Courts* (Pilgrim Press 1983).

¹⁵⁵ Claire Cooper, *CALIFORNIA JOURNAL*, November 1999, at 16.

One notable exception among the media covering the California Supreme Court was the *Wall Street Journal*. Although it did report on the Bird Court’s reluctance to enforce the death penalty, it was just as concerned with the business civil decisions. Author Medsger, on the other hand, faulted the *Los Angeles Times* for sloppy and unethical reporting on Justice Bird, although she does not mention Bigbee in her book.

¹⁵⁶ Betty Medsger, *The New Right Attack on Chief Justice Rose Bird and the Courts* 242 (Pilgrim Press 1983).

¹⁵⁷ Betty Medsger, *The New Right Attack on Chief Justice Rose Bird and the Courts* 242 (Pilgrim Press 1983).

¹⁵⁸ Betty Medsger, *The New Right Attack on Chief Justice Rose Bird and the Courts* 7 (Pilgrim Press 1983).

Once elected in 1984, Governor Deukmejian fulfilled his campaign promise¹⁵⁹ to work toward ousting Chief Justice Bird. He soon distributed a list of 31 cases decided by the state Supreme Court. These cases, he claimed, were having a “negative impact upon the private sector’s job-producing capabilities.” *Bigbee* was fifth on the list.¹⁶⁰ In his interview with the press, the newly elected Governor evoked images of thousands of businesses retreating from California because of the California Supreme Court’s decision in *Bigbee*.¹⁶¹ In researching the Governor’s cited cases, the *L.A. Times* reported a brief, conclusory statement that *Bigbee* “held a telephone company liable for injuries suffered in one of its phone booths even though the injuries were caused by a reckless driver who ran into the booth.”¹⁶² Like subsequent accounts of *Bigbee*, the *L.A. Times* reported that the opinion had held the telephone company liable, rather than that it (and the other defendants) *could be held liable* by a jury. In addition, for the *L.A. Times* it seemed a foregone conclusion that *Bigbee*’s injuries were caused by Leola Roberts alone. The reporter also neglected to investigate thoroughly the other cases cited by the Governor. If nothing else, the Court’s opinions in eleven of the thirty-one cases were written by Justices who had already left the Court when the Governor distributed the list. In addition, there was room for argument regarding the Court’s anti-business bias¹⁶³

¹⁵⁹ California State Library, Governors of California, *available at* http://www.governor.ca.gov/govsite/govsgallery/h/biography/governor_35.html. (According to the website when asked why he ran for the office of Governor, Deukmejian replied, "Attorneys General don't appoint judges - Governors do." Deukmejian appointed 1,000 judges, and by the time he left office, he had appointed the majority of California State Supreme Court Justices then serving on the bench.)

¹⁶⁰ A-Mark Foundation, Rose Bird pro/con: Other Major Decisions, *available at* <http://www.rosebirdprocon.org/pop/Other.htm> (on file with author)

¹⁶¹ William Endicott, *Governor Cites Cases in Assailing State Court*, L.A.TIMES, Feb. 14, 1985, at A3.

¹⁶² *Bigbee v. Super. Ct.*, 155 Cal. Rptr. 545 (1979).

¹⁶³ A-Mark Foundation, Rose Bird pro/con: Other Major Decisions, *available at* <http://www.rosebirdprocon.org/pop/Other.htm> (on file with author). (“We have reviewed the 31 cases cited and can find no pattern to support the charges of anti-business bias in the Bird court’s decisions making. Three of the 31 cases involved workers’ compensation issues, six involved injury/liability issues, five involved taxation issues, one involved contract liability, two involved issues related to business practices,

Especially because several of the 31 alleged “negative” business impact cases involved more obscure issues like tax law, the *Bigbee* case was perhaps the easiest on the list to capture in a few brief sentences. Moreover, that an obvious evildoer -- the drunk driver -- might have escaped liability, while a public utilities company that provided a service to the community would be forced to pay, could readily be portrayed as irrational and unjust. *Bigbee* was also a useful vehicle for critics to use to explain to a layperson what nightmares might occur were tort reform not undertaken. William McCormick, chairman of the Fireman’s Fund Insurance Company said in an interview with “This Week with David Brinkley,” that the decision dictated that “the phone booth would have to be made of reinforced concrete,” and that the Bird Court had decided that a phone booth “could have been made so strong as to withstand the crash.”¹⁶⁴ When reporters omitted the claim that the door had stuck or the fact that there had been a prior car crash into that telephone booth, it is easy to understand that listeners would be outraged.

From 1985 on, the Republican Party’s version of *Bigbee* became viral. Ronald Reagan’s account to the Tort Reform Association was being relayed to the general public. Although his audience that night numbered only in the thousands, it is important to note

two involved unemployment issues, three involved employer/employee issues, and one involved an environmental issue. ... The following provides a breakdown of the court’s voting record on the 31 cases:
6 (19%) were unanimous votes.
8 (26%) were 6-1 or 5-1 votes.
11 (36%) were 5-2 or 4-2 votes.
6 (19%) were 4-3 votes.
31 (100%)

Chief Justice Bird did not write the lead opinion in any of the six 4-3 decisions. Chief Justice Bird voted with the majority in 28 of the 31 cases and wrote the lead opinion in two of the 28 -- both of which were 6-1 decisions. She did not participate in three of the cases.”)

¹⁶⁴ *The Liability Insurance Crisis, Insurance Crisis, Real or Manufactured? 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs, 99th Cong. 98 (July 23, 1986) (statement of Charles Bigbee). ; The Liability Insurance Crisis, 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs, 99th Cong. 98 (July 23, 1986) (prepared statement of Charles Bigbee).*

that this was an influential audience.¹⁶⁵ Reagan had called on them to make reforms via legislative channels. Almost immediately, the *Bigbee* story became more than a story of negative business impact in California, but a story of the entire civil justice system gone awry.

Bigbee had become a story of intersecting forces. It was a story to justify several top Republican Party agenda items: ousting Chief Justice Rose Bird, reforming the tort system, protecting the insurance industry, keeping business costs low, and ensuring the Republican Party's hold on California, starting with controlling the governor's seat and, in turn, membership on the state Supreme Court.

The Wall Street Journal Briefs Bigbee

No media outlet demonized Rose Bird as extensively as the *Wall Street Journal*. Unlike other press outlets, however, the *Wall Street Journal* assailed the California Supreme Court for its business decisions as much as it did for the Court's death penalty record.

The newspaper published at least three editorials over the course of 11 months which referred to the *Bigbee* decision explicitly. In general, the themes of these editorials were high-minded and rested on the idea of traditional American jurisprudence. The *Wall Street Journal*, perhaps because it catered to a more sophisticated audience, explained *Bigbee* as a decision in derogation of the common law, and Bird's actions, as a violation of Constitutional principles of separation of powers among the branches of government.¹⁶⁶

¹⁶⁵ See Stephen R. Barnett, 71 Cal. L. Rev. 1134, *1135 -1136 (1983)

¹⁶⁶ For example, the Wall Street Journal called the court "the most subversive state court in the country." Editorial, *Capping the Courts*, WALL ST. J., Dec. 3, 1985, at 9. See, also, Robert G. Berger, The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions, AM. U. L.

The first editorial was published two years after the decision was issued and had numerous errors including the circumstances of the accident as well as the date the opinion was issued.¹⁶⁷ The following year, the newspaper again claiming Bird to be a traitor to American jurisprudence, wrote that Bird had, according to the editorial entitled “The Case Against Rose Bird,” “subverted common law, the ancient inheritance of common sense rules of behavior.”¹⁶⁸ The editorial blamed Chief Justice Bird, as well as other judges, for the litigation explosion and insurance crisis, specifically by “undermin[ing] tort law,” and then went on to say that “[o]ne famous case where the Bird Court substituted its notion of fairness for the common law ... was the 1983 *Bigbee v. Pacific Telephone*.”¹⁶⁹

The newspaper’s brief account of Bigbee’s accident not only blamed Leola Roberts “the drunk,” but also disparaged Bigbee. “A drunken driver barreled off a highway slammed into a telephone booth, and injured the plaintiff who was using the phone. The drunk wasn’t worth much in damages, so the plaintiff wanted a shot at deeper pockets.” In a statement that misconstrued Bigbee’s theories on negligent design, the *Wall Street Journal* made no mention of the alleged jammed door or the prior accident, even though it published a Letter to the Editor from a reader who pointed out the *Journal’s* omissions in its last editorial.¹⁷⁰ Even after a reporter interviewed Bigbee’s

REV. 285, 321 (1988).(*Bigbee* cited for the proposition that federal legislation setting limits and standards for tort liability would be preferable to trusting judges to honor common law. Berger argues that the “nakedly arbitrary assignment of fiscal responsibility in the California Supreme Court’s Pacific Telephone/phone booth decision goes beyond acceptable limits.” According to Berger, if rules were left to “mutate unpredictably through common law accretion” rather than by statutes, Americans will “encounter the same trauma in the insurance industry as [deleted] experienced in the savings and loan industry.”)

¹⁶⁷ Jerrold E. Fink, *Letter to the Editor*, WALL ST. J., Dec. 31, 1985, at 9.

¹⁶⁸ Editorial, *The Case Against Rose Bird*, WALL ST. J., Oct. 20, 1986, at 26.

¹⁶⁹ Telephone Interview with Mark V. Berry, Attorney for Western Electric, Inc. (November 3, 2003).

¹⁷⁰ Jerrold E. Fink, *Letter to the Editor*, WALL ST. J., Dec. 31, 1985, at 9.

lawyer, the editorial staff omitted Cacciatore's theories on location and repair, as well as his accounts of misconduct by the defendants during discovery.¹⁷¹ According to the editorial, "[p]hone booths would have to be made of reinforced concrete to withstand such accidents."

The overarching theme of the editorials, however, was that the Court in *Bigbee* had upended tort law. The *Wall Street Journal* was most indignant about Bird's Footnote 14. The editors noted that "redistribution via tort law concept is the big reason for skyrocketing insurance costs." And again, arguing that Bird had ignored precedential case law, called the holding to be an upheaval of the "reasonable foreseeability test" in favor of "conceivable event test." Imposing liability when the Court admitted there was no moral blame, and *because of* the probable availability of insurance to cover Bigbee's injuries, was a flippant disregard of business realities, according to the *Wall Street Journal*. The writer disparagingly called Footnote 14 of *Bigbee*, the "Robin Hood" argument.

When in November 1986, Chief Justice Bird and two of her colleagues also appointed by former Democratic Governor Jerry Brown were voted off the bench, the *Wall Street Journal* was triumphant. They summarized that "[t]he voters said they wanted more judicial restraint and loyalty to the common law," although it is unlikely that many California voters considered or even knew what common law is when they went to the polls.¹⁷² The *Wall Street Journal* also theorized, "the clear message was that voters understand that the tort liability crisis was judge-made and that the judges who

¹⁷¹ Telephone Interview with Thomas P. Cacciatore (May 24, 2004).

¹⁷² Editorial, *Judging the Judges*, WALL ST. J., Nov. 28, 1986, at 10.

created the crisis must go.”¹⁷³ Reviving their *Bigbee* account one last time, the *Wall Street Journal* said, “[f]oremost was her bizarre opinion that someone hit by a drunken driver while in a phone booth could sue the booth’s designer, manufacturer, and installer . . . [d]on’t worry about causation, she wrote, the deep-pocket Defendants’ insurance will cover it.”¹⁷⁴

MR. BIGBEE GOES TO WASHINGTON: SETTING THE RECORD STRAIGHT WITH RONALD REAGAN

In July 1986, Bigbee, then 45, traveled from southern California to Washington to testify at a Congressional subcommittee hearing on tort law.¹⁷⁵ He wanted to set the record straight. In his words, he was there to give “the true facts about [his] injury,”¹⁷⁶ in response to accounts by President Reagan, his administration, and the media. In hearings before the Subcommittee on Economic Stabilization of the Committee on Banking, Finance, and Urban Affairs, Bigbee testified with two other “witnesses” to provide insight on the insurance crisis. The theme of the hearings was, “Insurance Crisis—Real or Manufactured?”¹⁷⁷

Bigbee attended at the invitation of Congressman Falce, chairman of the subcommittee who was investigating the insurance industry and allegations that the Reagan Administration was providing misleading information in its campaign to promote

¹⁷³ Editorial, *Judging the Judges*, WALL ST. J., Nov. 28, 1986, at 10.

¹⁷⁴ Editorial, *Judging the Judges*, WALL ST. J., Nov. 28, 1986, at 10.

¹⁷⁵ *The Liability Insurance Crisis, Insurance Crisis, Real or Manufactured? 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs*, 99th Cong. 98 (July 23, 1986) (statement of Charles Bigbee); RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA (Random House 1996).

¹⁷⁶ *The Liability Insurance Crisis, Insurance Crisis, Real or Manufactured? 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs*, 99th Cong. 98 (July 23, 1986) (statement of Charles Bigbee).

¹⁷⁷ *The Liability Insurance Crisis, Insurance Crisis, Real or Manufactured? 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs*, 99th Cong. 98 (July 23, 1986) (statement of Charles Bigbee).

legal reform. Ralph Nader and others claimed a distortion of injury case examples to suggest unfair claims and excessive jury awards. Accompanying Bigbee was Joan Claybrook, president of Public Citizen, a public interest organization. She substituted for Ralph Nader.¹⁷⁸

Bigbee testified: “I think it is very unfair that the President would distort the story, so they can justify limiting the truth or tell half the story ... of people who have been injured like myself.”¹⁷⁹

Bigbee gave a brief account of the crash. “On October 2, 1974 ... I looked out and saw a car headed in my direction. At the time that I thought I was going to get hit, I pulled at the door and the door would not open. I was basically trapped in the phone booth until the car ran over me. ... I don’t know about the other people here, but I think with your help, people like myself and anybody that’s injured will be justly compensated. It’s not asking for a gift; it’s asking for the truth. And when the truth be told, I don’t see any other way they can render a decision.”¹⁸⁰

In the prepared statement, attached in the appendix, Bigbee gave a postscript to the decision:

“It has taken me ten years to get used to losing my leg. I may not be over it yet. I know I have to accept it or I will be under a mental strain for the rest of my life. I was employed by the City of Los Angeles for ten years at the time of the accident. Now, I’m just trying to get some kind of work so I can feel useful again. I am only 45 years old and I feel like I can continue to work, even though there are limitations as to what I can do.

¹⁷⁸ *The Liability Insurance Crisis, Insurance Crisis, Real or Manufactured? 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs, 99th Cong. 98 (July 23, 1986) (statement of Charles Bigbee).*

¹⁷⁹ *The Liability Insurance Crisis, Insurance Crisis, Real or Manufactured? 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs, 99th Cong. 98 (July 23, 1986) (statement of Charles Bigbee).*

¹⁸⁰ *The Liability Insurance Crisis, Insurance Crisis, Real or Manufactured? 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs, 99th Cong. 98 (July 23, 1986) (statement of Charles Bigbee).*

But the loss of my leg has put a hold on my life and working career. When I was working for the city, I would take tests for promotions or transfers into another department. Who knows where I would be today? And the mental strain caused by dealing with my injury has held me back also. I have frequent nightmares about being run over and losing my leg.”¹⁸¹

Bigbee died in 1994 at the age of 53.

¹⁸¹ *The Liability Insurance Crisis, 1986: Hearings Before the Subcomm. On Economic Stabilization of the House of Representatives Comm. On Banking, Finance, and Urban Affairs, 99th Cong. 98 (July 23, 1986) (prepared statement of Charles Bigbee).*