INTRODUCTION AND FACTUAL SUMMARY.

A. Overview.

On January 21, 1995, a common, garden-variety intersectional accident occurred when a 1988 Dodge Caravan minivan and was struck on its left rear side by a 1987 Toyota Corolla traveling at a speed of approximately 30 miles per hour. *Four passengers in the Chrysler minivan died!*

These people died because they were ejected out of the rear of the minivan as the result of a defective rear door latch which Chrysler knew, long before the accident, to be defective. Long before this accident, Chrysler management reviewed videotapes of Chrysler minivan rear doors popping open at very low speeds. Chrysler engineers chuckled about how they had to use duct tape
to keep the rear door closed during testing in order to protect camera equipment. Long before this accident, the National Highway Traffic Safety Administration ("NHTSA") informed Chrysler that its 1985 to 1994 minivans had "a safety defect involving children." An internal engineering memo from 1990 reveals that Chrysler knew that its latch was, by far, the weakest on the market and explored changing it. Long before this accident, the head of the Chrysler "Minivan Safety Leadership Team" stood up and told Chrysler management that these were bad latches, that they were killing people, and that the latches must be replaced. Chrysler Management responded, "That ship had sailed." Its lawyers warned that replacing the latches would be admissible in pending and anticipated product liability actions and would be detrimental to Chrysler's defense. Chrysler then ordered that the "Minivan Safety Leadership Team" be disbanded and its records destroyed. NHTSA found that the bad minivan latches constituted "a safety defect involving children" and launched a full-scale investigation into Chrysler minivan rear door latches. The mass media, including 20/20, Inside Edition, Current Affair, local TV news and every newspaper in the country, caught word of the story.

Chrysler threatened the head of its Minivan Safety Leadership Team, Paul Sheridan, with termination if he truthfully cooperated with the NHTSA investigation. After Mr. Sheridan cooperated with NHTSA and was interviewed on 20/20, Chrysler fired him. They then tried to silence him with an $84,000,000 lawsuit.

In December of 1994, on the verge of a NHTSA recall order and the ensuing public relations and marketing disaster it would entail, Chrysler's CEO, Chairman, President and Vice-Chairman got together and, according to the "Confidential and Privileged" memo of the meeting, decided to "launch an aggressive effort in Washington to prevent the adverse use of bureaucratic power within NHTSA, specifically their funding from Congress"; "to use political pressure to squash a recall"; and to implement "The Third Approach," i.e., its euphemistically labeled "service campaign" to replace all of the latches in order to "seize the high road" and "to tell NHTSA to pound sand."

One week later, Chrysler drafted a letter to NHTSA for the signatures of two Congressmen who sat on the committee which has oversight over NHTSA, threatening to cut NHTSA’s funding if it failed to change its voluntary recall procedures. The letter was signed and sent by the Congress-
men. NHTSA’s response was dutifully forwarded by the Congressmen to Chrysler. Chrysler’s President wrote the Congressmen “to personally thank you for your involvement on behalf of Chrysler.”

Suddenly, Chrysler was able to cut a deal with NHTSA and avoid a formal recall by implementing “The Third Approach” which allowed it “to tell NHTSA to pound sand.” The “service campaign” itself was a fraudulent charade on its customers and was deliberately deceptive and woefully inadequate.

Nevertheless, any adequate replacement would come too late to save the lives of these four young people who were ejected through the rear door of their 1988 Chrysler minivan in a 30 mph impact.²

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¹Chrysler balks at plaintiffs’ reference to its “service campaign” as a “recall.” However, in telling its dealers what it was doing in January of 1995, this is precisely how Chrysler characterized it, i.e., “Chrysler Corporation today announced that it will voluntarily recall all 1984-1994 model Chrysler, Plymouth and Dodge minivans. . . .” (Emphasis added.) Plaintiffs concur with Chrysler’s characterization.

²All six unbelted passengers who were not ejected sustained minor injuries. All four unbelted passengers who were ejected through the rear door from the rear bench seat died. The fact that the two drivers are responsible for the accident and only minor injuries, and the vehicle is responsible for the ejections and deaths, was long ago recognized by Chrysler itself. Its former Chief Engineer of Auto Safety stated:

“It is also important to distinguish between the cause of the accident and the cause of the injury to the car occupants. The cause of motor vehicle accidents are many . . . . In contrast, the cause of injury to car occupants, once the vehicle is involved in the accident, are much more limited and the vehicle plays a major role. In the typical accident the occupant has been injured because he has been thrown out, perhaps through an open door.”

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“Crash injury data have already shown, as early as 1955, that occupants who were thrown out of the car were much more apt to be severely injured or killed than those that stayed inside in similar accidents. Crash injury data had also shown that occupants were thrown out of the car generally because one or more doors opened during the course of the accident. Thus it appeared likely that keeping the doors closed would help prevent ejection of the occupants and would thus reduce serious and fatal injury to a substantial degree. What was even more important was that the Cornell ACIR studies were subsequently able to show that improvements in door latches were indeed successful in materially reducing the frequency with which doors came open and that there was correspondingly a significant reduction in serious and fatal injury.”
Although there are many Chrysler minivan door latch cases pending throughout the country, this is only the third to go to trial to date. The most recent judgment came five months ago in South Carolina where the jury found Chrysler’s latch to be defective, awarded the parents of six-year-old Sergio Jimenez $12.5 million in compensatory damages and $250 million in punitive damages, i.e., the largest verdict ever in an automobile design defect case. (Jimenez v. Chrysler Corporation, Civil Action No. 2:96-1269-11). The first case to be tried, Abercrombie v. Chrysler Corporation in New Mexico, similarly resulted in a finding that the rear door latch was defective. Due to lack of causation, however, a defense judgment was entered. Here, the only percipient witness to the path of ejection, as well as the chief traffic accident investigator for the City of Los Angeles, have both testified that all four decedents were ejected through the rear of the vehicle. Indeed, the position of the four bodies on the street and sidewalk compels the conclusion that all four were shot out of the rear of the minivan in a “spray” pattern.

Notwithstanding the massive nature of the damages involved, the more significant aspect of the case involves the various claims for punitive damages. By clear and convincing evidence, plaintiffs will show that Chrysler's behavior was malicious, fraudulent, oppressive and despicable, i.e., “conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people.”

B. Nine Plaintiffs And Eleven Claims: Four Wrongful Death Actions, One Survivor Action, One Personal Injury Action, And Five Emotional Distress Actions, With Seven Appended Punitive Damage Claims.

THE PLAINTIFFS:

1. Eva Castaneda: wrongful death of her 15-year-old daughter and successor-in-interest to the personal injury claim of her daughter;

2. Isabel Castaneda: wrongful death of his 15-year-old daughter and successor-in-interest to the personal injury claim of his daughter;

3. Trinidad Martinez: wrongful death of her 18-year-old daughter and emotional distress from witnessing her death;

4. Sergio Perez: wrongful death of his 5-year-old daughter;
5. Trinidad Garcia Perez: wrongful death of her 5-year-old daughter;
6. Margarita Castaneda: emotional distress from witnessing the death of her sister;
7. Blanca Martinez: emotional distress from witnessing the death of her niece;
8. Gabriela Martinez: emotional distress from witnessing the death of her niece;
9. Iscela Ornelas: wrongful death of her mother, emotional distress from witnessing the death of her mother, and personal injuries.

**THE CLAIMS:**

1. **The Wrongful Death Action:**
   
   Four people died as a result of the defective latch:
   
   (a) Beatriz Ornelas, the 21-year-old mother of plaintiff, then 4-year-old Iscela Ornelas, who was left orphaned by the accident (she never knew her father) and is being raised by her grandparents, Bernardo and Maria Ornelas, in their home near Guadalajara, Mexico. Iscela's guardian ad litem is her grandfather, Bernardo Ornelas.
   
   (b) Lorena Castaneda, the 15-month-old daughter of plaintiffs Eva and Isabel Castaneda;
   
   (c) Araceli Martinez, the 18-year-old daughter of plaintiffs Trinidad Martinez;
   
   (d) Diana Perez, the 5-year-old daughter of plaintiffs Sergio and Trinidad Perez.

2. **The Survivor Action.**

   Plaintiffs Eva and Isabel Castaneda also sue as the successors-in-interest to the personal injury claim of their daughter, Lorena Castaneda, who passed away at the hospital.

3. **The Personal Injury Action.**

   Iscela Ornelas received head and orthopedic injuries when she was partially ejected through the rear door.

4. **The Emotional Distress Actions.**

   Five plaintiffs suffered emotional distress as the result of contemporaneously perceiving the deaths of close family members:
   
   (a) Iscela Ornelas witnessed the death of her mother, Beatriz Ornelas;
   
   (b) Trinidad Martinez witnessed the death of her daughter, Araceli Martinez.
(c) Margarita Castaneda witnessed the death of her sister, Araceli Martinez;
(d) Blanca Martinez witnessed the death of her aunt, Araceli Martinez;
(e) Gabriela Martinez witnessed the death of her aunt, Araceli Martinez;

5. The Punitive Damage Claims.

There are seven claims for punitive damages:
(a) The survivor action by Eva and Isabel Castaneda arising out of the personal injury claim of their deceased daughter, Lorena;
(b) The emotional distress claim of Margarita Castaneda;
(c) The emotional distress claim of Blanca Martinez;
(d) The emotional distress claim of Gabriela Martinez;
(e) The emotional distress claim of Iscela Ornelas;
(f) The emotional distress claim of Trinidad Martinez;
(g) The personal injury claim of Iscela Ornelas.³

C. Contributory Fault And Proposition 51.

Of all nine of the plaintiffs and all four of the decedents, only decedents Araceli Castaneda and Beatriz Ornelas can even be accused of contributory negligence. Decedents Lorena Castaneda, Diana Perez and plaintiff Iscela Ornelas were too young, as a matter of law, to be guilty of contributory negligence. The driver of plaintiffs' vehicle, Luisa Martinez, arguably had a statutory duty to ensure seatbelting of her passengers; however, she is not a plaintiff in this action.

Under Proposition 51, defendant Chrysler may attempt to apportion fault to other tortfeasors. It is clear that the accident would not have occurred but for the participation of the two drivers, i.e., Holguin and Martinez. However, the drivers are, at most, responsible for a garden-variety, 30 mph accident and minor injuries (as suffered by the six unbelted occupants who were not ejected). Chrysler is responsible for the resulting carnage.

All six unbelted passengers who were not ejected through the rear door suffered minor injuries, whereas all four unbelted passengers on the rear bench seat who were ejected through the

³Technically, Iscela Ornelas's personal injury and emotional distress claims should be considered a single claim or cause of action.
rear door, suffered fatal injuries from contact with the pavement.

Moreover, the fault of the drivers lies in momentary inattention. Chrysler's fault lies in its intentional decision to save itself some money by exposing the families who use their vehicles to potential catastrophe.

**D. The Issue Of Defect.**

It is not difficult to establish that the Chrysler rear door latch on its minivans was defective. Both juries which had the opportunity to assess the obvious insufficiency of the Chrysler rear door latch have concluded that the design was defective. It was so weak that it was designed to open without even the use of a handle. It was the subject of a lengthy and extensive NHTSA defect investigation, as well as a raft of media articles and TV news magazine programs. Its defectiveness is fairly well known and documented. Chrysler recalled all of its 1984-1994 minivans after it finally changed the design and notified the owners to have the defective latches replaced at Chrysler's expense.

Chrysler manufactured both a passenger minivan and a cargo minivan. The rear door latch on the cargo van was much stronger than the latch on the minivan. The rear latch on the cargo minivan was, in fact, the same latch used on the side doors. Indeed, the rear door latch on the passenger minivan was designed to be opened by merely turning a key without even the engagement of a door handle. The Chrysler minivan was the only one in the industry with a single-stage, rear door latch and the only one without a handle. Chrysler's own 1990 memo acknowledges that it was the weakest on the market and should be replaced.

When Chrysler first started manufacturing minivans, it prevailed on NHTSA to classify them, not as passenger vehicles, but as trucks. As such, the Federal Motor Vehicle Safety Standards regarding passenger vehicles was then inapplicable to Chrysler minivans.

**E. CAUSATION.**

In a number of Chrysler door latch cases, notwithstanding the clear evidence of defect, liability is problematical due to evidence regarding causation. A plaintiff occupying a Chrysler minivan which was demolished by a speeding Brinks truck may have been ejected even if the minivan had been equipped with a nondefective rear door latch. Where eyewitnesses and physical evidence
lead to the conclusion that the injured passenger was ejected, not through the rear door, but through the side window, the clearly-defective rear door latch is not the cause of the injuries.

Here, however, things are different. This is a low-speed, "garden-variety," everyday intersectional accident. Consistent with all of the physical evidence and the testimony of the passengers, both an independent percipient witness and the chief accident investigator for the Los Angeles Police Department have, and will, testify that all four decedents were ejected through the rear door which opened after the latch failed. Each decedent was found lying near to or on the sidewalk in a pool of blood and in a "spray" pattern, i.e., as if they were all shot out of the rear of the minivan at the same time.

Chrysler hired a biomechanical expert to determine whether the decedents were ejected through the rear door. Prior to his deposition, however, this expert was redirected to give opinions on accident reconstruction only. His opinions regarding ejection became protected. The one expert who did agree to help Chrysler on the ejection issue would only say that two of the decedents exited through the rear.

F. PUNITIVE DAMAGES.

Punitive damages are legally recoverable on seven of the causes of action pled in the complaint, i.e., the five emotional distress claims, the personal injury claim, and the survivor action.

1. Factual Overview.

(a) Chrysler Knew Of The Defect And Its Dangers For Ten Years.

For ten years, Chrysler knew that its latches were dangerous and unsafe. As early as 1979, the National Highway Traffic Safety Administration warned that "[s]ome manufacturers are apparently not using proper locking mechanisms (for liftgates and hatchbacks) and thus people are being needlessly killed and injured," citing 15 accidents and 21 injuries. The designer of the latch agreed that "potato chips" being transported in a cargo van had more protection from cargo van door latches than children did from the Chrysler liftgate latch. This same witness explained that, after

The National Transportation Safety Board has concluded its case study of the subject accident. The Case Study reveals that the NTSB, who conducted an independent investigation of the accident, also concluded that all four of the decedents were ejected through the defective rear door.
being informed of one particular rear door ejection accident in 1985, Chrysler drew up plans—which it has since destroyed—to strengthen the whole rear area of the minivan including the latch assembly. The plans were never acted upon.

At least by 1987, Chrysler was aware of claims and lawsuits regarding the inadequacy of the design of the latch. Chrysler continued to become aware in the 1980s and early 1990s that the latches were performing poorly in the field. This awareness was based on a continuing stream of claims and lawsuits. Yet Chrysler failed to act. Instead, it ordered various testing documents to be shredded pursuant to written shredding orders.

Chrysler possessed videotapes of tests demonstrating minivan rear doors popping open at very low impact speeds. They did nothing. Its engineers chuckled at how they had to use duct tape to keep the rear door closed during testing so as to keep camera equipment from being ejected out the rear door.

By July of 1990, Chrysler became aware of about 15 lawsuits regarding its minivan rear door latches. In that same month, a Chrysler engineering memo discussed a comparison of the strength of Chrysler’s rear door latches with those of its competitors. It revealed that Chrysler’s were the weakest on the market. The logistics and cost of strengthening the latch to make it safe were explored. Nothing was implemented.

An internal Chrysler memorandum from “D. Prescott to E. Altmann” states that, prior to 1990, Chrysler asked its latch vendor to conduct developmental tests to upgrade the latch/striker strength and it was determined that the subject latch could easily be made to conform to MVSS #206 (for 20¢ a vehicle). Nothing was done.

In November of 1993, a Mr. Barry Boyd wrote a letter to Robert Eaton and Robert Lutz describing a September 1993 accident where his minivan was struck on the side, the rear hatch flew open, and his child flew out the open hatch (seat, seatbelt and all). Chrysler’s response to Mr. Boyd’s concern about the hatch was to tell Mr. Boyd that his wife should not “pull out in front of people.”

That same month, Chrysler began another study to strengthen the rear latch after being informed of numerous accidents where the latch failed and ejections resulted in serious injury.
or death. Chrysler chose not to inform its customers and not to recall the defective latches or retrofit existing vehicles. A 1993 memo reflected Chrysler’s position that it would not change its latches unless forced to do so by NHTSA.

(b) Chrysler’s “Minivan Safety Leadership Team” Concludes That The Latches Are Defective And Should Be Replaced

The latch problem was studied by Chrysler’s own “Minivan Safety Leadership Team” chaired by Paul Sheridan. The Safety Leadership Team was formed “to prevent death and injury to Chrysler minivan occupants” and to position itself as a “leader in safety.”

With the agreement of all of the members of the minivan Safety Leadership Team, Mr. Sheridan informed Chrysler’s management that the latches were defective, were killing and seriously injuring children seated in the rear bench seat, and urged Chrysler to change the latch. He was told, “That ship had sailed.” To change the latch now would jeopardize Chrysler’s defense in current and future product liability actions. Chrysler’s in-house lawyers told the Safety Leadership Team to not take notes of their meetings.

(c) Chrysler Destroys The Minivan Safety Leadership Team And Its Records.

Then, Chrysler ordered the Minivan Safety Leadership Team to be disbanded and its records shredded. Mr. Sheridan was told: “Your team is dead. That’s all you need to know.” If he cooperated with NHTSA, he would be fired. When NHTSA inquired about the charges made by Chrysler’s own Safety Leadership Team chief, the General Counsel for Chrysler simply lied to the Federal Government by outright denying the safety expert’s involvement with Chrysler minivans.

(d) The NHTSA Defect Investigation.

In September of 1993, NHTSA launched a full-scale defect investigation into the Chrysler minivan rear door latches. A recall of ten years of minivans, numbering in the hundreds of thousands, would have been an economic and public relations catastrophe for Chrysler. When Paul Sheridan cooperated with NHTSA and was interviewed by 20/20, Chrysler fired him while he was out of town during the Christmas holidays of 1994. They then sued him for $84,000,000 for telling the truth.

NHTSA concluded that Chrysler’s latches were the weakest in the industry and
posed a “safety defect involving children.”

(e) Chrysler Devises A Plan To “Mount An Aggressive Effort In Washington”

To Threaten NHTSA’s Funding, “Use Political Pressure To Squash A Recall,” and “To Tell NHTSA To Pound Sand.”

In December of 1994, having just fired the head of its Minivan Safety Leadership Team, Chrysler was facing an imminent NHTSA recall. Chrysler was in a defensive mode. On December 5, 1994, Vice-President Dale Dawkins met personally with the Director of the Office of Defects Investigation for NHTSA to plead Chrysler’s case and to make an oral presentation. On December 13, 1994, this was followed up by Mr. Dawkins sending NHTSA an extensive written presentation. The press was on to the story.

On December 9, 1994, the highest levels of Chrysler got together for a crisis-control “minivan latch meeting.” Attached as Exhibit “A” is the “Confidential and Privileged” memo of that meeting from Vice Chairman Denomme to CEO/Chairman Eaton and President Lutz. The memo sets forth, among others, the following points:

1. Either NHTSA or a consumer group leaked to the press the fact that there was a raging debate within Chrysler on whether to recall the vans or take on NHTSA.

2. Chrysler’s presentation to NHTSA had hopefully “bought us a little time” with NHTSA but that it was “unlikely that we have changed their minds . . . eventually we will be requested to do a recall.”

3. The logistics of a “latch fix” were discussed.

4. Chrysler’s “Take On NHTSA Strategy” was discussed.

5. Focus groups were conducted to gauge consumer reaction to Chrysler’s “Take On NHTSA Strategy.”

6. A “Third Approach” was considered, i.e., a voluntary “service campaign” to replace all of the latches in order “to seize the high ground” and “to tell NHTSA to pound sand.” This would be a “softer and less urgent” way to recall the defective latch which would have the “obvious benefit” to Chrysler of not “admitting to a defect.”

7. The “Final Point is the most disturbing—and the most egregious. The plan
was to: “mount an aggressive effort in Washington to prevent the adverse use of bureaucratic power within NHTSA, specifically their funding from Congress . . .

“If we want to use political pressure to squash a recall, we need to go now.”

What “political pressure” could Chrysler use “to squash a recall” by “an aggressive effort in Washington . . ., specifically [NHTSA] funding”? They used Congressmen Oxley and Dingell, both ranking members of the Congressional Committee which oversees NHTSA, as surrogates. Eight days later, on January 17, 1995, Chrysler drafted a letter for the signatures of Congressmen Oxley and Dingell addressed to the Administrator of NHTSA. The opening paragraph clearly links NHTSA’s funding to a “review of the agencies’ procedure” regarding voluntary recalls, i.e., precisely what Chrysler was facing. NHTSA’s response to Congressman Dingell was promptly forwarded on to Chrysler’s Vice President Dawkins.

Then, on March 30, 1995, after Chrysler suddenly found itself able to cut a deal with NHTSA and institute its “Third Approach” (i.e., a voluntary “service” campaign), Chrysler CEO and Chairman Robert Eaton sent Congressman Oxley a letter “to thank you for your personal involvement on behalf of Chrysler . . .”

Thus, notwithstanding its own acknowledgment that “eventually we’ll be asked to do a recall,” Chrysler maneuvered itself into a position to cut a deal with NHTSA and avoid a

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5While Chrysler sold thousands of minivans to safety-conscious families by pushing its “Car Buyer’s Bill of Rights” (e.g., “every American has the right to a safe vehicle” and “assurance of a manufacturer with the lowest average percentage of safety recalls of the Big Three”), Chrysler was using political pressure to “squash” a recall.

6Before sending the letter off to the Congressmen to be signed, Chrysler’s Al Slechter and Bud Liebler had it reviewed by Chrysler’s highest management including CEO/Chairman Eaton and Vice-Chairman Denomme [“Attached is the letter to Rick Martinez [head of NHTSA] which we have been working on with Hill staff. The final is signed by Mike Oxley and John Dingell.” In the margin, Mr. Liebler cautions, “Hopefully this won’t leak.”] It did.

7To paraphrase Charles E. Wilson, Congressmen Oxley and Dingell obviously believe that “What is good for Chrysler is good for America.” Perhaps Woodrow Wilson was more on point: “Big business is not dangerous because it is big, but because its bigness is an unwholesome inflation created by privileges and exemptions which it ought not to enjoy.” Congressmen Oxley and Dingell are two of the privileges which Chrysler ought not to enjoy.
recall. It would now be allowed to implement its “Third Approach,” i.e., a “service campaign” to replace the latches, “seize the high ground,” and “tell NHTSA to pound sand.” Chrysler’s participatory involvement in American democracy had paid off in spades.

II

PUNITIVE DAMAGES IN PRODUCT LIABILITY ACTIONS

A. The Salutary Role Of Punitive Damages In Promoting Public Safety In Products Liability Cases.

Defendant has previously contended that “punitive damages are disfavored in California.” Not so—especially in mass-produced products liability actions where the manufacturer is aware of the defect and makes a business decision to do nothing about it.

“In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect.”

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“Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable.” Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 810.

“Admitting evidence of no product change or of no withdrawal from the market, on the issue of punitive damages, is consistent with the public policy consideration of Evidence Code section 1151. Failure to make changes in a known defective product, failure to remove such a product from the market does not promote public safety.

“Such conduct is contrary to any policy aimed at promoting or encouraging public safety. Such conduct is admissible evidence on the punitive damage issue in order to provide meaningful consumer protection against the manufacture and distribution of dangerous, defective products.” Hilliard v. A.H. Robbins Co. (1983) 148 Cal.App.3d
“Richards was not punished for a design decision; it had a well-designed product. Due to a manufacturing error, the product did not fit the template for which it was made. Richards knew of this defect, but in order to protect its competitive position against other manufacturers of prosthetic devices, decided to continue to market the defective product anyway. The public policy in favor of product development is unaffected by the award of punitive damages in this case.” *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, 968.

Here, as in *Grimshaw, Hilliard* and *Vossler*, plaintiffs have alleged defendant's “failure to make changes in a known defective product [and] failure to remove such a product from the market . . . .”

**B. Plaintiffs Will Show That “The Defendant Was Aware Of The Probable Dangerous Consequences Of Its Conduct And That It Willfully And Deliberately Failed To Avoid Those Consequences.”**

“In order to justify an award of punitive damages [in a products liability case] on the basis of a conscious disregard of the safety of others, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of its conduct and that it wilfully and deliberately failed to avoid those consequences.” *Hilliard v. A.H. Robbins*, *supra*, 148 Cal.App.3d at 395.

“Product liability cases imposing punitive damages on manufacturers . . . require a conscious disregard of the probable dangerous consequences in marketing the manufacturer's product, not that the manufacturer know the identity of the specified persons who will suffer injury.” *Ramona Manor Convalescent Hospital v. Care Enterprises* (1989) 177 Cal.App.3d 1120, 1141.

“Through the results of the crash tests Ford knew that the Pinto’s fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging
in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford’s institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford’s conduct constituted ‘conscious disregard’ of the probability of injury to members of the consuming public.”

* * *

“The jury in the present case could reasonably infer that defendants acted in callous disregard of plaintiffs’ rights, knowing that their conduct was substantially certain to vex, annoy, and injure plaintiffs. Such behavior justifies the award of punitive damages.”


This is precisely what plaintiffs will show, here.

C. Post-Accident Conduct Has Repeatedly, And Consistently, Been Held To Be Admissi-

ble On The Issue Of Punitive Damages In California.

Although defendant Chrysler has not done so here, in the _Jimenez_ action it attempted to argue that evidence of its post-accident conduct was inadmissible. Finding that such a contention was contrary to the majority rule, and the law in South Carolina in particular, the evidence was allowed in _Jimenez_. Here, California law is quite explicit on the matter.

In _Hilliard v. A.H. Robbins & Co._ (1983) 148 Cal.App.3d 374, a product liability action involving an allegedly defective IUD, our Second District Court of Appeal held that the trial court prejudicially erred by excluding evidence of the defendant manufacturer’s conduct occurring after the date the IUD was removed from the plaintiff.

“... The trial court ruled that evidence that defendant Robins had taken the Dalkon Shield off the United States market on June 28, 1974 was not relevant. The trial court also excluded evidence that Robins withdrew the Dalkon Shield from the domestic market in June 1974, _under some pressure from the federal Food and Drug Administra-
tion (FDA)._ The trial court set an evidentiary cutoff date of May 1974 of Robins’ activities with Dalkon Shield. This was the date the IUD was removed from plaintiff.

[^8]: Here, Chrysler instituted its “service campaign” to replace all of the latches “under some pressure from” NHTSA.
These rulings prevented plaintiff from presenting evidence of Robins’ subsequent activities in connection with her punitive damage claim.

"The evidence rulings were made during the trial while the punitive damage issue was still before the jury. The rulings were erroneous.

"The excluded evidence was in each situation relevant. (Evid. Code, § 210.) . . . Evidence that defendant Robins took the Dalkon Shield off the domestic market as the result of some pressure or activity by the FDA in June 1974 is relevant if Robins was aware of the reasons of the FDA in seeking the removal of this device from the market because this evidence has a tendency in reason to prove that Robins, aware of the probable dangerous consequences of the product, wilfully and deliberately failed to avoid those consequences until pressured by the FDA. Evidence of any conduct by defendant, in continuing to manufacture and market the Dalkon Shield without change, in the United States, or elsewhere, aware of the probable dangerous consequences of the IUD, is evidence having a tendency in reason to prove Robins wilfully and deliberately failed to avoid these consequences. Evidence that Robins failed to adequately test the Dalkon Shield before marketing it or during marketing is evidence that Robins acted with conscious disregard for the safety of others.” (Emphasis added.)

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“All of the evidence has strong probative value to show malice of defendant Robins under the conscious disregard concept which is the main factor for the jury to consider in awarding punitive damages. [Citation.] . . . As already pointed out the malice or conscious disregard concept was and is a main issue in the punitive damage part of plaintiff’s case and the rejected or excluded evidence permitted a strong, a powerful inference of the existence of elements of the conscious disregard concept of malice. [Citation.] The evidence was cumulative but necessary to plaintiff’s burden of proof because evidence of the repeated instances of this conduct by Robins is evidence of Robins’ conscious disregard of the safety of others, Robins’ awareness of the probable dangerous consequences of its conduct and its Dalkon Shield, and Robins’ wilful and
deliberate failure to avoid said consequences. Exclusion under Evidence Code section 352 was or would be an abuse of discretion because the prejudice to defendant Robins is substantially outweighed by the probative value of the evidence on the issue of malice.

"Finally, we consider whether the evidence of conduct or activities of defendant Robins in manufacturing and marketing the Dalkon Shield subsequent to the IUD being placed in plaintiff, subsequent to the IUD being removed from plaintiff, and subsequent to the IUD being removed from the domestic market is admissible. We hold that it is admissible on the issues of malice and punitive damages. Proffered evidence which deals with events occurring after a plaintiff had last used the product is generally inadmissible. On the issue of malice and punitive damages, however, the plaintiff may present any evidence which would tend to prove the essential factors of the conscious disregard concept of malice. This includes evidence of subsequent activities and conduct of defendant Robins. (Blank v. Coffin (1942) 20 Cal.2d 457, 463 [126 P.2d 868]; emphasis added.)

"In proving that defendant Robins acted in conscious disregard of the safety of others, plaintiff Hilliard was not limited to Robins’ conduct and activities that directly caused her injuries. The conscious disregard concept of malice does not limit an inquiry into the effect of the conduct and activities of the defendant on the plaintiff, the inquiry is directed at and is concerned with defendant’s conduct affecting the safety of others. Any evidence that directly or indirectly shows or permits an inference that defendant acted with conscious disregard of the safety or rights of others, that defendant was aware of the probable dangerous consequence of defendant’s conduct and/or that defendant wilfully and deliberately failed to avoid these consequences is relevant evidence.”

(Hilliard at pp. 398-401.)

In concluding that Evidence Code section 1151 (precluding evidence of subsequent remedial measures to prove negligence), did not render post-sale evidence inadmissible, the Hilliard court reasoned as follows:

"The policy purpose of Evidence Code section 1151 is to exclude evidence of
affirmative remedial or precautionary conduct. The policy consideration was not to exclude evidence of the failure to make changes in a defective product or the failure to withdraw a dangerous product from the market. Admitting evidence of no product change or of no withdrawal from the market, on the issue of punitive damages, is consistent with the public policy consideration of Evidence Code section 1151. Failure to make changes in a known defective product, failure to remove such a product from the market does not promote public safety.

“Such conduct is contrary to any policy aimed at promoting or encouraging public safety. Such conduct is admissible evidence on the punitive damage issue in order to provide meaningful consumer protection against the manufacture and distribution of dangerous, defective products. ‘Punitive damages . . . remain as the most effective remedy of consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expense of doing so . . . .' (Grimshaw v. Ford Motor Co., supra, 119 Cal.App.3d 757, 810.)” (Id. at pp. 401-402.)

*Hilliard* has been cited with approval and applied in both *Wesi v. Johnson and Johnson* (1985) 174 Cal.App.3d 831, 868 (affirming a $10 million punitive damage award based on a tampon which caused toxic shock syndrome) and *Barajas v. USA Petroleum Corp.* (1986) 184 Cal.App.3d 974, 990 ["We have determined that the court did not err in allowing evidence concerning claims of USA wrongdoing with respect to safety of workers at its plant. Plaintiffs attempted to prove that USA operated its plant with a conscious disregard for their safety, to obtain punitive damages within the meaning of Civil Code section 3294. In overruling appellant’s objection, the trial court relied on *Hilliard v. A.H. Robins co.* (1983) 148 Cal.App.3d 374, 395, 399-401 [196 Cal.Rptr. 117], which allows the introduction of such events in an attempt to show conscious disregard.”]

Respectfully submitted,

GRASSINI & WRINKLE
A Law Corporation
By
ROLAND WRINKLE
Attorneys for plaintiffs
PLAINTIFFS' COMBINED OPPOSITION TO DEFENDANTS' MOTIONS IN LIMINE, AND TRIAL BRIEF

I

INTRODUCTION

Defendants have filed eleven untimely motions in limine and a trial brief regarding the consumer expectation test. For the sake of convenience, plaintiffs will not file eleven separate opposition briefs and a separate responsive trial brief. Rather, plaintiffs will respond to all twelve briefs in the same document, addressing each motion or brief under a separate index tab indicating the motion or brief to which it is addressed.

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SEVERAL MONTHS AGO, THE SECOND DISTRICT PROVIDED IMPORTANT GUIDANCE TO TRIAL COURTS REGARDING THE HANDLING OF MOTIONS IN LIMINE IN LIGHT OF RECENT TRENDS.

The recent Second District decision in Kelly v. New West Federal Savings (Sept. 20, 1996) 49 Cal.4th 659 (copy attached for the Court's convenience), extensively discusses the uses and abuses of motions in limine. In Kelly, the plaintiff sued the defendants following an accident allegedly caused by a defective elevator. At her two depositions, the plaintiff testified the accident occurred in the smaller of two elevators. After discovery disclosed that defendants had worked on the large elevator on the day of the accident prior to the accident and worked on it again following the accident, plaintiff's counsel became concerned that the accident might have actually occurred on the large, not the small, elevator and so notified the defendants. Defendants filed numerous motions in limine including two (Nos. 1 and 11) directed to precluding plaintiff and her expert, based on plaintiff's deposition testimony, from testifying about the large elevator. The trial court granted both motions and a judgment for nonsuit followed.

In reversing the trial court, Division Four of the Second District had much to say about the use and abuse of motions in limine:

"In recent years, the use of motions in limine has become more prevalent, primarily by defense counsel to address a number of perceived concerns. It is not uncommon for the trial court to be presented with in excess of ten separate motions in limine."

* * *

"... [M]any of the motions filed by Amtech were not properly the subject of motions in limine, were not adequately presented, or sought rulings which would merely be declaratory of existing law or would not provide any meaningful guidance for the parties or witnesses. For example, motion No. 19 sought to `... exclude any testimony of the plaintiffs which is speculative.' No factual support or argument was presented to suggest the nature and type of speculative testimony which Amtech
expected to be elicited from plaintiffs. Motions No. 8, 20 and 21 sought to exclude evidence of prior incidents unless an appropriate foundation was established to show the relevance of such evidence or that the prior incidents were similar in nature to the incident involved in the suit. Again, no factual support was presented in connection with the motions, meaning the court would have to rule in a vacuum. Motion No. 7, previously referred to, sought to limit the opinions of plaintiff's experts to those 'rendered at deposition and in written reports.' Again, there was no supporting evidence to suggest what opinions had been rendered at the depositions, leaving the court and the parties to guess what opinions during trial may be included within the scope of the ruling. Motion No. 6 sought an order precluding plaintiffs from calling any witnesses 'not previously identified in plaintiffs' discovery responses.' Absent a meaningful and expressed belief that this may occur, this was a meaningless motion unless and until plaintiffs attempted to call such witnesses. [Footnote 3 reads as follows: “While pages of deposition transcript were attached to a few of the motions, there was no factual support by way of declaration or affidavit in support of any of these motions or to authenticate the pages attached to the motion. Motions in limine, to the extent that they rely upon a factual foundation, are no different than any other pretrial motion and must be accompanied by appropriate supporting documents. Absent an appropriate factual showing to support the motion, the court should not entertain the motion.”]

Similarly, defendant Chrysler's Motion In Limine No. 5 seeks to preclude "Any Testimony On Issues Of Duty And Any Other Question Of Law To Be Determined By The Court."

Similarly, defendant Chrysler's Motion In Limine No. 3 seeks to preclude "Evidence Regarding Other Lawsuits And/Or Claims" and its Motion In Limine No. 9 seeks to preclude "Any Articles, Statements, Data, Tests, Recorded Complaints And/Or Studies Regarding Alleged Liftgate Latch Failures Or Liftgate Openings." As to both motions and as in Kelly, "no factual support was presented in connection with the motions, meaning the court would have to rule in a vacuum."

Similarly, defendant Chrysler's Motion In Limine No. 7 seeks to preclude "Facts, Evidence And/Or Documents Which Were Not Disclosed In Discovery." Here as well, "the court and the parties [are left] to guess what opinions during trial may be included within the scope of the ruling."

Here, as well, no factual support is offered relative to any of defendant's eleven motions.
"Under appropriate circumstances, a motion in limine can serve the function of a "motion to exclude" under Evidence Code section 353 by allowing the trial court to rule on a specific objection to particular evidence. . . . [¶] In other cases, however, a motion in limine may not satisfy the requirements of Evidence Code section 353. For example, it may be difficult to specify exactly what evidence is the subject of the motion until that evidence is offered. Actual testimony sometimes defies pretrial predictions of what a witness will say on the stand. Events in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code section 353. As we observed in People v. Jennings [(1988) 46 Cal.3d 963], "[U]ntil the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (46 Cal.3d at p. 975, fn. 3.) In these kinds of circumstances, an objection at the time the evidence is offered serves to focus the issue and to protect the record.' (People v. Morris, supra, 53 Cal.3d at pp. 188-190.)" (Kelly, at 670-671.)

Here as well, with respect to the majority of defendants' motions in limine, the issues addressed therein are better ruled upon when "the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice." The Court should not be compelled to rule in a vacuum.

There is yet another danger in "pre-trying" the case through motions in limine. In Kelly, supra, the trial court granted defendants' motion in limine to preclude plaintiffs' expert from testifying to any opinion not rendered in his deposition and, then, after conducting an Evidence Code section 412 hearing on the expert's competence to testify at all, precluded his testimony entirely. In reversing, the Second District stated as follows:

"This outcome demonstrates another danger inherent in motions in limine if they are not carefully scrutinized and controlled by the trial judge. Amtech was able to successfully guide the court's attention away from the expressed limited nature of the proceeding, to determine if Scott had previously given testimony at his deposition which may support the use of res
ipsa loquitur, and turn it into a hearing relating to Scott's overall competence to testify. There was no notice or adequate warning to plaintiffs' counsel that the court would ultimately consider issuing an order that his expect could not testify at all. This was a matter of overreaching by counsel for Amtech and an abuse of discretion by the trial court.” (Id. at 678.)

It is respectfully submitted that defendants' eleven motions in limine should be considered in light of the guidance provided by *Kelly*. 
DEFENDANTS' MOTION IN LIMINE NO. 1, RE: THE CONSUMER EXPECTATION TEST, AND DEFENDANTS' TRIAL BRIEF RE: THE CONSUMER EXPECTATION TEST.

I

INTRODUCTION.

Defendants' Motion in Limine No. 1 and their Trial Brief address the identical issue, i.e., the applicability of the consumer expectation test to the facts of this case. Both parties agree that the consumer expectation test applies "when the circumstances of the product's failure permit an inference that the product's design performed below the legitimate commonly accepted minimal safety assumption of its ordinary uses." (Soule v. General Motors Corp. (1994) 8 Cal.4th 548; see defendants' Trial Brief, p. 3.) Where the parties disagree is as to whether the ordinary consumer of a family minivan can have reasonable expectations that the rear door of this family-oriented vehicle would fly open during a garden-variety intersectional collision. The facts are clearly in dispute. The parties will not agree on the reconstruction of the accident. The Court is, once again, being asked to rule in a vacuum in the absence of any evidence whatsoever.5

II

BRESNAHAN AND SOULE.

The parameters of the applicability of the consumer expectation test were recently set as the result of two decisions: (1) Soule, supra (holding the test inapplicable to the facts presented); and (2) Bresnahan v. Chrysler Corp. (1995) 32 Cal.App.4th 1559 (finding the test applicable).

In Soule, the plaintiff fractured her ankle under the following circumstances:

"The collision bent the Camaro's frame adjacent to the wheel and tore loose the bracket

5 Indeed, defendants' brief is not focused at all on the facts of this case. Rather, it is merely a "canned" brief filed in a different case. Thus, defendants argue that "this court . . . must reject the application of the consumer expectation test to plaintiff Alan Grossman's product liability claims." (Emphasis added.) Of course, Alan Grossman is not a party to this litigation.
that attached the wheel assembly (specifically, the lower control arm) to the frame. As a result, the wheel collapsed rearward and inward. The wheel hit the underside of the 'toe pan'—the slanted floorboard area beneath the pedals—causing the toe pan to crumple, or 'deform,' upward into the passenger compartment.” (Id. at 557.)

In Bresnahan, the plaintiff fractured her arm when her air bag inflated in a collision, causing her arm to become caught between the air bag and the window pillar.

In Soule, the Court reasoned as follows:

“Plaintiff's theory of design defect was one of technical and mechanical detail. It sought to examine the precise behavior of several obscure components of her car under the complex circumstances of a particular accident.”

***

“... Nor would ordinary experience and understanding inform such a consumer how safely an automobile's design should perform under the esoteric circumstances of the collision at issue here.” (Id. at 570.)

In Bresnahan, the Court concluded that “an ordinary consumer would be capable of forming an expectation, one way or the other, about whether the design of the “air bag-equipped automobile satisfied minimal safety expectations in causing that result.” (Id. at 1569.)

As noted in Bresnahan, “ordinary experience may well advise a consumer what measure of safety to expect from her car's side windshield assembly and air bag . . . .” (Id. at 1568.)

Here, similar to the airbag in Bresnahan and unlike the welds of the toe pan in Soule, the ordinary consumer is able to have a reasonable expectation that the rear door of a family minivan will not pop open during a low-speed, garden-variety collision.6

Put another way, when asked whether he or she would expect an air bag to fracture the driver's arm, or the rear door of a family minivan to spring open during a routine collision, the ordinary consumer would respond by saying, “Yes, I have an expectation on that,” whereas the ordinary consumer, when asked about whether the welds on the toe pan would hold when the adjacent wheel

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6 The non-ejected occupants of plaintiffs' vehicle received minor, if not negligible, injuries.
THE CONSUMER EXPECTATION TEST HAS BEEN HELD TO APPLY TO CRASHWORTHINESS AND OCCUPANT RESTRAINT CASES.

Defendants urge that "a crashworthiness case such as presented here is an example of the type of case in which the consumer expectation test should not be applied . . . ." (Defendants' Brief, p. 5.) Defendants simply ignore the holding in *Bresnahan v. Chrysler Corp.*, supra, 32 Cal.4th 1559 (remand to allow air bag injury case to proceed on theory of consumer expectation).

In *Bresnahan*, the plaintiff's elbow was fractured when her vehicle air bag inflated during an accident. At trial, defendant Chrysler convinced the trial court to grant a motion in limine that plaintiff "not be allowed to present her case under the alternative Barker test of 'consumer expectations.'" Chrysler contended that the passive restraint air bag was a new product and technology, with whose dynamic operation, including instantaneous deployment, ordinary consumers were not familiar, and the acceptability of which they could not decide without understanding its relative risks and benefits." (Id. at p. 2943.)

The Second District Court of Appeal then applied the *Soule* decision to injuries allegedly suffered as the result of defective occupant restraint systems during vehicular collisions, i.e., a "crashworthiness" theory.

"We believe that, on the showing before us, an ordinary consumer would be capable of forming an expectation, one way or the other, about whether the design of the highly publicized and by now commonplace product of an air bag-equipped automobile satisfied minimal safety expectations in causing that result (assuming that it was the cause). Plaintiff's theory here does not pose the consumer unawareness that attended the design defect claim in *Soule*. In contrast to *Soule*'s complex and murky situation regarding the crashworthiness of wheel brackets and frames, ordinary experience may well advise a consumer what measure of safety to expect from her car's side windshield assembly and air bag in a minor rear-end collision.
“Chrysler poses a number of contrary considerations that are not dispositive. First, the fact that relatively few consumers may have experienced the deployment of an air bag is not disabling. The same point could be made in any case where a product performed in an unusual manner, or where safety equipment was triggered. What is germane is whether the 'everyday experience' of the consumer permits him or her to entertain minimum safety expectations, or the product's performance under foreseeable circumstances. (Soule, supra, 8 Cal.4th at p. 567.) We believe that an ordinary consumer is so equipped to form expectations of the safety of a car with an air bag in a minor rear-end collision.” (Bresnahan, at 1569; emphasis added.)

Defendant Chrysler's position, here, is wholly incompatible with, and was rejected in, Bresnahan and Soule.

Defendants cite Soule v. General Motors Corp. (1994) 8 Cal.4th 548, in support of their argument that the consumer expectation test does not apply to automotive crashworthiness cases. To the contrary, the court in Soule rejected this argument when advanced by General Motors “that the consumer expectation test is improper whenever 'crashworthiness,' a complex product, or technical questions of causation are at issue.” 8 Cal.4th at 568.

The court in Soule explained as follows:

"[W]e cannot accept GM's insinuation that ordinary consumers lack any legitimate expectations about the minimum safety of the products they use. In particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers. In such cases, a lay jury is competent to make that determination.” 8 Cal.4th at 569.

The applicability of consumer expectation in the automobile occupant restraint case was further elucidated and encouraged by Bresnahan, on the following facts:

“Plaintiff proposed to prove that under the foreseeable circumstances of the accident (see Id. at p. 560, 34 Cal.Rptr.2d 607, 882 P.2d 298), her vehicle's design, specifically the air bag feature in conjunction with the placement of the windshield, performed in a manner below the safety expectations of an ordinary consumer, when it forced plaintiff's arm into a series
of injurious 'internal' collisions with the interior of the car (the same nature of impacts the air bag was intended to avert). We believe that on the showing before us, an ordinary consumer would be capable of forming an expectation, one way or the other, about whether the design of the highly publicized and by now commonplace product of an air bag-equipped automobile satisfied minimal safety expectations in causing that result (assuming that it was the cause)."

If an ordinary consumer is able to form minimal safety expectations regarding air bags that involve relatively new technology, surely they cannot be said to be incapable of forming minimal safety expectations for the doors on their family vehicle.

III

IN ARGUING AGAINST APPLICATION OF THE CONSUMER EXPECTATION TEST, DEFENDANTS CONFUSE THE SEPARATE ISSUES OF DEFECT AND CAUSATION.

Defendants argue that the consumer expectation test should not apply here because it involves "esoteric questions concerning the extent of injuries that ordinarily should be sustained as a normal consequence of such collisions"; and "an ordinary consumer would not know what injuries to expect in a particular collision." (Defendants' Brief, pp. 7-8.)

Defendants confuse defect and causation. The consumer expectation test is used to determine the issue of defect. It has nothing to do with the jury's determination of the "enhanced" injuries sustained in a "crashworthiness" case. In *Soule*, the court clearly separates its discussion of the consumer expectation test under the heading "The test for design defect" from its discussion of "enhanced" injuries under the heading "Causation instruction". The former has nothing to do with the latter. Simply because the ordinary consumer may not have a reasonable expectation as to "what injuries to expect in a particular collision" is irrelevant to the separate issue of whether the ordinary
consumer could expect the rear door to fly open. 7

Finally, defendants discuss extensively their contention that “the courts have also stressed the need for expert testimony regarding the more complex subjects of injury causation and accident reconstruction.” (Defendants' Motion No. 1, p. 3.) Again, plaintiffs do not contend that the consumer expectation test is a substitute for evidence of “injury causation or accident reconstruction.” These issues have nothing whatsoever to do with the sole issue involved in the consumer expectation test, i.e., defect.

7 Defendants also argue the “ordinary consumer cannot determine when the latch failed during the accident sequence and the quality of force required to do so. Therefore, the consumer expectation test does not apply to this action.” (Defendants' Motion No. 1, p. 7.) Again, defendants miss the point. The consumer expectation test is used to determine the issue of defect—not causation, i.e., when the latch failed.
DEFENDANTS' MOTION IN LIMINE NO. 2, RE: PHOTOGRAPHS TAKEN OF THE DECEDENTS.

I

THE PHOTOGRAPHS OF THE DECEDENTS SHOWING THEIR LOCATION AT THE SCENE AND THE NATURE AND EXTENT OF THE INJURIES SUFFERED ARE CRUCIAL TO THE CONTESTED ISSUES OF WHETHER THE DECEDENTS WERE EJECTED THROUGH THE REAR DOOR OPENING OR SIDE WINDOW AND WHETHER THEY DIED UPON EJECTION OR WERE KILLED PRIOR TO EJECTION.

In order to defeat the element of causation, defendants contend that the defective latch was not a causative factor in the four deaths because (1) the decedents were ejected through the side windows, and/or (2) the decedents died prior to ejection. Experts have testified that the positions of the bodies at the accident scene are indicative of ejection through the rear of the vehicle and that these injuries and the accumulation of blood on the pavement surrounding their heads, as demonstrated in these photographs, is probative of the fact that the four passengers died because of being ejected.

As unpleasant as these photographs may be, they are critical to two issues of causation. Defendants should not be able to argue that the decedents died prior to ejection and came out of the side windows, while excluding critical evidence refuting these contentions—simply because, in a wrongful death case, they depict death.

Alternatively, the photographs are relevant to plaintiffs' claims for wrongful infliction of emotional distress from witnessing the deaths.
DEFENDANTS' MOTION IN LINE NO. 3, RE: OTHER LAWSUITS AND/OR CLAIMS.

I

INTRODUCTION

Defendants seek to exclude all evidence of other claims of failed rear door latches on their minivans.

In 1979, the National Highway Traffic Safety Administration warned that “Some manufacturers are apparently not using proper locking mechanisms (for liftgates and hatchbacks) and thus people are being needlessly killed and injured,” citing 15 accidents and 21 injuries. After a 1985 accident, Chrysler initiated a major design study to see what it would take to substantially strengthen the latches on the rear doors of their minivans. No design changes were made. By July of 1990, Chrysler became aware of about 15 lawsuits regarding its minivan rear door latches.

By November of 1993, Chrysler began another study to strengthen the rear latch after being informed of numerous accidents where the latch failed and ejections resulting in serious injury or death. Chrysler chose not to inform its customers and not to recall the defective latches or retrofit existing vehicles. NHTSA concluded that Chrysler's latches were the weakest in the industry and posed a “safety defect involving children.” On March 27, 1995—three months after the subject accident—Chrysler announced a “Service Campaign” to repair all 1984-1994 Chrysler Minivan rear door latches.

At least by 1987, Chrysler was aware of claims and lawsuits regarding the inadequacy of the design of the latch. Chrysler continued to become aware in the 1980s and early 1990s (up until the NHTSA defect inquiry on September 30, 1993) that the latches were performing poorly in the field. This awareness was based on a continuing stream of claims and lawsuits. Yet Chrysler failed to act.

Chrysler's failure to recall or replace the defective 1984-1995 Minivan rear door latches when it knew or should have known of their dangerous impact characteristics represented a clear and conscious disregard for the safety of others. During the two-year NHTSA defect investigation (September 1993 through October 1995), Chrysler management failed to properly disclose all of the
information it possessed regarding claims and lawsuits involved with the Chrysler Minivan rear door latches.

Evidence of other claims and lawsuits is relevant to at least three issues presented in this case:

1. Defect;
2. Notice (for purposes of negligence liability); and
3. Conscious disregard (for purposes of punitive damages).

II

AS IN KELLY, DEFENDANTS ARE ASKING THE COURT TO “RULE IN A VACUUM.”

As discussed above, the Second District recently discussed the misuse of motions in limine in Kelly v. New West Federal Savings (Sept. 20, 1996) 49 Cal.4th 659:

“... [M]any of the motions filed by Amtech were not properly the subject of motions in limine, were not adequately presented, or sought rulings which would merely be declaratory of existing law or would not provide any meaningful guidance for the parties or witnesses. For example, ... [m]otions No. 8, 20 and 21 sought to exclude evidence of prior incidents unless an appropriate foundation was established to show the relevance of such evidence or that the prior incidents were similar in nature to the incident involved in the suit. Again, no factual support was presented in connection with the motions, meaning the court would have to rule in a vacuum.” (Id. at 671.)

Precisely the same considerations pertain here.

III

PRIOR COMPLAINTS IN A PRODUCTS LIABILITY ACTION ARE RELEVANT TO THE ISSUE OF PUNITIVE DAMAGES.
In the face of a flood of complaints and lawsuits concerning its defective latch, Chrysler continued to refuse to recall the latch, replace it, or warn its customers. Prior complaints are clearly admissible on the issue of punitive damages.

Indeed, in *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 411, the Court held that evidence of defendant's activities regarding the Dalkon Shield IUD after the plaintiff had the device removed was relevant and admissible for the purposes of punitive damages.

"The plaintiff had the burden of showing that defendant Robins acted with conscious disregard of the safety of others when it was aware of the probable dangerous consequences of its conduct and wilfully and deliberately failed to avoid those consequences. [Citation.] [¶] On the issue that defendant wilfully and deliberately failed to avoid the consequences, evidence is admissible of its subsequent conduct to show that it continued to sell the devices without change and with an awareness of its probable dangerous consequences." (Ibid.)

Courts uniformly hold that evidence of prior incidents is relevant to the issue of punitive damage.

"Where it was alleged that with reckless indifference to the consequences, appellant failed to perform its duty to avoid the threatened injury, evidence that appellant knew from complaints of similar incidents that the probable consequence of a certain defect would be to inflict injury was relevant to the question of malice or wanton misconduct." *Skil Corporation v. Lugsdin* (1943) 168 Ga.App. 754, 755, 309 S.E.2d 921, 922.

"TPI also asks that we grant a motion in limine keeping out any evidence of similar occurrences. It fears jury confusion and possible prejudice. . . . Evidence of prior occurrences is admissible to establish the unreasonably dangerous qualities of a defective design of a product for purposes of strict liability. [Citation.] Plaintiffs also seek punitive damages for willful and wanton conduct, and evidence of prior occurrences is admissible to show that a defendant was on notice of a dangerous condition in its product which will probably result in further injury if nothing is done." *Bastian v. TPI Corporation* (N.D.Ill. 1987) 663 F.Supp. 474, 477.

"The purpose of the admission of prior occurrences to establish punitive damages in
products liability cases is to show that the manufacturer had or should have had knowledge of harm inflicted on consumers by its product and with flagrant indifference to public safety failed to warn consumers of or remedy the defect.” *Loitz v. Remington Arms Company, Inc.* (1988) 177 Ill.App.3d 1034, 532 N.E.2d 1091, 1108.

“Circumstantial evidence is admissible to establish motive, knowledge or state of mind since direct evidence on such facts is rarely available. *(Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 923, fn. 6 [148 Cal.Rptr. 389, 582 P.2d 980]; Bertero v. National General Corp. (1974) 13 Cal.3d 43, 66 [118 Cal.Rptr. 184, 529 P.2d 608, 65 A.L.R.3d 878].) The fact that Ford fired a high ranking engineering executive for advocating automotive safety was indicative of Ford management's attitude towards safety in automobile production and was thus relevant to the issue of malice. It had a tendency in reason to prove that Ford's failure to correct the Pinto's fuel system design defects, despite knowledge of their existence, was deliberate and calculated.” *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 787-788.

The present case mirrors *Grimshaw*. Evidence of prior complaints is admissible to show a conscious disregard of safety.

**IV**

**EVIDENCE OF OTHER ACCIDENTS AND COMPLAINTS ARE ADMISSIBLE TO SHOW DEFECT AND NOTICE “IF THE PREVIOUS INJURY IS SUCH AS TO ATTRACT THE DEFENDANT'S ATTENTION TO THE DANGEROUS SITUATION.”**

Evidence of other accidents is admissible to prove a defective condition, knowledge or the cause of an accident, providing the circumstances are similar and not too remote. *(Kopfinger v. Grand Central Public Market (1964) 60 Cal.2d 852, 861.) When the evidence is offered only to show notice, the requirement of similarity is “relaxed” if the previous injury is “such as to attract the defendant's attention to the dangerous situation.” *(Hasson v. Ford (1982) 32 Cal.3d 388, 404; Elsworth v. Beech Aircraft (1984) 37 Cal.3d 540, 555.)*
For purposes of proving a defect, the requirement of substantial similarity should apply only to the cause of the failure and not to the factual circumstances under which it occurred. For example, in *Perkins v. Superior Court* (1981) 118 Cal.App.3d 761, the defendant battery manufacturer sought to limit the plaintiff's discovery of other accidents and complaints to batteries of the same make and model number and circumstances similar to the subject facts, i.e., cases involving accidents where a person was pulling a stuck battery cap. The Court of Appeal rejected defendant's restrictions. The court pointed out that accidents may occur under varying circumstances yet still be caused by a common defect. Evidence of such other occurrences could therefore tend to establish a defect.

As the court in *Perkins* recognized, a plaintiff need not establish substantial similarity to the accident facts. While circumstances of product failures may vary, if the failures result from a substantially similar cause, the evidence may establish the existence of a common defect.

In *Hasson v. Ford Motor Company*, supra, 32 Cal.3d 388, the trial court admitted into evidence letters sent to Ford Motor Company describing incidents of brake failure in 1965 and 1966 Continentals. One letter advised that a toll road had been closed to Continentals as a result of reports of brake failures. Another letter complained of brake failure, and there was evidence that two Continental owners had related instances of brake failure.

On appeal, Ford argued that such evidence should have been excluded because the circumstances were not similar enough to the accident in question. The court found the evidence was properly admitted, holding that the requirement of similarity of circumstances is relaxed when such evidence is offered to prove notice:

"The evidence was offered as proof that Ford had notice that the fluid boil problem persisted after the brake system was modified by the addition of different brake fluid and the vented dust shield . . . .

"When evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: 'All that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation. . . .' [Citation; emphasis added.]

"It does not appear that the evidence was improperly admitted; there were sufficient facts
from which the jury could have justifiably inferred that these post-recall failures were the result of fluid boil. All of the incidents were characterized by the sudden loss of all pedal and brake functions after a period of continuous hard use. In several of the incidents, the evidence showed that full pedal returned within a brief period after total failure, a clear symptom of fluid boil. Although the trial judge might justifiably have excluded some of the evidence on the ground that its potential for prejudice outweighed its probative value (see Evidence Code § 352), he did not abuse his discretion by admitting it.” (Hasson v. Ford Motor Company, supra, 32 Cal.3d at pp. 404-405.)

Here, the evidence will show a constant stream of complaints to Chrysler regarding its weak latch for over a decade. In response, Chrysler did nothing until it was forced to do so by the Federal Government—after the subject accident.
DEFENDANTS' MOTION IN LIMINE NO. 4, RE: WEALTH OF THE DEFENDANTS.

Plaintiffs do not intend to introduce evidence of defendants' assets and net worth until the second phase of the trial. If defendants' motion goes beyond such evidence, plaintiffs have no idea what defendants are seeking to preclude.

Defendants ask the Court to preclude plaintiffs' counsel from engaging in “personal attacks on the character or motives of the adverse party, his counsel or his witnesses” (defendants' Motion, pp. 56). Such a motion would appear to be akin to the motion in Keily v. New West Federal Savings, supra, to preclude “speculative testimony.” It is simply “not properly the subject of motions in limine.” It “would merely be declaratory of existing law or would not provide any meaningful guidance for the parties or witnesses.”
DEFENDANTS' MOTION IN LIMINE NO. 5, RE: ISSUES OF DUTY

Defendants assert by this motion that “the issue of whether a duty exists is solely a question of law for the court to decide.” (Defendants' Motion, p. 4.) Plaintiffs agree. Of course, that is the law. However, what testimony or what opinions are defendants seeking to preclude? Defendants never say. The motion is made in a vacuum. By granting it, the Court would merely be declaring obvious law and providing no guidance to the parties.

As observed in Kelly v. New West Federal Savings, 49 Cal.App.4th 659:
“. . . [M]any of the motions were not properly the subject of motions in limine, were not adequately presented, or sought rulings which would merely be declaratory of existing law or would not provide any meaningful guidance for the parties or witnesses.”

Defendants' Motion in Limine No. 5 is precisely what the Second District had in mind in Kelly.

Here, as in Kelly, “the court and the parties [are left] to guess what opinions during trial may be included within the scope of the ruling.”
DEFENDANTS' MOTION IN LIMINE NO. 6, RE: MEDIA COVERAGE.

This motion is a nearly-verbatim clone of defendants' Motion in Limine No. 3 regarding evidence of other claims and lawsuits. Defendants have merely inserted the words "media coverage regarding" before the phrase "claims or lawsuits against Chrysler." In essentially all other respects, the two briefs are identical. Accordingly, plaintiffs refer the Court to plaintiffs' opposition to defendants' Motion in Limine No. 3, rather than repeat their opposition here.

Further, any wholesale preclusion of all television programs regarding Chrysler's defective latch, without any reference to the specific material which defendants believe to be objectionable, would be inappropriate. Again, the Court cannot be expected to rule in a vacuum. As in Kelly v. New West Federal Savings, supra, "no factual support was presented in connection with the motions, meaning the court would have to rule in a vacuum."

Conceivably, some portions of this program might be admissible while other portions might be inadmissible. Who knows? Defendants do not provide the Court with the evidence to examine for purposes of admissibility. Defendants never identify the supposedly objectionable portions of these programs. There is simply no way to rule on the motion at this point.
I

INTRODUCTION

Defendants believe that “plaintiffs should be limited to introducing facts/evidence which were revealed to defendants in discovery” (defendants' Motion, p. 2), and “plaintiffs should be limited to those theories and evidence which they disclosed in discovery.”

Such a motion makes the defendants the final arbiter of the evidence the plaintiffs are allowed to present. If the defendant does not elicit the information during discovery, the plaintiffs are precluded at the time of trial. It makes all discovery responses (not just responses to requests for admissions) binding, which is directly contrary to California law. Such a result is not mandated, defendants contend, because “the discovery process is designed to avoid surprise” (defendants' Motion, p. 3), nor by appellate decisions affirming sanctions against parties for giving “wilfully false” answers to interrogatories. Offered without any factual support whatsoever, the Court is again being asked to rule in a vacuum—defendants simply fail to identify the challenged evidence. Finally, defendants' contention is directly contrary to Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659.

II

“AGAIN, NO FACTUAL SUPPORT WAS PRESENTED IN CONNECTION WITH THE MOTIONS, MEANING THE COURT WOULD HAVE TO RULE IN A VACUUM.”

III

PURSUANT TO RECENT SECOND DISTRICT AUTHORITY, "A COURT ABUSES ITS DISCRETION WHEN IT PRECLUDES A PARTY FROM TRYING A CASE ON A THEORY" BECAUSE IT IS CONTRARY TO THAT PARTY'S DISCOVERY RESPONSES.

Defendants contend that a party's discovery responses are binding. Defendants are wrong. As discussed above, in *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, the plaintiff testified in two depositions that she was injured on the smaller of two elevators. After it was learned that the defendant worked on the larger elevator just prior to the accident and repaired it afterwards, the plaintiff believed that the accident may have occurred on the larger elevator. The trial court granted defendant's motion in limine to preclude the plaintiff from proving that the accident occurred on the larger elevator. In reversing, the Second District rejected the contention advanced by defendant Chrysler here, i.e., that discovery responses, other than responses to requests for admission, are binding, and stated as follows:

"While a party may be precluded from introducing evidence based on a response to a request for admission [citation], depositions and interrogatories do not perform the same function as requests for admissions, issue preclusions."

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"It is a misuse of a motion *in limine* to attempt to compel a witness or a party to conform their trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery. One purpose of pretrial discovery is to pin down the testimony of parties and witnesses which can be used for impeachment at the time of trial. Amtech clearly succeeded in this regard. Other than issue preclusion based on responses to requests for admissions, sanctions for abuse of the discovery process, or a clearer case of waiver or estoppel, a court abuses its discretion when it precludes a party from trying a case on a theory consistent with existing evidence, even though the pretrial testimony of the party relating to how the accident occurred is contrary to the theory. There is no suggestion in the record before us that plaintiffs abused any portion of the discovery process, nor are there
any facts to support a theory of waiver or estoppel.” (Emphasis added.)

***

“...We conclude that Amtech's request to exclude evidence other than that related to the small elevator was completely without foundation and that the trial court abused its discretion in granting the motion.” (Id. at 672-673.)

Defendants' motion is clearly contrary to dispositive, Second District authority.

IV

THE AUTHORITIES CITED BY DEFENDANTS DO NOT SUPPORT THEIR MOTION.

Defendants rely on Thoren v. Johnston & Washer (1972) 29 Cal.App.270, to support their preclusion request. In Thoren, the plaintiff was asked in interrogatories for the names of all witnesses who arrived at the scene shortly after the accident. A Robert Clubb inspected the scene shortly after the accident and took photographs. Clubb then referred the plaintiff to an attorney. The plaintiff and attorney then deliberately omitted Clubb's name from the answers to interrogatories. The trial court found the omission willful and false. The Court of Appeal upheld the trial court's discretion in excluding the evidence and stated as follows:

“Where [willful] falsity lies in the deliberate omission of the name of a witness to the occurrence, an order barring the testimony of the witness must be sustained as a sanction less than dismissal of the complaint which the trial court properly deemed just.” (Id. at 275.)

As the court in Thoren noted:

“There is substantial evidence supporting the trial court's finding that appellant's answer to interrogatory B-2 was wilfully false.” (Ibid.)

Defendants can make no such claim here. Plaintiffs have not willfully falsified answers to interrogatories.
DEFENDANTS' MOTION IN LIMINE NO. 8, RE: THE USE OF THE TERM
"STRICT LIABILITY."

Plaintiffs are aware of no authority precluding the parties from mentioning “strict liability” in a strict liability action.
DEFENDANTS' MOTION IN LIMINE NO. 9, RE: ARTICLES, STATISTICS, DATA, TESTS, RECORDED COMPLAINTS, AND STUDIES REGARDING LATCH FAILURES.

I

DEFENDANT'S MOTION, AGAIN, IS MADE WITHOUT ANY FACTUAL SUPPORT AND FAILS TO IDENTIFY ANY DOCUMENTS WHICH IT SEEKS TO PRECLUDE.

Defendant's motion is hopelessly generic:

"... Chrysler respectfully requests this court to grant its motion in limine and preclude the introduction into evidence of any articles, studies, statistical surveys, consumer complaints and reports from various agencies listed in the notice portion of this motion, since they are clearly inadmissible as hearsay." (Defendant's Motion, p. 18; emphasis added.)

However, there are no documents or agencies "listed in the notice portion of this motion." Obviously, defendant is using another of its "canned" briefs; it makes a reference to a "notice portion" which does not exist. More importantly, defendant fails to identify the documents it seeks to preclude. "Again, no factual support was presented in connection with the motions, meaning the court would have to rule in a vacuum." (Kelly v. New West Federal Savings, supra, 49 Cal.App.4th 659.)

II

EVIDENCE OF ARTICLES, STATUTES, DATA, TESTS, RECORDED COMPLAINTS OR STUDIES REGARDING CHRYSLER MINIVAN REAR DOOR LATCH FAILURES MAY BE ADMISSIBLE FOR PURPOSES OF ESTABLISHING: (1) NOTICE; (2) PUNITIVE DAMAGES; OR (3) DEFECT.

Defendant's motion is clearly akin to its Motion in Limine No. 3 regarding other lawsuits and/or claims. Necessarily, therefore, the points and authorities discussed in plaintiffs' opposition to defendant's Motion in Limine No. 3 are pertinent here. Rather than repeating those points and authorities here, plaintiffs merely refer the Court to that opposition.

Moreover, defendant completely ignores the well-developed and extensive body of case law.
which supports the admissibility of "articles, statistical surveys, data, tests, consumer complaints, and/or studies "to demonstrate defendant's notice of the defective condition" for purposes of establishing entitlement to punitive damages, and to prove defect.


"There is substantial evidence that management was aware of the crash tests showing the vulnerability of the Pinto's fuel tank to rupture at low speed rear impacts with consequent significant risk of injury or death of the occupants by fire."

***

"While much of the evidence was necessarily circumstantial, there was substantial evidence from which the jury could reasonably find that Ford's management decided to proceed with the production of the Pinto with knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and live of the occupants. Such conduct constitutes corporate malice. (See Toole v. Richardson-Merrell, Inc., supra, 251 Cal.App.2d 689, 713.)" (Id. at 814.)

"Circumstantial evidence is admissible to establish motive, knowledge or state of mind since direct evidence on such facts is rarely available." (Id. at 788.)

Other jurisdictions agree.

"... Plaintiffs also seek punitive damages for willful and wanton conduct, and evidence of prior occurrences is admissible to show that a defendant was on notice of a dangerous condition in its product which will probably result in further injury if nothing is done." Bastian v. TPI Corporation (N.D. Ill. 1987) 663 F.Supp. 474, 475.

"... Where it was alleged that with reckless indifference to the consequences, appellant failed to perform its duty to avoid the threatened injury, evidence that appellant knew from complaints of similar incidents that the probable consequence of a certain defect would be to inflict injury was relevant to the question of malice or wanton misconduct." Skil Corporation v. Lugsdin (1943) 168 Ga.App. 754, 755, 309 S.E.2d 921, 923.

Such evidence is also admissible to show notice to the defendant.

27
“When evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: 'All that is required ... is that the previous injury should be such as to attract the defendant's attention to the dangerous situation. ...' [Citation.]” (Emphasis added.) Hasson v Ford Motor Co. (1977) 32 Cal.3d 388, 530 [“The evidence was offered as proof that Ford had notice that the fluid boil problem persisted after the brake system was modified by the addition of different brake fluid and the vented dust shield ...”].

Published articles are also admissible to show notice on the part of the defendant.

“... [T]he appellant sought to show that certain articles had been published concerning the dangers inherent in facial creams containing hormones and recommending the labelling of such preparations with warnings. This offer was made to support the appellant's claim that the appellee should have known that its product might be dangerous to users. The trial judge rejected the offer as hearsay. This was error. The publication of such articles was presented not to establish that the assertions therein were true, but rather that they should have alerted the appellee to possible hazards. In the light of the court's proper charge that appellee had a duty to warn if it knew or should have known that such a product might be injurious, the exclusion of the evidence was prejudicial to the appellants on an important issue.” Webb v. The Fuller Brush Company (3d Cir. 1967) 378 F.2d 500, 502.

Similarly, evidence of prior incidents is relevant to show defect.

“TPI also asks that we grant a motion in limine keeping out any evidence of similar occurrences. It fears jury confusion and possible prejudice. ... Evidence of prior occurrences is admissible to establish the unreasonably dangerous qualities of a defective design of a product for purposes of strict liability.” Bostanian v. TPI Corporation (N.D. Ill. 1987) 663 F.Supp. 474, 475.)
DEFENDANTS' MOTION IN LIMINE NO. 10, RE: FUTURE ECONOMIC LOSS.

I

IT IS THE DEFENDANT'S BURDEN TO PROVE DEPORTABILITY—NOT PLAINTIFFS' BURDEN TO PROVE CITIZENSHIP STATUS.

Defendant seeks to preclude plaintiffs from mentioning any future “economic losses without first establishing that each plaintiff was legally in the United States at the time of the accident.” (Defendant's Motion, p. 3.) Defendant relies on two decisions. In Metalworking Machinery, Inc. v. Superior Court (1977) 69 Cal.App.3d 791, the court held that requests for admissions concerning whether plaintiff was an illegal alien were relevant and calculated to lead to the discovery of admissible evidence. Rodriguez v. Kline (1986) 186 Cal.App.3d 1145, held that “whenever a plaintiff whose citizenship is challenged seeks to recover for loss of future earnings, his status in this country shall be decided by the trial court as a preliminary question of law.” (Id. at 1149.)

However, this is not the relief which defendant Chrysler seeks. Rather, defendant seeks to preclude plaintiffs from present any evidence of “economic losses without first establishing that each plaintiff was legally in the United States at the time of the accident.” This is directly contrary to the assignment of the burden of proof mandated by Rodriguez. In Rodriguez, the Court clearly stated:

“At the hearing conducted thereon, the defendant will have the initial burden of producing proof that the plaintiff is an alien who is subject to deportation.” (Id. at 1149.)

It is the defendant's burden—not the plaintiffs'. Moreover, the issue is not whether “each plaintiff was legally within the United States at the time of the accident,” but whether “plaintiff is an alien subject to deportation.”
DEFENDANT'S MOTION IN LIMINE NO. 11, RE: DEPOSITIONS IN OTHER CASES.

I

THE DEPOSITIONS OF DEFENDANT CHRYSLER'S EMPLOYEES AND EXPERTS TAKEN IN OTHER MINIVAN REAR DOOR LATCH CASES IS CLEARLY ADMISSIBLE UNDER EVIDENCE CODE SECTION 1291.

Given the prevalence of the 1984-1995 Chrysler minivans with defective rear door latches, numerous lawsuits against Chrysler are pending throughout the country. The depositions of Chrysler's employees and experts concerning these defective latches have been taken many times. In order to prevent these employees from being deposed over and over, and to prevent the deposition sessions from becoming unwieldy, Chrysler appointed national discovery counsel to coordinate such depositions and to allow them to be used in multiple cases. As to those depositions of which plaintiffs, here, obtained notice, plaintiffs gave Chrysler notice of their intent to rely on such depositions. As to any deposition of a Chrysler employee or expert taken in a minivan rear door latch case in which Chrysler was the defendant, it is clearly admissible under Evidence Code section 1291, which provides, in pertinent part, as follows:

“(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: . . .

* * *

“(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.”

As to each deposition, it cannot be disputed that: (1) Chrysler was a defendant; (2) Chrysler was represented and had the opportunity to cross-examine; (3) the deponent resides out of state and is unavailable to testify; and (4) the issue involved was the defective design of the Chrysler minivan rear door latch and Chrysler's prior knowledge of the defect and danger.

Notwithstanding the clear applicability of section 1291, defendant offers three grounds for
excluding this relevant evidence:

(a) Defendant asserts “counsel for plaintiffs never gave counsel for Chrysler timely notice of such depositions.” (Defendant’s Motion, p. 4.) However, defendant merely makes the assertion but fails to support it. Defendant cites no authority whatsoever that section 1291 is applicable only when a party gives timely notice of the deposition in the other action. No such requirement is stated in section 1291. No such requirement exists in California law.

(b) Chrysler contends “the motives and interests of Chrysler in the former depositions were dissimilar to its motives and interests in litigation” because “the depositions primarily involved plaintiffs in or witnesses to other accidents involving Chrysler minivans” (Defendant’s Motion, pp. 4 and 6; emphasis added). This is simply not true! Defendant is deliberately attempting to misdirect the Court in order to disprove the “similar motive” prong of section 1291. Each deposition involves a deponent whose testimony concerns the design, testing and history of the subject rear door latch, the NHTSA investigations, the replacement campaign and/or Chrysler’s knowledge of the dangerousness of its latch and its refusal to do anything about it. The subject depositions have nothing to do with plaintiffs or witnesses to other accidents. Defendant’s “dissimilar motives and interests” profession is simply feigned. Moreover, defendant’s purported “common sense” argument that “local counsel [cannot be expected] to cross-examine a deponent for the benefit of all other Chrysler counsel involved in cases throughout the country” is factually inaccurate. Not only does Chrysler have national discovery counsel but, as demonstrated by defendant’s motion to have out-of-state counsel associated pro hac vice, Chrysler does not have local counsel take these depositions. Rather, it flies in attorneys from Florida “for the purpose of defending and taking expert depositions and acting as co-counsel at trial on behalf of Chrysler.” (Declaration of Barry Schirm.) The motives and interests need not be identical but only “similar.” See People v. Zapien (1995) 4 Cal.4th 929, 975 [“These motives need not be identical, only ‘similar.’”]

(c) Defendant’s third ground is “the testimony was elicited regarding the details of other accidents, not the accident in question[;] the testimony is only relevant if the other accident involved conditions and circumstances which were substantially similar to the present accident.” (Defendant’s Motion, p. 7.) Defendant is simply misstating the facts. The testimony does not involve the details
of other accidents. Plaintiffs are not interested in the details of other accidents. Rather, the depositions concern the design history and experience of this Chrysler minivan rear door latch and Chrysler's knowledge of its dangerousness and its refusal to fix it or warn against it. These are issues that are common to all Chrysler rear door latch cases. The “substantially similar” requirement regarding other accidents has nothing to do with the depositions of Chrysler's employees and experts taken in other cases.
DEFENDANTS' APPLICATION TO PRECLUDE EVIDENCE OF DEFENDANTS' FINANCES UNTIL THE SECOND PHASE OF THE TRIAL.

Defendant seeks a bifurcation of the issue of malice, fraud or oppression from the issue of the amount of punitive damages, in order to preclude evidence of its finances during the first phase of the trial. This is the procedure provided by Civil Code, section 3295.


GRASSINI, WRINKLE,
GALLAGHER & TORJESEN
A Law Corporation

By ___________________
LAWRENCE P. GRASSINI
Attorneys for plaintiffs