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RECENT CASES

INTERNATIONAL LAW—UNITED NATIONS SECURITY COUNCIL RESOLUTION 301 IS NOT SELF-EXECUTING IN THE ABSENCE OF IMPLEMENTATING EXECUTIVE OR LEGISLATIVE ACTION—Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976).

On October 4, 1971, Secretary of State William P. Rodgers informed the United Nations General Assembly¹ that the United States had decided to accept the recent advisory opinion of the International Court of Justice on the legal consequences for states of the continued presence of South Africa in Namibia (formerly Southwest Africa).² Shortly thereafter, on October 20, 1971, the Security Council, with the affirmative vote of the United States, adopted Resolution 301 in which it called upon

[All states . . . to abstain from sending diplomatic or special missions to South Africa that includes the Territory of Namibia³ in their jurisdiction . . . [And] to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.⁴

By operation of the United Nations Charter, the United States is to carry out the decisions of the Security Council.⁵

The Marine Mammal Protection Act of 1972⁶ is designed to protect and encourage the development of marine mammal resources. To achieve this goal, the Act imposes a general mor-

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³. Namibia, formerly known as Southwest Africa, was a German colony administered after World War I by South Africa under a League of Nations mandate. In 1948, South Africa announced the end of the mandate and has since treated Namibia as its own territory and exploited both the natural resources and the population.
⁵. See U.N. CHARTER art. 25.
atorium on the importation of marine mammals and marine mammal products; however, the Act authorizes the Secretary of Commerce to waive the moratorium if certain requirements regarding the harvesting of the mammals in the country of origin are met. On two occasions, October 25, 1973, and November 19, 1973, the Fouke Company applied for a waiver pursuant to that clause. After review by the Commerce Department, which included an official trip to South Africa and Namibia, the two applications were consolidated and denied. Shortly thereafter, Fouke once again applied for a waiver to import skins from the 1975 South African harvest.

Since ruling on the new application would involve an official trip to Namibia, in violation of Resolution 301, an action was filed in the United States District Court for the District of Columbia seeking an injunction to prevent any such contact with South Africa. The plaintiffs were: Charles Diggs, Jr., Chairman of the House Sub-Committee on Africa; George Houser, Executive Director of the American Committee on Africa; Southwest Africa People's Organization (SWAPO), an association of inhabitants of Namibia and persons who have come from Namibia; and Theo-Ben Gurirab, a member of SWAPO and its unrecognized “representative plenipotentiary to the United Nations and to the Americas,” who cannot return to Namibia since he would be subject to arrest by the South African government. The case was brought as part of a continuing effort to secure the enforcement of the United States' international obligations, especially those relating to human rights, through the courts.

The defendant was Elliot L. Richardson who, as Secretary of Commerce, was responsible for the implementation of the Marine Mammal Protection Act. Fouke intervened in the action. Together, they filed a motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief could be granted. Although the district court found that the plaintiffs had sufficient standing to bring the suit, it granted the motion on the grounds that Resolution 301 was not self-executing and therefore created no private rights or, alternatively, that the matter was within the foreign policy authority of the President and was therefore non-justiciable.

7. *Id.* § 1371(a)(3)(A).
On appeal, the plaintiffs contended that Resolution 301 constituted a binding international obligation of the United States and further that it was self-executing. The government countered by maintaining that the plaintiffs lacked standing; that Diggs v. Schultz, a decision of the same court which recognized standing in almost parallel circumstances, was wrongly decided; and that the approach used in that case had been undercut by subsequent Supreme Court decisions. Additionally, it was asserted that the suit raised issues of a political nature which were not appropriate for adjudication. Finally, the government argued, that United Nations Security Council resolutions cannot create legally binding obligations and are never self-executing.

In affirming the decision of the lower court, the court of appeals reasoned that the resolution in question did not confer rights upon citizens of the United States that are enforceable in court in the absence of implementing legislation. In reaching its decision, the court focused on the issue of whether United Nations Security Council resolutions were self-executing. It placed primary reliance on People of Saipan v. United States Department of Interior which involved a determination of whether or not the provisions of the United Nations Charter concerning the Trusteeship Agreement were self-executing. To

10. Plaintiffs cited a letter dated August 2, 1974 from Deputy Secretary of State Robert S. Ingersoll to Secretary of Commerce Frederick B. Dent, in which Ingersoll states:

We do not believe that an official visit to Namibia by Commerce Department employees or contract personnel, and a possible determination by you regarding South Africa’s management of Namibian marine mammal resources can be brought into conformity with the obligations [set forth in Security Council Resolution 301].

A subsequent letter from Ingersoll to the Secretary of Commerce, Rogers B. Morton, stated:

We believe that U.S. Government approval of an application to import Namibian fur seal skins from South Africa would be contrary to our international legal obligations in that it would necessarily recognize the validity of South African management of Namibian resources.


12. In Diggs, plaintiffs who had been denied admission to Rhodesia sued to enforce executive orders implementing an economic embargo declared by the U.N. Security Council. Although the court there recognized the plaintiff’s standing to sue, it denied relief on the ground that a subsequent act of Congress (the Byrd amendment) had abrogated whatever obligation may have existed.


14. 502 F.2d 90 (9th Cir. 1974).
determine this, the *People of Saipan* court looked first to the intention of the parties as manifested in the language of the instrument and second, to the circumstances surrounding its creation. Since these two primary criteria were not helpful on the issue, it then looked to several contextual factors, including: 1) the purposes of the treaty and the objectives of its creators; 2) the existence of domestic procedures and institutions appropriate for direct implementation; 3) the availability and feasibility of alternative enforcement methods; and 4) the immediate and long-range social consequences of self-or non-self-execution.\(^\text{15}\)

Without providing an extensive analysis of how *People of Saipan* applied to the particular facts of the case or the language of the resolution, the court in *Diggs v. Richardson* concluded that Resolution 301 was not self-executing. The court observed that the language of 301 was directed at government action rather than at the action of private citizens and therefore the issue was related to foreign policy, "an area traditionally left to executive discretion."\(^\text{16}\)

In light of the motivating forces behind this litigation and its relation to the growing international concern for human rights (Frank C. Newman, noted international human rights advocate, submitted an amicus curiae brief), the significance of *Diggs* seems to go beyond the question of standing or of self-execution. Therefore, the court's decision may be as important for what it did not do as for what it did.

Specifically, the right of standing established in *Diggs v. Schultz*, recognized in *People of Saipan*, and challenged here was inferentially reaffirmed. The case was decided on the related, "but analytically distinct [grounds] of self-execution,"\(^\text{17}\) thus leaving intact the ability of individuals to bring actions seeking enforcement of United States' international obligations. This is especially significant in view of the recent narrowing of the concept of standing by the United States Supreme Court.\(^\text{18}\)

While the court appeared to give a deferential bow to the weight of authority on the question of self-execution, a close reading of the case supplemented by an examination of the

15. *Id.* at 97.
17. *Id.* at 850.
18. *See* cases cited note 13 *supra.*
relevant supporting documents hints that the decision was, rather, a suggestion that the administrative departments resolve the dispute among themselves. The correspondence produced by the plaintiffs clearly showed that in traveling to Namibia, the Commerce Department knowingly went against an express State Department position. The application of the Fouke Company which gave rise to the suit was still pending when this decision was rendered, thus the court's decision can be read as a reluctance to interpose a judicial remedy, especially a precedent-breaking one, where an administrative one would suffice.

Scott Lord

19. See note 10 supra.
20. Fouke's application was subsequently denied.

Three women from Santa Cruz, California, were charged with violation of section 2141 of the California Business and Professions Code, which prohibits the unlicensed practice of, among other things, midwifery. The People’s complaint charged that from October 25, 1973, to March 6, 1974, the plaintiffs did willfully and unlawfully hold [themselves] out as practicing a system of treating the sick or afflicted to wit: such practices as undertaking to assist and treat a woman in childbirth as authorized in sections 2137 and 2140 of the Business and Professions Code, and treat for a physical condition of a person, to wit: Terry Johnson, by such practices without having at the time of doing so a valid unre- volked certificate as provided in Chapter V, Division 2 of the Business and Professions Code.

The women, as defendants in municipal court criminal proceedings, demurred to the complaint. The court overruled the demurrer and the women, for the first time as plaintiffs, sought a writ of mandate from the superior court, directing the sustention of their demurrer.

In the wake of the superior court’s refusal to issue the writ, the women appealed asserting that the complaint was so worded as to charge a violation of only the first part of section 2141, which prohibits holding oneself out as treating the “sick or afflicted.” Thus, they contended that childbirth was neither a sickness nor an affliction and therefore, the portion of the complaint equating midwifery with the treatment of the sick or afflicted failed to state a cause of action. Additionally, they argued that the second part of section 2141, which prohibits the unlicensed diagnosis and treatment of a “physical condition,” was not meant to include the practice of midwifery.

1. CAL. BUS. & PROF. CODE § 2141 (West 1974) (current version at CAL. BUS. & PROF. CODE § 2350 (West Supp. 1977)).
3. Id. at 485, 556 P.2d at 1083, 134 Cal. Rptr. at 632.
4. Id. at 487, 556 P.2d at 1084, 134 Cal. Rptr. at 633.
5. Id. at 490-91, 556 P.2d at 1086, 134 Cal. Rptr. at 635.
The women further asserted that the section was unconstitutionally vague because it could reasonably be interpreted to prohibit even innocent behavior, such as a friend's informal advice on how to treat a common cold. Moreover, they claimed that it was overly broad since it proscribed treatment of nondiseased as well as diseased conditions, and thereby infringed upon both the free speech of unlicensed persons who desired to give advice as well as the right to privacy of prospective patients. Finally, they contended that, should the court construe the statute to prohibit unlicensed midwifery, the statute would violate a mother's right of privacy which encompasses the right to choose whom she wants to assist in the delivery of her child.

In rejecting the women's attacks on both the statute and the complaint, the California Supreme Court provided much needed insight into the scope of the "Healing Arts" portion of the California Business and Professions Code. The court disposed of the preliminary issues involving the wording of the complaint by relying on Penal Code section 952, which provides that an accusatory pleading "may be in the words of the enactment describing the offense . . . ." The court ruled that language of the complaint paralleled the language in both portions of the statute so as to give the women sufficient notice that they were being charged with violating both parts.

The court next turned to whether the practice of unlicensed midwifery constituted a violation of section 2141 as treatment of the "sick or afflicted." It reasoned that it did not on the basis of former section 2140, which defined midwifery as assistance in normal childbirth, and on the general rule of due process, that when statutory language is susceptible to two reasonable constructions, the defendant is entitled to the one most favorable to him. However, the court found that the complaint stated a cause of action based on its reference to Business and Professions Code section 2137, which prescribes certain acts that can be performed only by a licensed physician. This reference, in effect, charged the women with pur-

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6. Id. at 491, 556 P.2d at 1087, 134 Cal. Rptr. at 636.
7. Id. at 493, 556 P.2d at 1088, 134 Cal. Rptr. at 637.
8. Id. at 494, 556 P.2d at 1088-89, 134 Cal. Rptr. at 637-38.
9. Id. at 486, 556 P.2d at 1083, 134 Cal. Rptr. at 632 (quoting CAL. PENAL CODE § 952 (West 1970)).
10. Id.
11. Id. at 488, 556 P.2d at 1084, 134 Cal. Rptr. at 633.
12. Id. at 488, 556 P.2d at 1085, 134 Cal. Rptr. at 634 (applying CAL. BUS. & PROF. CODE § 2137 (West 1974)).
porting to treat complications of childbirth which, the court concluded, "unquestionably do qualify as 'sickness' or 'afflications.'"

In order to determine whether or not the second part of the statute prohibited the unlicensed practice of midwifery, the court looked to the broad meaning of "physical condition," to prior appellate court decisions, and especially to accepted rules of statutory construction described in prior case law. In accordance with those rules, the court referred to the entire statutory scheme of which section 2141 is a part in order to determine its meaning. The court reasoned that, since the statutory sections set out licensing provisions of various medical practices, including midwifery, their intent is to provide a sanction against uncertified persons who perform acts authorized under the various certificates described in the statutory scheme. The exclusion of uncertificated midwives, the court stated, would render the midwife certificate under section 2140 virtually meaningless. Therefore, the court refused to construe the statute such as to make other existing provisions ineffective.

Having construed the statute to prohibit unlicensed midwifery, the court was ready to rebut the allegation that the statute was unconstitutionally vague. It employed the rationale that a statute is not void for vagueness merely because marginal cases raise doubt as to its application, so long as an accused can reasonably understand that his or her act is prohibited by the terms of the statute. Under this rationale, the critical question was whether the women's alleged acts fell plainly within the proscription of the statute.

The court reasoned that since the statute is included within the division entitled, "Healing Arts," the legislature intended it to apply to persons who provide certain medical services which constitute the healing arts. The court found midwifery, based on its inclusion in the statutory scheme, was one of the healing arts, and therefore, its unlicensed practice fell within the proscription of the statute. In addition, the court reasoned that midwifery involved medical expertise, thus bringing the women's alleged acts clearly within the statute's regulatory scope.

13. Id.
14. Id. at 488-89, 556 P.2d at 1085-86, 134 Cal. Rptr. at 634-35.
15. Id. at 492, 556 P.2d at 1087, 134 Cal. Rptr. at 636 (quoting United States v. National Dairy Corp., 372 U.S. 29, 32 (1963)).
16. Id. at 493-94, 556 P.2d at 1087-88, 134 Cal. Rptr. at 636-37.
Proceeding to the contention that the statute was overly broad because it could be interpreted to infringe upon protected rights, the court noted that key verbs in the statute limit its coverage to one who "diagnoses, treats, operates for, or prescribes" without a valid certificate. Consequently, it reasoned that the verbs sufficiently narrowed the statute's coverage to the intended purpose of the entire statutory scheme. In addition, the court recognized the legitimate state interests in protecting citizens from unqualified practitioners in the medical field.

Applying the rationale that a statute which restricts constitutionally protected conduct may nevertheless be valid if it also serves important societal interests, the court concluded that section 2141 adequately served an important state interest in health and medical safety standards and was therefore valid. In effect, the court found a rational nexus between the statute and the legitimate state interests. The establishment of a rational nexus follows the traditional standard of review which requires that a state's regulatory system be shown to have a rational relationship to a legitimate state purpose.

The court's recognition of important state interests aided its analysis of the privacy issue. Relying heavily on the United States Supreme Court's decision in Roe v. Wade, the court recognized that a woman has a constitutional right to privacy which extends to the right to terminate her pregnancy, but noted that this right has never been so broadly interpreted as to protect a woman's right to choose the manner and circumstance in which her baby is born. The court was unwilling in this instance to extend the right of privacy to cover the acts of the midwife.

Moreover, as in Roe, it recognized the important state interests in the health and safety of both mother and child which justify limitations on the exercise of the privacy right. The court concluded that the policy reasons that permit a state to prohibit abortion of a viable fetus, may also support a state's requirement that those who assist in childbirth have valid licenses.

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17. Id. at 494, 556 P.2d at 1088, 134 Cal. Rptr. at 637 (quoting CAL. BUS. & PROF. CODE § 2141 (West 1974)).
18. Id. at 493-94, 556 P.2d at 1088, 134 Cal. Rptr. at 637.
21. 18 Cal. 3d at 495, 556 P.2d at 1089, 134 Cal. Rptr. at 638.
The court's decision in *Bowland v. Municipal Court* underscores the validity and importance of state interests in the health and safety of those who rely on medical practitioners for treatment. In deference to those interests, the court placed midwifery securely within the regulatory bounds of section 2141. It thereby restricted the practice to those with certificates and, at the same time, encouraged reliance on certificated midwives by women who might choose their services.

The highlight of the decision was the court's affirmance of the validity of the statute in light of the alleged violation of a woman's right of privacy. The court resolved the issue by refusing to expand the right to include a woman's liberty to choose whom she wants to assist in the birth of her child. The decision not only reflects the nebulous nature of the privacy right, but also the extent to which it is restricted, or even superseded, by legitimate state interests. At the same time, the court's reliance on cases to determine exactly what constitutes the right of privacy strongly suggests that it is limited to certain personal choices pertaining to child rearing, marriage, procreation, and abortion, and that outside those specific areas, privacy ceases to be a protected right.22

Arlene Ichien

22. *Id.* at 494, 556 P.2d at 1089, 134 Cal. Rptr. at 638.

While driving in the city of Covina at one in the morning, Michael Baughn observed a car being driven in an unlawful and erratic manner. He saw the car wander back and forth across the street, run a red light, hit and straddle a center divider and travel north in a southbound lane. Thinking the driver might accidentally kill someone, Baughn followed the car until it pulled into a private driveway and stopped. Upon approaching the car, he discovered that the driver appeared to be either asleep or insensible. Baughn located a police officer to whom he related the traffic offenses, described the car, furnished its license number and the address where the car had parked. Baughn then drove home while two alcohol safety officers were dispatched to investigate the car and its driver.

When the officers arrived, they discovered Imogene Green asleep in the driver's seat. The officers shook Green awake and she exited the car exhibiting obvious symptoms of intoxication. Since the officers could not arrest Green for any traffic offenses they had not witnessed, they picked up Baughn at his residence and brought him to the detention scene. Baughn identified Green as the driver of the car he had previously observed and stated that he wanted to have her arrested.

After Green refused the field sobriety test, the officers instructed Baughn on the procedures for a citizen's arrest outlined in Penal Code section 837. Baughn subsequently placed Green under arrest. The officers then informed her that she was under arrest for driving under the influence of intoxicating liquor, and that she was subject to loss of her license for refusal to take the sobriety test.

Following these events, the Department of Motor Vehicles

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1. CAL. PENAL CODE § 837 (West 1970) provides in relevant part:
A private person may arrest another:
  1. For a public offense committed or attempted in his presence.
  2. See CAL. VEH. CODE § 23102(a) (West 1971).

2. The implied consent admonition provides that every driver is deemed to have consented to a chemical test for alcoholic content if lawfully arrested for an offense while driving under the influence of intoxicating liquor. If any such person refuses to submit to a chemical test, the Department of Motor Vehicles must suspend that person's license for a period of six months. CAL. VEH. CODE § 13353 (West 1971).
suspended Green's driver's license for refusal to submit to a chemical test for intoxication and she brought an action of administrative mandate to compel the Department to reinstate it.

In support of her claim for reinstatement, Green alleged that the arrest was invalid under any of three basic rationales. First, she maintained that if the arrest was made by the police officers under Penal Code section 836, which authorizes warrantless arrest based on probable cause to believe that an offense was committed in the officer's presence, none of the three officers present at the arrest had witnessed the offense of driving while intoxicated.

Second, she argued that if the arrest was by Baughn under Penal Code section 837, which authorizes a citizen's warrantless arrest, the "fresh pursuit rule" required that the arrest be effected in fresh pursuit of the offender or within a reasonable time after the offense was committed. Under the circumstances of the arrest Green reasoned this rule had not been satisfied. Finally, she contended that if the arrest was by Baughn, it was invalid as Baughn had no actual knowledge that she was intoxicated.

The trial court granted the writ of mandate and the Department of Motor Vehicles appealed on the grounds that the arrest was valid either as a citizen's or a police arrest. The court of appeal found that the citizen's arrest was valid on the undisputed facts and reversed with directions to deny the issuance of the requested writ.

In making its determination, the appellate court initially examined the facts surrounding Baughn's actions. The court pointed out that when Baughn first notified the police, he had actual knowledge that Green had committed multiple offenses, including possibly reckless driving. When Baughn later returned to the detention scene, the court noted that he acquired actual knowledge that respondent was intoxicated. Thus, the court concluded that Baughn's arrest of Green for driving under the influence was not invalid for lack of actual knowledge of intoxication.

Turning to the claim that the arrest was invalid for lack of fresh pursuit, the court actively praised the citizen for taking

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4. Cal. Penal Code § 836 (West 1970) provides in pertinent part:
A peace officer may . . . without a warrant, arrest a person:
   1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
considerable time and trouble to aid in protecting the public from Green's reckless conduct. The court had little difficulty finding the fresh pursuit rule satisfied; the citizen did not go about other business before deciding to have Green arrested, rather, he promptly notified police and, when they were prevented from making the arrest, came at once and effected the arrest personally. Only thirty to forty minutes had elapsed between the time Baughn left the scene and the actual arrest.\(^6\)

The *Green* court did not directly answer the question as to whether the officers did or could initiate a warrantless arrest. Rather, the decision rested on the assumption that a citizen's arrest was made. The court justified the actions of the police in investigating Green's condition on the grounds that at that time, there was ample probable cause to detain her.\(^7\) Further, the court found that the citizen's arrest procedure began when Baughn first decided to arrest Green and actively sought help from the police. Thus, "the arrest" covered a period of thirty to forty minutes during which the citizen was absent for a substantial period of time. In addition, when Baughn summoned the police, the officers, in effect, became his agents for purposes of the arrest.\(^8\) Because of this expansive definition of the arrest, and the fact that the police were Baughn's agents, the police conduct, which included the attempted administration of a field sobriety test, was viewed as incidental to Baughn's valid citizen's arrest.

*Green v. Department of Motor Vehicles* clearly broadens the time frame of a citizen's arrest by finding that the arrest begins when the citizen first makes the decision to arrest and takes action in that regard. Additionally, by characterizing the police as agents of the private citizen, the decision avoids the problem of state action. Active police participation in the effecting of a citizen's arrest may now be deemed incidental if it can be shown that the decision to arrest began with the private citizen. Under this rationale, even police conduct which is ini-

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7. 68 Cal. App. 3d at 542, 137 Cal. Rptr. at 372. It is a well recognized rule that an officer may stop a motorist or pedestrian for questioning under circumstances that fall short of probable cause for arrest. See, e.g., *Cornforth v. Department of Motor Vehicles*, 3 Cal. App. 3d 550, 552, 83 Cal. Rptr. 762, 764 (1970).
8. 68 Cal. App. 3d at 542, 137 Cal. Rptr. at 371.
tially questionable apparently can be ratified; arguably paving the way for a host of new situations in which a warrantless arrest can be effected. Though the Green reasoning appears inoffensive when applied to a traffic offense, it could be applied in other areas to further erode the warrant requirement.

Kenneth Fairbanks Gray

In November of 1971, James Fogo was admitted to a Kansas hospital, suffering from viral hepatitis, contracted from a Factor IX coagulant (Konyne) manufactured and distributed by Cutter Laboratories. The patient, a mild hemophiliac, had been treated with Konyne by his physician prior to a tooth extraction. The coagulant stopped the bleeding within two hours, but two months later Fogo died of viral hepatitis.

Fogo's surviving wife and children brought a wrongful death action against Cutter in California upon five causes of action: negligence, strict liability, express and implied warranty, and willful and malicious conduct. The trial court refused the wife's instructions on strict liability, and express and implied warranty, and the jury failed to find Cutter negligent in its manufacture of the product, Konyne.

In affirming the trial court's rejection of the strict liability and warranty causes of action, the appellate court focused on the language of Health and Safety Code section 1606. Section 1606 provides that the procurement, processing, distribution, or use of any blood product or blood derivative—such as Konyne—is a service "for all purposes whatsoever." At issue, was whether the language of 1606 should be extended to include the commercial distributor of a blood product. Specifically, the

1. Kansas law imposes a $50,000 limitation on the recovery of wrongful death damages; there is no limitation on such damages in California. In addition to actual damages, the wife and children sought punitive damages on the willful and malicious cause of action. Fogo v. Cutter Laboratories, 68 Cal. App. 3d 744, 760, 137 Cal. Rptr. 417, 425 (1977).

2. The negligence cause was predicated upon both a failure to adequately warn of the inherent risks involved in using the coagulant and upon the alleged negligent use of blood collected at plasmapheresis centers located in slum areas. Id. at 757, 763, 137 Cal. Rptr. at 423, 426-27.

3. Evidence submitted by Cutter Laboratories indicated that Konyne is a plasma-derived coagulant. There is no known scientific method for detecting the hepatitis virus in the plasma. Although there are methods for destroying the virus, the technique cannot be used in processing Factor IX without simultaneously destroying the coagulating activity of the factor.


5. See Klaus v. Alameda-Contra Costa Medical Blood Bank, Inc., 62 Cal. App. 3d 417, 133 Cal. Rptr. 92 (1976) (blood transfusion provided by a for-profit blood bank is a service covered by 1606); Shepard v. Alexian Brothers Hosp., 33 Cal. App. 3d 606,
court was forced to consider whether Cutter's marketing of Konyne for profit was a sale, possibly subjecting Cutter to strict or warranty liability, or a service within the meaning of 1606, exempt by definition from such liability.

After noting that Cutter marketed the blood product in order to profit therefrom, the court reasoned that this did not necessarily give rise to a sale. On the contrary, the court found, without elaborate analysis, that "the clear language of section 1606 requires us to construe the respondent's distribution of Konyne as the rendition of a service. . . ." The court then concluded that this characterization of the distribution scheme as a service precluded the application of strict liability. The court found itself "constrained to adhere to the time-honored, well-established law which states that those who sell their services . . . cannot be made liable in the absence of negligence or intentional misconduct."

Similarly, the court quickly disposed of the warranty causes of action—without a sale there is no cause of action in warranty. The court added, however, that had there been an issue on express warranty, the extensive warranty printed on the package would have provided a valid disclaimer on any warranty cause of action. Finally, the court indicated that even if express warranty liability was to be extended to service transactions, reliance on the warranty must be shown as an incident to recovery. Since there was no evidence that the treating physician had relied upon Cutter's warranty in his administration of Konyne, the court reasoned that this also defeated the express warranty cause of action.

_Fogo_ remains consistent with previous California decisions, which thus far have been unwilling to expand the theory of strict liability in tort from sales transactions to sales of services. Additionally, _Fogo_ extends this unwillingness to liability in express warranty.

Nevertheless, the _Fogo_ rationale probably does not repre-
sent a bar to the expansion of strict liability or express warranty theory to the area of services. The Fogo decision is grounded upon a statute which labels what is arguably a sale, a service.

The statute expresses a strong public policy in support of the efficacy of blood transfusions and blood products, and Fogo indicates a firm refusal to apply no-fault liability to those products which the courts deem covered by section 1606. Moreover, the Fogo court ostensibly could have reached a similar conclusion, had the distribution of Konyne been found to be a sale—by characterizing Konyne as one of the unavoidably unsafe products described in the Restatement (Second) of Torts. The Fogo court found that the impossibility of testing for the hepatitis virus, and the manifest desirability of encouraging drug companies to continue to develop such products, militated against the application of strict liability theory to products such as Konyne.

Barbara Frischholz

12. Restatement (Second) of Torts § 402A, Comment k (1965).
13. Cutter Laboratories was awarded the 1969 Research and Achievement Award from the National Hemophiliac Foundation for its development of the first Factor IX concentrate. 68 Cal. App. 3d at 757, 137 Cal. Rptr. at 425.
14. Id. at 752-53, 137 Cal. Rptr. at 422.
Herbert Ray, claiming damages sustained from a fall from a defective ladder, sued Alad Corporation (Alad II) in strict liability. Alad II had neither manufactured nor sold the ladder, but had, prior to the accident, succeeded to the business of the actual manufacturer (Alad I) through the purchase of that corporation's assets for an adequate cash consideration. The trial court granted summary judgment for the defendant. Ray subsequently appealed to the California Supreme Court.

The issue confronting the supreme court was whether it should create a special exception to the general rule against the imposition upon a successor corporation of its predecessor's liabilities when the plaintiff has no viable remedy against the actual manufacturer of a defective product.

Other than those contractual liabilities expressly assumed, the acquisition of a manufacturing business generally does not impose the liabilities of the predecessor upon the successor. The criteria that courts have traditionally used when determining whether a purchasing corporation should assume a seller's liabilities are whether:

(1) there is an express or implied agreement of assumption,
(2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts...

Ray conceded that Alad II had entered no express or implied agreement to assume its predecessor's liabilities and that Alad II had no fraudulent purpose in not making this assumption. Additionally, the supreme court found that the consideration paid was adequate and was made available to Alad I's

1. Included in the acquisition were the manufacturing plant, offices, office fixtures and equipment, trade name, inventory, and good will of the actual manufacturer of the ladder. Alad II continued to manufacture the same product line under the Alad trade name, and solicited Alad I's customers through the same sales representatives, with no outward indication of the change in ownership.
creditors at the time of the dissolution and sale. Despite the adequacy of the consideration, Ray contended that Alad II was a mere continuation of Alad I, in view of Alad II's acquisition of Alad I's assets and its use of those assets and former employees to continue the manufacture of the same product line.

In response to this argument, the supreme court observed that a successor corporation is considered a mere continuation of its predecessor when: "(1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors, or (2) one or more persons were officers, directors, or stockholders of both corporations." Finding neither of those conditions present, the court concluded that Alad II was not a mere continuation of Alad I. Thus, the court found that under the general rule governing succession to a predecessor corporation's liabilities, Alad II would not be liable to Ray.

However, the court went beyond the traditional rule and continued its inquiry. It noted that Ray had no viable remedy against the actual manufacturer because of its dissolution and subsequent distribution of assets to its shareholders. Further, the court noted that Alad II had acquired the technical ability to estimate the risk of claims arising from the previously manufactured ladders. Significantly, the court also recognized the fairness of requiring the successor corporation to assume responsibility for defective products manufactured by its predecessor. It reasoned that this responsibility was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the predecessor's business. Thus, the court concluded that a party who acquires a manufacturing business and continues the output of its line of products assumes strict liability in tort for defects in similar units previously manufactured and distributed by the acquired entity.

In Ray v. Alad Corp., the California Supreme Court has reaffirmed its promotion of the policy of strict liability in tort and the spreading throughout society of the costs of injuries due to defective products. The court has extended the rule of strict liability to successor corporations who have acquired the

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3. Id. at 29, 560 P.2d at 11, 136 Cal. Rptr. at 582.
4. Id. at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581.
5. Id. at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.
assets, trade name and goodwill of a legally dissolved manufac-
turing business and have continued producing the predeces-
sor’s line of products, one of which has caused personal injury.
Based on the narrowness of the court’s holding, it seems reason-
able to conclude that the Alad analysis would not extend to
those situations in which merely the trade name is continued
but the product line is not. However, precisely how many of the
operating assets of the predecessor’s business must be acquired
to give rise to liability is not clear from the court’s opinion.¹

The impact of Alad will be felt primarily in two areas.
First, Alad expands the remedies available to those individuals
injured by defective products. Second, and more importantly,
the decision will affect the buying and selling of corporate as-
sets where the buyer contemplates continuing production of
the predecessor’s line of products. Successor corporations will
have to contemplate strict liability in tort for the predecessor’s
defective products when negotiating the purchase price.

Steven W. Valdes

¹ One element of the Alad case not addressed by the supreme court was that of
the age of the defective ladder in question. According to the court of appeal, the ladder
was probably manufactured in 1952, making it seventeen years old at the time of Ray’s
injury. Ray v. Alad Corp, 55 Cal. App. 3d 855, 127 Cal. Rptr. 817, 818 (1976), vacated,
19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). One might legitimately inquire as
to how long a manufacturer should be required to warrant his product. It seems that
there should be a point where natural wear and tear takes over. See Balido v. Improved
Mach. Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973) (defense of age or obsoles-
cence).

While operating a radial arm saw, designed and constructed by Sears, Roebuck, and Company, Paul Sherod Bailey severely injured his right hand. Bailey sued Sears, alleging that its negligent design and construction of the saw proximately caused his injury.

After filing its answer, Sears submitted written interrogatories to Bailey requesting a description of the accident. Viewing the responses as inadequate, Sears filed a motion in the trial court for an oral deposition as provided for in Code of Civil Procedure section 2019. The motion also requested a special order directing Bailey to record a reenactment of the accident on videotape. The trial court granted the motion for the videotape reenactment and ordered it included as part of the deposition.

Bailey petitioned the court of appeal for a writ of prohibition to restrain the order for videotaping. The appellate court affirmed the order, and Bailey subsequently sought a similar writ from the California Supreme Court. The question before the court was: "Absent a stipulation of the parties, may videotape be used to record and report the proceedings at a deposition?" The court held that it may not.

Basing his argument on Code of Civil Procedure sections 17,2 2004,3 2019(c),4 and 2019(e),5 Bailey asserted that, absent a stipulation of the parties, only a written reproduction of deposition testimony was permitted.

In support of its motion, Sears offered three arguments on the acceptability of videotaping. Initially it suggested that the supreme court adopt the reasoning of a New Jersey appellate
court, which had approved of videotaping as a proper method of recording.\(^6\)

Alternatively, Sears maintained that the provisions of the Evidence Code controlled the question of whether or not videotaping was an acceptable means of recording. Since videotaping was included within the code’s definition of a writing, Sears contended it could be used to record deposition testimony.\(^7\)

Finally, Sears argued that the court should simply approve videotaping as a proper method of recording depositions. In this regard, it noted that both the California Rules of Court\(^8\) and the Evidence Code\(^9\) recognize videotaping as a superior method of recording testimony.

While acknowledging that the Code of Civil Procedure did not expressly prohibit videotape recording, the supreme court reasoned that the legislative intent was clear: depositions were to be recorded and transcribed into a writing, unless the parties agreed otherwise. This conclusion was supported by commentators,\(^{10}\) Voorheis v. Hawthorne-Michels Co.,\(^{11}\) and United States Steel Corp. v. United States.\(^{12}\)

Addressing Sears’ contentions, the court noted that the

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7. 19 Cal. 3d at 976, 568 P.2d at 397, 140 Cal. Rptr. at 672.
8. CAL. R. Ct. 980(c) provides: “A court may permit photographing or electronic recording of judicial proceedings for the perpetuation of the record.”
9. CAL. EVID. CODE § 250 (West 1970) defines “writing” as “handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation . . . .”

The court looked to both Voorheis and United States Steel Corp. in its attempt to determine the legislative intent of Code of Civil Procedure section 2019. In Voorheis, the deponent made statements under oath but died before he had an opportunity to read and sign the transcript. The court would not allow the deposition into evidence because it had not been properly authenticated. The Voorheis dictum stated: “The term ‘deposition’ is now confined in meaning to testimony delivered in writing.” 151 Cal. App. 2d at 692, 312 P.2d at 54.

In United States Steel Corp., the court construed rule 30(c) of the Federal Rules of Civil Procedure (at that time worded identically to Code of Civil Procedure section 2019(c)) to preclude videotaping of a deposition, even to supplement the stenographic record.

In Bailey, the supreme court stressed that the legislature did not respond to the dicta of Voorheis and did not expand the definition in the Evidence Code in 1966. The retention of the 1903 Code of Civil Procedure definition implied that the legislature intended that depositions should continue to be recorded in the traditional manner. 19 Cal. 3d at 974-75 n.5, 568 P.2d at 396-97 n.5, 140 Cal. Rptr. at 671-72 n.5.
company’s reliance on New Jersey case authority was mis-
placed for two reasons. First, the court found that the signifi-
cant disparity in the language of the two statutes weakened the
applicability of the New Jersey court’s reasoning.\textsuperscript{13} Second, the
court noted that an out-of-state decision interpreting a proce-
dural rule of that state was of little assistance to a California
court attempting to determine the intent of the California leg-
islature.\textsuperscript{14}

Turning to Sears’ argument that the Evidence Code was
controlling, the court rejected it, again for two basic reasons.
First, it noted that the Evidence Code did not attempt to con-
trol the recording and reporting of depositions, but simply their
admissibility at trial. Second, it pointed out that the Evidence
Code, by its very terms, dictates that its provisions are inappl-
icable when “otherwise provided by statute.”\textsuperscript{15} Consequently,
since the Code of Civil Procedure, which regulates the report-
ning and recording of depositions, provides its own definition of
a “writing,” the court concluded there was no reason to rely on
the definition of a writing found in the Evidence Code.\textsuperscript{16}

In dismissing Sears’ contention that videotaping should be
approved due to its superiority, the court matter-of-factly
noted that the reliability and advantages of videotape were not
at issue. The issue was whether or not the legislature had in-
tended that videotaping be used to record and report deposi-
tions. The court deemed unimportant the fact that the legisla-
ture had authorized the use of videotape in contexts other than
depositions.\textsuperscript{17}

In closing, the \textit{Bailey} court was careful to emphasize that
its decision did not depart from the philosophy of liberal con-
struction of discovery statutes in favor of disclosure. It seems
clear from the language of the opinion that the decision does
not deal with the scope of discovery but merely with the meth-
ods of recording and reporting depositions.

The \textit{Bailey} court was equally careful to confine its decision
to the sole issue of whether one party may \textit{compel} the other to
submit to the videotaping of a deposition. The court expressly
limited the possible extension of its reasoning by stating that
it did not reach five related questions. These questions in-

\begin{itemize}
\item \textsuperscript{13} 19 Cal. 3d at 975, 568 P.2d at 397, 140 Cal. Rptr. at 672.
\item \textsuperscript{14} Id. at 975-76, 568 P.2d at 397, 140 Cal. Rptr. at 672.
\item \textsuperscript{15} See \textit{CAL. EVID. CODE} § 250 (West 1966).
\item \textsuperscript{16} 19 Cal. 3d at 975, 568 P.2d at 397, 140 Cal. Rptr. at 672-73.
\item \textsuperscript{17} Id. at 977-78, 568 P.2d at 398, 140 Cal. Rptr. at 673-74.
\end{itemize}
cluded: May the parties agree to supplement a written transcript with a videotape? Can the parties forego a written transcript in favor of a videotape? Would depositions be more available to indigents if audiotape was held to be an acceptable substitute for a stenographic record? Does the supreme court have the inherent *forma pauperis* power to waive the requirement of a stenographic record? and, Is the requirement of a stenographic record an unconstitutional denial of due process and equal protection unless trial courts are permitted to waive this requirement for indigent persons? 18

In *Bailey*, the California Supreme Court wisely refrained from extending the method of recording and reporting depositions. Before videotaping becomes an accepted practice, rules must be promulgated to determine how the events in question should be depicted. The needed guidelines will have to include standards controlling the qualifications of videotape technicians, types of tape, cameras and microphones, the number and placement of cameras and microphones, and the method of reviewing, correcting, and certifying videotapes. Similarly, these standards should indicate whether a videotape must be supplemented by a stenographic record.

This list of problems, no doubt incomplete, amply demonstrates that the propriety of videotaping is a question better handled through the legislative process than by case-by-case determination of the courts.

Robert Zager

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18. *Id.* at 978 n.12, 568 P.2d at 399 n.12, 140 Cal. Rptr. at 679 n.12.