WHEN COURTS COLLIDE

By Joel B. Castro

NEWLY MANIFESTED PROPERTY DAMAGE UNDER *AAS*, vs CMO AND STATUTORY DISCOVERY CUT-OFFS AND "FINAL DEFECT LISTS"

INTRODUCTION:

What happened when Godzilla met Rodan in the battle for Tokyo? The two super sized monsters collided and battled it out while the viewers wondered if Godzilla could prevail over the recently hatched and fast growing Rodan. Litigators in California can now sit back and watch a similar battle unfolding between the California Supreme Court's *Aas* decision and the ubiquitous CMO's (Case Management Orders) which now threatens the basic tenets of the admissibility of critical damage evidence at trial. Through what metamorphosis did the humble CMO become the monster that can wipe out reams of relevant damage information and render them inadmissible at the time of trial? This paper will review how we got to this point and what can be done to avoid the pitfalls of introducing "newly manifested property damage" at the time of trial.

In 2000, when the California Supreme Court spoke out on *Aas*, it substantially affected the introduction of evidence of defects where no damage had occurred. In a nutshell, we were told "no damage, no recovery," and no admissible evidence because motions in limine would be granted. The *bright light* to this draconian ruling was that *if and when* damage occurred (manifestation) defect evidence could be introduced with impunity at trial. After all, this was plaintiff's only "bite of the apple" and the new manifestation hurdle had now been satisfied.

Consider the following scenario:

(1) plaintiffs in a construction defect case discover *newly manifested*, appreciable property damage shortly before trial;

(2) plaintiffs and defendants previously signed a case management order ("CMO") in which they stipulated to a *final defect list* and a discovery deadline which expired six months before plaintiffs discovered the new damage;

(3) the CMO contains no provision which addresses the rights and remedies of parties who discover *newly manifested damage* after the discovery cut-off and after the preparation of a final defect list;

(4) the defendants oppose any attempt by plaintiff to re-open discovery (either by additional investigation and destructive testing, augmentation of plaintiffs' witness list, or noticing additional depositions) and

(5) the defendants oppose any attempt by plaintiff to introduce such evidence at trial.

Plaintiffs argue that under *Aas v. Superior Court* (2000) 24 Cal.4th 627, 646, they are entitled to present evidence of any "appreciable damage," regardless of when it occurred. Defendants argue that because the tortious act did not cause "appreciable" injury *within the time parameters of the CMO or the statutory cut-off date* for completion of discovery, the court has the right to enforce limitations on damage discovery under its inherent power to manage litigation and issue binding case management orders:

> "The order issued after the case management conference or review controls the subsequent course of the action or proceeding unless it is modified by a subsequent order." *California Rule of Court*, Rule 3.730.

How should trial courts handle these cases and who should prevail? Is it now time to curtail the CMO and its ever expanding exclusionary provisions?

THE CASE MANAGEMENT ORDER IN CALIFORNIA

In *Lu v. Superior Court* (1997) 55 Cal.App.4th 1264; 64 Cal.Rptr. 2d 561, the Court recognized that a case management order is "[a] useful tool, employed by many judges managing complex litigation [which] lays out a clear path and timetable for the completion of all tasks necessary to ready the case for trial." Id. at 1267-68 (citation omitted.) The Lu Court identified items which are typically covered including but not limited to: a detailed discovery schedule or provision for the creation of a schedule frequently with the assistance of a discovery referee; protective orders; creation of interrogatories or other discovery orders requiring all parties to disclose certain information such as insurance coverage, specifics of damages; provision for exchange of documents including creation of a document depository

and identifying documents to be deposited. Id. at 1268. In addition, in construction defect cases, the parties usually include specific dates and conditions for site inspections and destructive testing. Such a case management order permits the parties to uncover basic facts for purpose of mediation without creating a staggering drain on the parties' time and pocketbook and the Court's resources.

However, case management orders cannot conflict with statewide statute, rule of law, or Judicial Council rule. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967, *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 295; *First State Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 324, 336.

THE CONSTITUTIONAL RIGHT TO PRESENT DAMAGE EVIDENCE, DENIAL OF PLAINTIFFS' DAY IN COURT IS A DENIAL OF DUE PROCESS.

From a constitutional standpoint, any litigant is entitled to due process, i.e. notice and an opportunity to be heard. In laymen's terms, denial of due process is denial of a litigant's day in court.

A. Procedural Due Process In Judicial Proceedings

Under the California Constitution, ``a claimant need not establish a property or liberty interest as a prerequisite to invoking due process protection. ... Focused rather on an individual's liberty interest to be free from arbitrary adjudicative procedures ... , procedural due process under the California Constitution is `much more inclusive' and protects a broader range of interests than under the federal Constitution." (*Ryan v. California Interscholastic Federation - San Diego Section* (2001) 94 C.A.4th 1069-1071; *People v. Ramirez* (1979) 25 Cal.3d 260, 263-264. Further, "freedom from arbitrary adjudicative procedures is a substantive element of one's liberty...This approach presumes that when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudicial decision-making and in being treated with respect and dignity." *Id.* at 268.

Identifying the dictates of due process generally requires consideration of:

(1) the private interest that will be affected by the official action;

(2) the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards;

(3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and enabling them to present their side of the story before a responsible government official;

(4) the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

B. Due Process For Litigants

A court is empowered to limit or prohibit a party's right to present evidence when that party has failed to comply with procedural or evidentiary rules. *Redevelopment Agency v. Tobriner* (1989) 215 Cal.App.3rd 1087,1097. Parties who play by the rules, however, are entitled to the unqualified right to a hearing, including the right to produce evidence and to cross-examine adverse witnesses. *Fewel v. Fewel* (1943) 23 Cal.2d 431, 434; *Estate of Buchman* (1954) 123 Cal.App 2d. 546. *Fewel* was a child custody case where the mother had no opportunity to obtain an investigator's report denying her custody or to cross-examine the investigator. Justice Traynor, in a concurring opinion, said: "where a motion is concerned not with an incidental procedural matter but with the fundamental substantive issues in controversy, and the order denying it is in effect a judgment on the merits, the ordinary rules of evidence apply." *Fewel* at 438.

In *Estate of Buchman*, a case involving removal of an executor where no competent evidence was received and no evidentiary hearing, the court, in reversing the lo wer court, said "under the constitutional guarantees, no right of an individual, valuable to him pecuniarily or otherwise, can be justly taken away without it being done in conformity to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides." *Estate of Buchman,* (1954) 123 Cal.App.2d 546.

A CMO is a procedural device devised by the court and litigants jointly to further the interests of judicial efficiency, to comply with delay reduction management policies and to enable the court to administer and control its calendar.

Where those interests conflict with, or result in, the deprivation of constitutionally protected property rights and the right to meaningful access to, and participation in, the judicial process, due process should prevail.

AAS V. SUPERIOR COURT **PERMITS PLAINTIFFS TO INTRODUCE EVIDENCE OF NEWLY MANIFESTED DAMAGES**

The California Supreme Court in *Aas* has now definitively stated that there must be appreciable damage before a plaintiff can recover in tort. Accordingly, it is not unusual for courts to segregate a defect that has caused damage and a defect that has not. In *Aas*, the trial court did exactly that when it ruled on defendants' motions in limine. The defendants brought motions in limine to preclude plaintiffs from introducing evidence of defects where no damage had occurred. That did not, however, affect plaintiffs' ability to present evidence of defects which did in fact cause property damage:

> ". . .We need not address liability for construction defects <u>that have caused property damage</u>, if any have, because the trial court's ruling does not prevent plaintiffs from introducing evidence of such defects. . . ." *Id.* at 635. [Emphasis added].

In holding that a construction defect has to cause property damage, the Supreme Court explained that under the economic loss rule, ***"appreciable, nonspeculative, present injury is an essential element of a tort cause of action."*** *Id.* at p. 646. "Construction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses," the Supreme Court held, "do not comfortably fit the definition of ' "appreciable harm" '--an essential element of a negligence claim." *Id.* at 646.

DOES *APPRECIABLE DAMAGE* MANIFEST ONLY ONCE ?

Defendants are likely to argue that defects and damages only manifest themselves once, and additional evidence of defects and damages which subsequently appear are connected and relate back to the original defects and damages. Although in some cases, a construction defect and its manifested damages can occur at one time, many construction defect cases involve "continuing and progressive" manifestations of damage. When that occurs, litigants' rights are not cut off. In construction cases, California courts have long recognized the right to recover for continuous or progressive injury cases.

"Determining when *appreciable damage* occurs such that a reasonable inspection would have disclosed the defect is a QUESTION OF FACT that must be decided by the jury, not motions in limine. *Geertz v. Ausonio* (1992) 4 Cal.App.4th 1363, 1368. In *Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607, 616-617, the court stated:

> "Plaintiffs do not seek any relief in this action in connection with the 1962 slope failure. They concede an action based thereon would be barred by the three-year period of limitations. (Code Civ. Proc., § 338, subd. 2.) They allege that the causes of action that arose from the 1965 incidents were separate and distinct from those which accrued in 1962; that they could not have been anticipated prior to November 1965, by a reasonable person in the exercise of due diligence, and that since they filed their complaint on July 1, 1966, they are within the three-year period of limitations. Defendants contend that the pleadings affirmatively admit that plaintiffs had knowledge of the alleged defects in 1962; that all causes of action accrued in 1962, and that the three-year period of limitations is a bar to their action filed in 1966.
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> As a general rule a cause of action arises when the wrongful act was committed and not at the time of the discovery; the statute commences to run even though a plaintiff is ignorant that he has a cause of action. (See 1 Witkin, Cal. Procedure (1954), Actions, pp. 614-615; extent of damages from fraud not fully known -- *Rubino v. Utah Canning Co.*, 123 Cal.App.2d 18 [266 P.2d 163]; extent of personal injuries not fully known -- *Sonbergh v.*

MacQuarrie, 112 Cal.App.2d 771 [247 P.2d 133]; false arrest and false imprisonment -- *Collins v. County of Los Angeles*, 241 Cal.App.2d 451, 454, 455 [50 Cal.Rptr. 586].) To avoid the harsh and unjust effects of this rule, the courts have made exceptions, the pertinent exception being in "[actions] based on progressively developing or continuing wrongs where nature, extent or permanence of the harm are difficult to discover." (1 Witkin, Cal. Procedure (1954) Actions, p. 616.) Thus, in *Bellman v. County of Contra Costa*, 54 Cal.2d 363 [5 Cal.Rptr. 692, 353 P.2d 300], a case involving the destruction of lateral support, the Supreme Court stated at page 369: "Further, the rule is that a new and separate cause of action arises with each new subsidence, with any applicable limitations statute running separately for each new separate subsidence." (In accord: damages due to defective furnace -- *Howe v. Pioneer Mfg. Co.*, 262 Cal.App.2d 330 [68 Cal.Rptr. 617]; damages due to defective heating system -- *Mack v. Hugh W. Comstock Associates, Inc.*, 225 Cal.App.2d 583, 590 [37 Cal.Rptr. 466]; damages due to diversion of water on successive occasions -- *Frustuck v. City of Fairfax*, 212 Cal.App.2d 345, 373-375 [28 Cal.Rptr. 357]; damages due to seepage -- *Nelson v. Robinson*, 47 Cal.App.2d 520, 529-531 [118 P.2d 350]; Prosser on Torts, 3d ed., p. 75.)"

Moreover, the test is "whether a reasonable inspection and further inquiry after discovery of the initial defect would have disclosed the full extent of the problem." *Mills v. Forestex* (2003) 108 Cal.App.3d 625, 650, n. 15.

Significantly, neither *Aas* nor any other authority has ever limited or restricted the presentation of "appreciable" damage based on *when the damage was discovered.* Moreover, neither *Aas* nor any other authority confers any power upon a trial court to preclude the introduction of such appreciable damage simply because it manifested itself after a statutory or CMO discovery cut-off or after a defect list became "final" under a CMO.

If appreciable damage did not exist for the first two years of a pending lawsuit, and construction defects ripen into property damage the third year, no court can or should arbitrarily shut down the lawsuit because the late manifestation of damage does not conform to artificial, arbitrary deadlines set forth in a CMO before the damage manifested itself in the first place.

DENYING ADMISSION OF NEWLY MANIFESTED DAMAGES DENIES PLAINTIFFS' STATUTORY RIGHT TO BE MADE WHOLE

The *Aas* decision contemplates that once a defect has ripened into property damage, plaintiffs will be allowed to bring their claim in tort. Additional statutory and case authority permits a party to claim additional damages after the filing of a complaint.

Civil Code §3283 provides that "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." *Renz v. 33rd District Agricultural Association* (1995) 39 Cal.App.4th 61, 68 [allowing damages for noise and fumes that plaintiffs continued to suffer after the filing of their legal action, reasoning that plaintiffs should not have to bring an additional action, since repetitive litigation was not in the interests of justice or judicial economy]; *Keys v. Romley* (1966) 64 Cal.2d 396 [plaintiffs were allowed to introduce damages suffered after commencement of the action]; *Bellman v. County of Contra Costa* (1960) 54 Cal.2d 363, 369 [plaintiff may recover for the time period prior to the filing of the governmental claim and also, without the necessity of filing successive claims, on such items as accrue after that date]; *McKelvey v. Rodriguez* (1943) 57 Cal.App.2d 214, 225 [in an ejectment action damages do not end with the commencement of the trial].

Civil Code §3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Plaintiffs cannot be made whole unless they are permitted to seek recovery for ***all*** compensatory damages caused by the defendants' negligence. If plaintiffs are barred from recovery of newly manifested damages, plaintiffs cannot be made whole. Denial of otherwise recoverable damages constitutes substantial, irreversible prejudice. It is also reversible error on appeal. *Gill v. Epstein* (1965) 62 Cal.2d 611, 618 [jury instruction was erroneous which stated that emotional distress and physical suffering during imprisonment were not legally compensable because they were not proximately caused by wrongful arrest].

In *Rovetti v. City and County of San Francisco* (1982) 131 Cal.App.3d 973, 977-978, in late fall 1972 and early 1973 plaintiffs first noticed cracks forming in the exterior of their residence. Cracking went on until 1975. Plaintiffs alleged that water entered through the cracks and damaged the home's interior and introduced evidence of a general contractor's bid to repair made in 1978. The defendant argued on appeal that plaintiffs were only entitled to damages occurring in 1972, the date of injury. The court of appeal disagreed stating that ***plaintiffs were entitled to the cost to repair at the time of trial***:

"Increasing an award to compensate for the effects of inflation insures that a plaintiff will not receive less than he is entitled to; such an increase merely removes the impact of inflation from the amount of the judgment awarded. Where an inflation adjustment is made the impact of delay is minimized, not exacerbated; and the defendant is denied the windfall of paying for an injury with dollars of diminished value. The plaintiff recovers only that which time has already taken from him." *Id.* at p. 978.

"LEGAL PREJUDICE" IS A NARROW AND SPECIFIC STANDARD THAT MUST BE DEMONSTRATED TO THE TRIAL COURT

Where there is a continuing or progressive injury or a newly-manifested damage, defendants cannot claim prejudice if they are given the opportunity to respond. In *Dickison v. Howen* (1990) 220 Cal.App.3d 1471, the court analyzed and discussed the issue of prejudice in cases involving the presentation of new experts or expert testimony during trial. The *Dickison* court held:

> "The determination of prejudice in both cases turned on the party's ability to respond to the new testimony. We believe that the same analysis is appropriate here". *Id.* at 1479.

Dickison is critical in understanding what "prejudice" means. It does not simply mean that the evidence was discovered or disclosed late in the case, or even on the eve of trial. Defendants must show that the late discovery or disclosure deprives them of the ability to present a proper defense to the new evidence. If plaintiffs offer to have their experts redeposed at plaintiffs' expense, or allow defendants a reasonable opportunity to conduct an additional investigation of the

new evidence, defendants cannot summarily reject that offer, since acceptance could cure any "prejudice." If no defense expert has yet testified, no defense argument has been compromised by the new evidence and there is no "bell to unring."

Whether defendants are prejudiced under *Code of Civil Procedure*§2034.620 is determined by their ability to respond to the new information and their ability "in ***maintaining*** that party's action or defense on the merits." It is not determined by belated excusable disclosure of evidence. It is not determined by the fact that the new evidence may conceivably increase defendants' liability exposure. It is not determined by the fact that the defendant will incur additional costs and legal fees to respond to the new damage claim. There can be no prejudice when parties are given "every opportunity to recover from any disadvantage caused by the surprise and reject the opportunity. *Dickison v. Howen, supra.* Re-opened discovery will be allowed, even if it must occur during trial. *Id; Whitehill v, United States Lines, Inc. (*1986) 177 Cal.App.3d 1201, 1210; *Foster v. Gillette Company* (1979) 100 Cal.App.3d 569,578 [plaintiffs refused offer to recess trial to allow plaintiff to depose new expert and obtain rebuttal evidence].

In the context of a motion for new trial based upon *Code of Civil Procedure* §657(4), the court in *Andersen v. Howland* (1970) 3 Cal.App.3d 380, reversed the denial of a motion for new trial. Plaintiff's expert testified that plaintiff had received a whiplash injury as a result of a rear-end automobile accident but he did not testify that the plaintiff had any fracture. Plaintiff also called a radiologist, who just before he took the witness stand, discovered evidence of a previously undiagnosed fracture of a cervical vertebra, but he could not testify that it was related to the accident. Plaintiff's expert who could make the connection had left for Hawaii and could not be recalled as a witness. The defense expert testified that there was no fracture. The jury returned a verdict of $2,800.

Plaintiff moved for a new trial. The defense argued that plaintiff had not been diligent. The trial court denied the motion. The court of appeal reversed. The appellate court held that a newly formed expert opinion was not as a matter of law insufficient to support an order granting a new trial. *Id.* at 384-385.

CONCLUSION.

Plaintiffs in construction defect litigation should politely insist that the CMO provide a safety valve in the event of a continuing or progressive injury or a newly-manifested damage. This matter should be resolved *before the CMO is executed* so that plaintiff's counsel do not risk possible exclusion of critical and material damage information at the time of trial.

Plaintiffs' other alternative is under *Code of Civil Procedure* §2024.050. This section gives a party the right, by good cause motion, to reopen discovery proceedings An obvious predicate for such a motion is

(1) appreciable damage;

(2) appreciable damage which occurred after the statutory or CMO cut-offs and

(3) appreciable damage which was unforeseeable and which could not have been discovered earlier by plaintiffs.

Finally, it is not in the interests of justice or judicial economy to require plaintiffs to bring successive actions or to bring a motion for new trial in order to recover the newly manifested damages.

PROPOSED CMO LANGUAGE

AAS LATE MANIFESTATION OF DAMAGE PROVISION::

The intent of this provision is to assure that newly manifested damage evidence is not excluded from trial and that all parties are afforded a fair opportunity to consider the new damage information before its use at deposition or trial. Under *Aas v. Superior Court* (2000) 24 Cal.4th 627, parties in California are not able to recover for defects that have not manifested damage as defined therein.

a) In the event there is new manifestation for defects that previously had no manifestation of damage, plaintiff shall notify all parties about the newly manifested damage and send out a "meet and confer" letter to initiate discussions regarding the new damages. If the parties are able to agree on how the new damage is to be evaluated and considered by experts on all sides, the parties shall prepare a written stipulation for the trial court to extend and/or re-open the discovery so that all parties and their respective experts are satisfied that they have evaluated the new damage information and are prepared to address it at deposition and/or trial.

b) If the parties cannot agree on how to handle the new damage information, any party may apply to the court to consider or exclude the new damage information by noticed motion. No such motion shall be filed by any party absent a "meet and confer" letter and session.

c) In the event expert designations have occurred, expert depositions are underway, or expert depositions have been completed, any party may apply to the court to re-open the discovery so that the newly manifested and discovered damage information can be used at trial.

d) If the final defect list, does not contain the defects that have demonstrated newly manifested damage, any party may apply to amend the defect list to include both manifested damage and any or all underlying defects causing that damage for use at trial.

e) If the final defect list, actually contains the defects that have demonstrated newly manifested damage, any party may send out notice of "Manifestation of Damage of Previously Itemized Defect(s)" and apply to the court to include the manifested damage evidence at trial.

f) If the process of evaluating newly manifested damage infringes on any existing deposition or trial date, any party may apply to the court to stay, extend or continue such dates pending evaluation of the newly manifested damage information. The parties shall meet and confer after the new damage information is considered to reschedule depositions and/or trial dates. In the event the parties agree to the new scheduled dates for depositions and trial, a written stipulation will be prepared and presented to the court on noticed motion. In the event the parties do not agree to dates rescheduling depositions and/or trial, any party may apply to the court on noticed motion to reset depositions and/or trial.