Large verdict highlights failings of Prop. 213: *Briones v. Zink*

The recovery of general damages by the driver of an uninsured vehicle when struck by a drunk driver

By Christopher Dolan

In 1996 California voters were duped once again by Big Insurance into dismantling the rights of innocent people injured by the fault of another. In what can only be referred to as a deceptive "initiative sandwich," The Personal Responsibility Act, Proposition 213, adopted by the voters in 1996, deprives uninsured motorists, who are injured by no fault of their own, of the time immemorial right to recover the full measure of their damages, both economic and non-economic.

Prop. 213, codified in Cal. Civ. Code §§ 3333.3 & 3333.4, restricts damages recovery for injured automobile owners and drivers in three situations. Non-economic damages are barred: 1) where the driver themselves is convicted of DUI; 2) where they did not have the state minimum liability insurance at the time of the accident; and 3) when injury is sustained by a convicted felon whose injuries were proximately caused during the commission of the felony or immediate flight therefrom.

Uninsured drivers, regardless of why they were uninsured, were lumped together, and stained by, drunk drivers and fleeing felons. But make no mistake; it was the uninsured driver who Big Insurance wanted to target as the meat in the middle. The two outside layers, the drunk and the felon were the garnish to get 77 percent of the voters to swallow the bait. According to a 1996 LA Times article: *Insurers Backing Prop. 213 With Big Contributions*, written by Kenneth Reich (Oct. 16, 1996), with less than three weeks before the election the insurance industry's gifts

The victim, Mr. Briones, was left a quadriplegic.

to the Proposition 213 campaign constituted almost 90 percent of the total $1,585,701.00 raised. The three largest contributors (90 percent) were the largest auto insurers: Farmers, Mercury and State Farm.

In 1996, at the time of the initiative, the Rand Institute for Civil Justice, in its study, *The Effect of Proposition 213 on the Cost of Auto Insurance in California*, estimated that about 11 percent of future California auto-accident victims would be uninsured drivers injured by an insured driver. Another 2 percent of future victims were projected to be insured drunk drivers who are either injured by another insured driver or are injured by an uninsured motorist and have uninsured-motorist coverage.

In all, the Rand Study estimated the proposition would bar compensation for non-economic loss to about *13 percent of auto accident victims who were not at fault*. No one has been keeping track of the actual statistics; after all, why do so when you have already won? The true toll will never be known as many of these victims will never be able to locate a lawyer to represent them, never have their day in court, and never be counted. The only ones who gauge this toll are my brothers and sisters of the Plaintiffs' bar who are forced to tell innocent, shocked, and surprised victims that the insurance industry ran them over long before they were hit.

Gary Dordick, well known to most of us as a Los Angeles victim's-rights advocate and successful plaintiffs' lawyer, has taken on the issue head-on. On January 6 of this year, Dordick, as he has done for years, went to bat for his client, Francisco Antonio Briones, a 21-year-old man who, in March of 2013, at 5:00 a.m., was driving to work in a car he borrowed from his parents when a vehicle driven by a drunken Christopher Zink, who "fell asleep," blew through a red light and "T boned" Briones, causing catastrophic injuries including a broken neck that has rendered him permanently quadriplegic and entirely dependent on others for his care. The only thing that Briones did to cause this collision was to drive to work, just like you and I do every day.

At the time of trial, Zink had been convicted of felony drunk driving and was/is serving a seven-year sentence. Remarkably, and offensively, Zink's insurance company (Nationwide) brazenly denied a timely demand for his policy limits of $50,000 (some sources say $75,000), leading Dordick to take the case to trial.

During the two-week trial Dordick presented evidence to the jury that Zink, who had previously been in a collision while

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driving under the influence, had consumed the equivalent of 17 alcoholic drinks and had not slept, during the previous 24 hours. The Ventura county jury, after one day of deliberations, found Zink liable and awarded Briones a record $125,168,202.00 in damages as follows: past and future wage loss – $1,354,235.00, past medical treatment – $740,017.00, future medical treatment – $17,989,849.00, past and future non-economic damages (pain, suffering, emotional distress, disability and loss of enjoyment of life) – $42,500,000.00, and punitive damages in the amount of $62,585,101.00, equal to his compensatory damages.

Following the trial Zink's attorney, Bruce Finck, citing Civil Code section 3333.4, moved to strip Briones of the $42,500,000.00 in non-economic damages based on one factor: unbeknownst to Briones, his parents' car was uninsured when Zink plowed into him. The verdict, and the post-trial motion, has put Dordick and Finck on a collision course, thrusting Prop. 213 into the spotlight where it is destined to be scrutinized by scholars, trial judges, and appellate justices for the foreseeable future.

Prop. 213 has been the source of much litigation over the years. It was originally challenged in a set of cases, *Yoshioka v. Superior Court* (1997 2nd Dist. Div. 7) 58 Cal.App.4th 972, and *Quackenbush v. Superior Court* (*Cong. of California Seniors*) (1997 1st Dist. Div. 3) 60 Cal.App.4th 454, as modified on denial of reh'g (Jan. 23, 1998).

In *Yoshioka,* an action arising out of a rear-end automobile accident, the trial court granted defendants' motion in limine to exclude the victim's evidence of general damages. He petitioned for writ of mandate, challenging the constitutionality of Prop. 213. The writ was denied. Over a well-reasoned dissent by Justice Johnson, the *Yoshioka* decision held that (1) retroactive application of the proposition did not violate due process or equal protection; (2) due process did not require that driver be given a hearing before being denied recovery for non-economic damages; (3) the prospective application of the proposition did not violate equal protection; and (4) the proposition did not violate the single-subject requirement of the state constitution.

In denying the due-process challenge, the court held that "Due process does not require that the uninsured be given a hearing before being denied recovery for non-economic damages because potential culpability is not at issue." In essence it created a strict-liability like standard. The court reasoned that there was no reason to afford each uninsured driver a hearing "because uninsured motorists that choose to drive can easily avoid the penalty of not being entitled to non-economic damages, by simply choosing alternative forms of transportation. Further, if the uninsureds made any attempt at all (good faith or otherwise) to buy insurance, they would in fact no longer be subject to such a penalty." (*Id.*, 58 Cal.App.4th at p. 990.) The Court denied the equal-protection argument finding a rational basis existed; therein holding ". . . the voter's interest in restoring balance to our justice system is legitimate. This includes narrower interests in encouraging compliance with California's Financial Responsibility Law, avoiding the frustration of empty judgments and preventing individuals who fail to take responsibility from seeking unreasonable damages." (*Id.* at p. 997.)

Quackenbush addresses uninsured driver of borrowed car

In *Quackenbush,* the Congress of California Seniors, other consumer/taxpayer/citizen groups, and three individuals (referred to collectively as CCS) brought an action for an injunction and for declaratory relief. CCS alleged that Prop. 213 violated equal protection and due process under both the federal and California constitutions, burdened the right to travel, and denied the targeted drivers the First Amendment right to petition government for redress of grievances. CCS objected to retroactive application of Prop. 213 and also claimed it violated California's "one subject" restriction on initiative measures. Then Insurance Commissioner Quackenbush, demurred to the complaint.

Judge William Cahill of the San Francisco Superior Court issued an injunction preventing expenditure of state funds to implement the initiative and overruled defendant's demurrer. He found that CCS was likely to prevail in its equal protection challenge as to three sections of the measure: 1) Prop. 213 treated felons more favorably than uninsured motorists, denying felons recovery only when their injuries are proximately caused by their felonies or flights therefrom, whereas uninsured motorists commit only infractions and are denied recovery even when their injuries do not relate to the infraction of failing to secure insurance; 2) that drunk drivers and fleeing felons are denied recovery only if they are convicted and that they can obtain compensation if they are not prosecuted or convicted or if they are permitted to plead guilty to misdemeanors while uninsured motorists have no such escape hatches; and 3) Section 3333.4, subdivision (a)(2), covering uninsured owners (who are not always drivers), and subdivision (a)(3), governing uninsured drivers (who are not always owners), because of the wording of subdivision (c), results in an inequity as an owner could obtain damages from a drunk driver whereas a driver who is not an owner may not.

The court suspected a possible drafting oversight, but determined that the distinction had no rational basis and denied equal protection to the uninsured driver of a borrowed car. (Bravo, Judge Cahill.) (*Quackenbush* at pp. 461-462.) Quackenbush petitioned for writ of mandate. The Court of Appeals, in an opinion written by Justice Phelen and concurred in by Justices Corrigan and Parrilli, after the *Yoshioka* decision came down, ordered issuance of a peremptory writ of mandate compelling the trial court to vacate its injunction and its order overruling defendant's demurrer and to enter a new order sustaining the demurrer without leave to amend. Stating that its ruling was focused "on the legality of

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the measure, not its wisdom," the court agreed with the holding in *Yoshioka* concerning due process and equal protection (as well as the "one subject" issue.) (*Id*. at p. 464.)

The *Quackenbush* court set forth what it termed "CCS' legitimate criticism against Proposition 213's disparate treatment of different classes of motorists" in a thoughtful way as follows:

Why, for example, should an uninsured owner be permitted to recover noneconomic damages from a drunk driver while an uninsured driver who is not an owner may not? And why must a drunk driver have been convicted in order for the uninsured driver to recover? Doesn't this disfavor an uninsured owner in the situation where an obviously drunk driver dies from injuries sustained in the crash? Should felons committing or fleeing crimes and drunk drivers be excused from any Proposition 213 penalties if they avoid convictions, while uninsured motorists have no comparable leeway? Should tortfeasors (insured or not) who injure uninsured motorists, even recklessly or intentionally, be immune from noneconomic damages while tortfeasors who injure felons are immune only from damages caused by negligence? Should an uninsured owner be denied noneconomic damages when injured by a felon committing any crime other than drunk driving, no matter how serious the felony? CCS contends none of these anomalous distinctions furthers a legitimate state purpose; instead, they all demonstrate the irrationality of the statutory scheme." (*Id*. at p. 466.)

While the *Quackenbush* court asked the right questions, it rendered the wrong answers. Citing the California Supreme Court's decision in *Young v. Haines* (1986) 41 Cal.3d 883, a post-Medical Injury Compensation Reform Act (MICRA) case, the Court stated that only the "rational basis" test must be met when reviewing legislative classifications among personal injury plaintiffs. The Court identified the "primary classification" of Prop. 213 as "a division between the group of people who obey the law by purchasing automobile insurance, driving sober, and committing no vehicle-related felonies and the group of people who violate these driving-related laws and are disfavored because of their violations."

It went on to state that the Superior Court directed its attention to perceived inequities in Proposition 213's "*secondary classification scheme*" identified as "the differences in treatment between uninsured owners and drivers, the perceived advantages for felons and drunk drivers who avoid conviction, and the prospect that an innocent uninsured motorist would be unable to recover from a wealthy uninsured tortfeasor." I posit that for Mr. Dordick's client, and countless like him, his pain, suffering, complete disability, and complete dependence on others for his most basic survival needs, is not secondary.

So many cases, so little sense

Since its passage Prop. 213 has been bizarrely applied in a host of cases. In *Cabral v. Los Angeles Cty. Metro. Transp. Auth.* (1988 2nd Dist. Div. 5) 66 Cal.App.4th 907, an uninsured driver brought a negligence action against a county transportation authority arising after its bus collided with the door of plaintiff's legally parked car as the plaintiff was getting out of the car. The *Cabral* opinion denied the plaintiff the right to his full measure of damages per application of Section 3333.4. The court reasoned that being in a parked car was a form of use, stating: "Limiting plaintiff's damages in this case to economic losses tends to equalize the litigation benefits for insured plaintiffs suing uninsured defendants and uninsured plaintiffs suing insured defendants." It is this author's view that this was not the intended purpose of Prop. 213 and stereotypes all uninsured owners and drivers as being unable to pay for damages they caused through independent means apart from insurance.

In another stretch of the imagination, *Harris v Lammers* (2000 1st Dist. Div. 5) 84 Cal.App.4th 1072, plaintiff Harris was standing behind her parked car, handing balloons to her children through the window. She was injured by a motorist pulling out of a parking space who clipped the door and pinned the victim against her vehicle, causing her serious injury. Harris did not have insurance on her vehicle at the time. The court ruled that Harris was clearly "using" her car to transport her children and supplies, and that the accident arose out of and flowed from that use. Hence, the court concluded this was an action "arising out of ... [the] use of a motor vehicle" and that Civil Code section 3333.4 applied." (*Id.* at p. 1077.)

The *Harris* court stretched the reach of Prop. 213 almost to the point where looking at a car would divest one of their rights, stating: "Although driving is included within the concepts of operation and use of a vehicle, operation is a broader concept than driving and does not require that the vehicle be in motion or even have the engine running. Operation includes stopping, parking on the highway, and other acts fairly regarded as a necessary incident to the driving of the vehicle...." (*Id.* at pp. 1077-1078.) This stretch of the imagination has voided the rights of people sitting in their cars, even if they were parked, in a parking lot. By application it could eliminate the rights of someone pumping gas, washing their car or even taking a selfie leaning against an uninsured vehicle.

In 2002, in *Allen v. Sully-Miller Contracting Co.* (2002) 28 Cal.4th 222, an uninsured motorcyclist who was injured in a single-vehicle accident while turning across an unmarked elevated bus pad on a public roadway, brought a negligence and premises-liability action against the private construction company that maintained control over the roadway at the time of the accident. The Supreme Court reasoned that the action was one involving the operation or use of a motor vehicle.

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This decision showed the perversion from the stated original objective of preventing uninsured drivers from receiving benefit from an insurance pool *of insured drivers* that they had not contributed to. Clearly the Court was protecting a construction company and its certificate of general liability (CGL), drawn from a pool that insured motorists don't pay into.

In 2010, in *Chude v. Jack in the Box Inc*. (2000 2nd Dist. Div. 3) 185 Cal.App.4th 37, Ms. Chude, a customer of Jack in the Box (JIB), suffered second-degree burns on her genitals and lap when she spilled the coffee she had just purchased at the drive-through window. After JIB's employee handed her the cup of coffee, Chude took the coffee from the employee and brought it inside her car where the cup dropped into her lap leaving the lid in her hands. Chude sued JIB for the negligent manner in which her coffee cup was assembled and handed to her. The court denied her the right to non-economic damages because her vehicle was uninsured. It ruled "Were we to construe section 3333.4 as inapplicable here, JIB would remain legally responsible to compensate an uninsured driver for both economic and non-economic losses arising out of the accident where only JIB obeyed the law by obtaining insurance. Such a result would reward Chude for breaking the law." How compensation for injury can be seen as a reward is unfathomable. Whether Chude did, or did not, have insurance would have no effect on the insurance pool from which JIB would be compensating her (a CGL). Had Chude been standing at the counter, or sitting in a booth, she would have been able to recover: her status as insured or not would have had no bearing on JIB's insurance costs. This decision was just punitive.

Back to the instant matter, *Briones*

The *Briones* case showcases one of the most troubling and unjust flaws in the law: Section 3333.4. subdivision (c). Under Prop. 213, if an owner of an uninsured vehicle is injured by a convicted drunk driver, they can recover non-economic damages even if they are uninsured. But someone like Mr. Briones, a driver who borrows a car, anticipating that it will be insured in compliance with the law's requirements, who is injured by a convicted drunk driver, is denied the equal right/protection under the law to recover those damages. If Briones had owned the car *and knew it was uninsured* when he was hit by Zink he would be entitled to recovery. How does that square with logic? The person who knowingly violates the law can collect while the unsuspecting victim can't. That is not rationally related to advancing the purportedly legitimate state interest of encouraging the purchase of insurance. It's a windfall for the drunken driver and his/her insurance company. As these drunken driving accidents are some of the most serious injury-producing collisions we see, it creates the biggest windfall for the insurance companies while simultaneously bestowing the greatest injustice upon the victims.

Montes: the employer's vehicle

Examination of a variation on the uninsured theme involving drivers of another's uninsured vehicle demonstrates the logical and just way that Prop. 213 should be analyzed and restrained. In the case of *Montes v. Gibbens* (1999 2nd Dist. Div. 2) 71 Cal.App.4th 982, Montes was driving his employer's vehicle while in the course and scope of his employment. His employer carried no liability insurance on the vehicle. At the time, Montes did not own an operable motor vehicle and did not have an "operator's policy" providing him coverage for driving a non-owned vehicle pursuant to Vehicle Code section 16452. The trial court barred Montes from recovering non-economic damages.

CAALA Board Member Jeff Ehrlich handled the appeal and explained to the appellate court that, under the applicable financial-responsibility laws, it is an employer's responsibility to maintain insurance on their vehicle, to report to the DMV any accident causing damage of over $500.00 to the DMV, and to demonstrate to the DMV that there was evidence of insurance in effect at the time of the collision or pay the fine for a citation received for no insurance. Because it was not Montes' obligation to ensure his employer's vehicle was insured, he was able to recover regardless of Section 3333.4. The *Montes* Court ruled: "The use of the word "or" in the language of section 16050 imposing a responsibility on "*every driver or employer*" evidences a legislative intent to free the employee from the obligation of establishing financial responsibility while driving an employer's motor vehicle. This makes sense. The unsuspecting operator of another's car should not be penalized for something they cannot control, i.e., procuring insurance for the owner's vehicle.

This approach squares with the well-established legal principal embodied in California Civil Jury Instruction 411 which states: "Every person has a right to expect that every other person will use reasonable care and will not violate the law, unless he or she knows, or should know, that the other person will not use reasonable care or will violate the law." This cornerstone of legal expectation is well defined in the case of *Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523: "The general rule is that "every person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could come to him only from violation of law or duty by such other person."'

However, under Prop. 213, an uninsured driver is not given any due-process consideration to demonstrate their lack of knowledge or reasonableness thereof; they are met with a strict-liability standard: no insurance, end of story. The law in this area should provide for both due process and equal protection.

The reasoning that by paying into the insurance pool victims somehow

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restore balance to our justice system is flawed. There are other ways that financial responsibility can be demonstrated besides a prepaid policy of insurance. Pursuant to Vehicle Code section 16054 one can post a bond for the state minimum. (Veh. Code section 16056 requires bodily injury limits of $15,000.00 per person, $30,000.00 per occurrence and $5,000.00 for property damage.) Pursuant to Vehicle Code section 16053, an entity may receive a *certificate of self-insurance* when it satisfies the DMV that the applicant, in whose name more than 25 motor vehicles are registered, is possessed and will continue to be possessed of the ability to pay judgments obtained against him or her in amounts at least equal to the state minimum. Section 16053 does not require *any updating* of the financial information which provides the basis for such a certificate. So, once a company has demonstrated that they have the ability to pay, they can have *25 uninsured* vehicles traveling over the roadways if their financial fortunes change. As these fleets are often taxis, airport shuttles, or other common carriers in continuous use, the risk of them being involved in a collision is far greater than a passenger car which is used on average less than 4 percent of the time. Should such an entity, once solvent, become financially unable to provide the state minimum, then their vehicles would be defacto uninsured. Yet, as long as they hung on to that certificate, no different than an expired insurance card, they would meet the requirements of Section 3333.4 and their drivers could recover for their injuries.

When the "self-insured" go bankrupt

You may say, "that's a stretch," but you need look no further than San Francisco, and the recent bankruptcy filing last month of Yellow Cab Cooperative (Yellow), to see the reality of this scenario. As the lawyer representing two of the top ten creditors of Yellow, both victims injured by Yellow drivers (one a passenger, one a pedestrian), I know that Yellow's legal position is that they "have no money to pay for our self-insured liabilities." This farce allows big businesses to skirt the financial responsibility laws while victims like Mr. Briones lay motionless because his mother was not a company who once persuaded the DMV that she "was good for it."

Because the purpose of the law is to make sure that there is an amount of funds, equal to the state minimum, available *in the event of liability* for damage or injury, the real concern, and purpose of the financial responsibility laws, is to assure that a fund of at least $15,000.00 for bodily injury per person, $30,000.00 per occurrence, and up to $5,000.00 in property damage is available after a collision occurs and *after liability has been determined*. That rationale is recognized by Vehicle Code sections 16021(d) and 15054.2(a).

Section 16021 states that one method that financial responsibility may be established is by complying with section 16054.2, which states that financial responsibility may be demonstrated by depositing the state minimum with the DMV.

That is logical. It is similar to an escrow account. An accident happens; a driver deposits the minimum with the DMV and then the issue of liability can be worked out safe in the knowledge that, should the depositor ultimately be found liable, they can responsibly meet their minimum statutory financial obligations. If they are at fault, then the other driver receives the funds. If they are not, they have the monies in defacto escrow refunded. Status quo between the drivers is maintained whether or not there is insurance: it just cuts the insurer's premium/profit out of the equation. Given the recent insurance crisis following the housing/insurance-backed mortgage crisis, having cash on hand in the DMV is an even greater surety of financial responsibility than a policy of insurance.

Mr. Briones met the financial responsibility laws by placing "cash on the barrel" with a deposit at the DMV. Had Mr. Zink been determined by the jury to be the victim, and Mr. Briones liable, the monies on deposit in the DMV would have been his. Indeed, even as I write, the $35,000.00 ($30,000.00 per occurrence minimum with the $5,000.00 minimum for property damage) remains on deposit, even though it need not be, with the DMV.

If the ability to have paid the drunken Mr. Zink was the issue, that was resolved long ago. The monies were there to pay him had he proved Mr. Briones was liable. This was the opinion of Judge Nguyen when he just recently denied Zink's motion to set aside the non-economic damages award. If the Second District Court of Appeals (serving Ventura County) truly wants to restore balance to our justice system – and it is fairness and accountability we are after – then Mr. Briones' verdict should be upheld and he should be compensated for all of his horrific injuries and his interminable suffering.

I say to Mr. Dordick, do what you do best, don't give them any quarter, hold them accountable, and make them pay.

Dolan

Chris Dolan is the owner of the Dolan Law Firm *with offices in San Francisco, Oakland and Sacramento. He has received the Consumer Attorneys of California Trial Lawyer of the Year Award, the Edward Pollock Award for service to the plaintiff's bar, the SFTLA Trial Lawyer of the Year Award, The Chief Justice's Award for Contribution to the Courts, and the SFTLA Civil Justice Award. Dolan is named in Best Lawyers in America. He currently serves as president of the San Francisco Trial Lawyers Association.*

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