WALKUP, MELODIA, KELLY & SCHOENBERGER

FOCUS on torts

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$12.2 Million Verdict Highlights Pedestrian Injury Risk

A car versus pedestrian crash with tragic consequences in San Mateo County may bring about safer crosswalks in California, after a Redwood City jury awarded more than $12 million in damages to a 17-year-old girl struck in a marked crosswalk at an intersection without a traffic signal on State Route 82 (El Camino Real) in Millbrae. Emily Liou suffered extensive brain damage and is left in a permanent vegetative state, requiring 24-hour care, from the time she was placed in the ambulance and will continue to require such care for the rest of her shortened life.

Walkup, Melodia partners Richard Schoenberger and Douglas Saeltzer obtained this verdict in July. "We presented evidence that Caltrans has known for years that marked crosswalks at uncontrolled intersections are dangerous because they give pedestrians a false sense of security. These intersections may be safer without any marked crosswalk. This seems counterintuitive, but statistics, taken from study after study, bear this out," said Schoenberger.

Rich and Doug found evidence of knowledge of the dangers of such crosswalks dating back to a 1972 study commissioned by the City of San Diego. That study, which investigated 400 pedestrian accidents over a five-year period in the 1960s, concluded "approximately twice as many pedestrian accidents [per pedestrian crossing] occur in marked crosswalks as in unmarked crosswalks." Those results were referenced in a later study sponsored by Caltrans. And that study reached the same conclusions: marked crosswalks have a higher frequency of pedestrian accidents than unmarked crosswalks at uncontrolled intersections.

Then in 2002 the Federal Highway Administration analyzed more data in a report titled "Safety Effects of Marked Versus Unmarked Crosswalks at Uncontrolled Intersections." That report concluded marked crosswalks should not be used on roadways with four or more lanes and a raised median that see an average of at least 15,000 vehicles a day. El Camino Real, in the area where Liou was struck, has six lanes of traffic and a raised median and sees an average of more than

Continued on page three

Walkup Product Liability Team Leading Hip Recall Fight

On August 26, 2010, DePuy Orthopaedics, Inc. announced a formal recall of its ASR "metal-on-metal" prosthetic hip. These defective hips were implanted in patients worldwide starting in 2002 and continuing up to the date of the recall.

Johnson & Johnson, parent company of DePuy, says a total of 93,000 patients were implanted with the ASR both in the U.S. and abroad. The Walkup, Melodia medical product liability team, headed by Michael A. Kelly, Matthew Davis and Khaldoun Baghdadi, are at the leading edge of the curve in prosecuting these cases nationwide. Mike, Matt and Khaldoun are representing clients across the country, and working with physician experts in the U.K., Australia and the U.S. They have acquired a thorough understanding of the failure mechanism and the risks to patients presented by these metal-on-metal prosthetic hip components.

The product recall includes two defective models: the ASR XL Acetabular System and the ASR Hip Resurfacing System. Walkup, Melodia filed the first case in the U.S. against DePuy based on its defective ASR hip implant in March, 2009 – almost 18 months before the device was recalled.

The emerging consensus in the medical and scientific community is that the poorly designed ASR generates excessive levels of

Continued on page five

Mike Kelly Named SFTLA Award Winner

Walkup partner Michael Kelly was presented with the 2010 San Francisco Trial Lawyers Association Trial Lawyer of the Year Award at a gala celebration before an overflow crowd at the Parc 55 Hotel grand ballroom. The award capped a year in which Mike obtained a record breaking obstetrical injury verdict, was elected President of the San Francisco Chapter of ABOTA, was chosen as a finalist for the Consumer Attorneys of California's Consumer Attorney of the Year award and selected for membership in the International Academy of Trial Lawyers (IATL). This was the fourth time Mike had been nominated for the prestigious SFTLA honor.

Also honored at the awards banquet were Nancy Hersh (Lifetime Achievement) and Charlotte Venner (Mediator of the Year).

In his acceptance speech Mike thanked the SFTLA Board and cited the positive impact that practicing with former SFTLA Presidents from the Walkup firm (Jim Downing, George Shelby and Daniel Kelly) has made in his career. He also saluted the contributions of the rank and file members of SFTLA in fighting to preserve the jury system, and undertaking the burden of representing those injured

Photo of Mike Kelly accepting the 2010 SFTLA "Trial Lawyer of the Year" Award. Behind Mike from left to right, are the other finalists Randall Scarlett, Donald Krentsa, Walter (Skip) Walker, and Daniel Dell'Osso.

through the carelessness of others regardless of the size of the case.

In his remarks, Kelly quoted University of Michigan Law School Professor John Reed as follows:

"As lawyers at the civil bar, we meet here seeking to know and befriend and support one another, knowing that the world is too dangerous for seeking anything but the truth. Sometimes we are frustrated that there is so much to be done and we are so few. But think of the parable of the small child walking on the beach with his grandfather. As the child picked up a starfish to throw it back in the water, the grandfather said 'There are millions of stranded starfish, what you are doing won't make any difference.' To this the child replied 'It makes a difference to this one.'"

So is it with our clients. Our work on each case matters to each client individually, this one and the next, one at a time. While being honored as "Trial Lawyer of the Year" is a special tribute, Mike pointed out that every lawyer in the audience had made a difference in some client's life during the year, and to one extent or another, shared in his award as "Trial Lawyer of the Year." "It is not the size of the verdict that's important" Mike said, "it is the amount of justice that gets delivered."

Mike spoke at length about the need for those who represent victims of corporate negligence to stick together. "It seems that we are forever under attack for doing nothing more than trying to make certain that democracy works at the most basic and grassroots level. We should never forget that trial is not a failure of ADR, it is a constitutional right, part of our democracy and something that needs to be protected. It requires each of us to see beyond ourselves, to take risks, always knowing that the risk of loss is ever present. Although victory is not assured despite our best efforts, defeat is assured if we do not join the battle."

11th Circuit Limits Medicare Reimbursement Claims

Dealing with the claimed reimbursement rights of the United States Government can be one of the most frustrating aspects of cases in which we represent Medicare beneficiaries. Relying on its own internal manuals, Medicare regularly claims that it is entitled to the full value of payments it has made for medical bills (less procurement costs) even in cases in which the plaintiff is not made whole as a result of inadequate liability insurance proceeds, comparative negligence, or other reasons.

The Eleventh Circuit recently concluded that this interpretation of the law by Medicare is incorrect. In Bradley v. Sebelius (11th Cir. 2010) __ F.3d __, 2010 WL 3769132, a decedent's ten children and his estate entered into a pre-litigation settlement against a nursing home in the full amount of the nursing home's liability insurance policy limits of $52,500. Because the amount of insurance was meager, it was clear that decedent's surviving heirs were not fully compensated by the settlement. Nonetheless, Medicare claimed that it was entitled to reimbursement for the full amount of all payments it made minus the procurement costs (a deduction for a pro-rata share of costs and fees), an amount which represented more than half of the coverage.

The 11th Circuit held that Medicare's recovery was not wholly superior to the right of recovery of the 10 children. Relying on conclusions reached by a Florida probate court, which heard evidence about the damages suffered by each surviving child, the 11th Circuit held that the full value of the case to the plaintiffs was $2,538,875.08. It reached this figure by giving each of the 10 children $250,000 in general damages for the loss of a father plus $38,875.08 to reimburse Medicare. Dividing the Medicare payments by the full value of the case resulted in the ratio of estate damages (medical bills) to full value of the case. That ratio was then multiplied by the full value of the settlement, giving Medicare a reimbursement of $787.50.

Beyond this mathematical approach based on principles of equity, the Court of Appeal also addressed Medicare's underlying substantive argument: that its "field manual" was essentially controlling law. The Justices rejected this argument out of hand, holding that the manual was neither controlling law nor did it deserve *Chevron* deference.

Looking forward, we are hopeful other Circuits will adopt this interpretation. There is some hope for this possibility, as the mathematical approach used in Bradley is consistent with that applied by the United States Supreme Court in Arkansas Dep't of Human Servs.v. Ahlborn (2006) 547 U.S. 268.

Economic Meltdown Increases Future Economic Damages

When catastrophic injury is involved, accurately forecasting the present cash value of lost future wages, benefits and household services has always been critical. In making such projections, most economists have traditionally assumed that the average American worker has a work-life expectancy somewhere between ages 62 and 65. New data now suggests that such assumptions greatly understate the amount of probable future loss. Early retirement is no longer the goal of most workers. Even retirement at age 65 seems unattainable to many people. The majority of Americans now expect to work until age 65 or later.

According to a May 2010 Gallup survey, the number of Americans planning to retire before age 65 has dropped from 50% in 1996 to 29%. Meanwhile, the proportion of people planning to work until after age 65 has increased from 15% in 1996 to 34%. This is the first time in the 15 year old survey that more workers plan to retire after age 65 than before it.

Factors influencing Americans' willingness to work past the traditional retirement age of 65 include the progressively higher age at which Social Security recipients are eligible for full benefits and the financial insecurity that has accompanied the shift from pensions to personal retirement planning. Retirement account balances are still far from their peak of $8.6 trillion reached in 2007. Many Americans with their life savings in 401(k)'s and IRA's will need to work longer to replace money lost in the stock market collapse of 2008.

The number of private sector workers who participate in a traditional pension that guarantees retirement income for life declined by 33% between 1980 and 1996, from 30.1 million to 19.9 million, according to the Department of Labor. Although many employers contribute to 401(k) accounts, the amounts vary considerably. And there is no guarantee that employers will continue making 401(k) contributions – at least 267 major employers reduced or suspended their 401(k) matches in 2009 and 2010.

Finally, uncertainty over healthcare coverage also mitigates in favor of later retirement ages. Medicare eligibility generally does not begin until an American turns 65. Depending on the needs of dependents, and the desire to continue pre-existing doctor patient relationships, remaining at work is one way to maintain group health coverage until Medicare becomes a viable option.

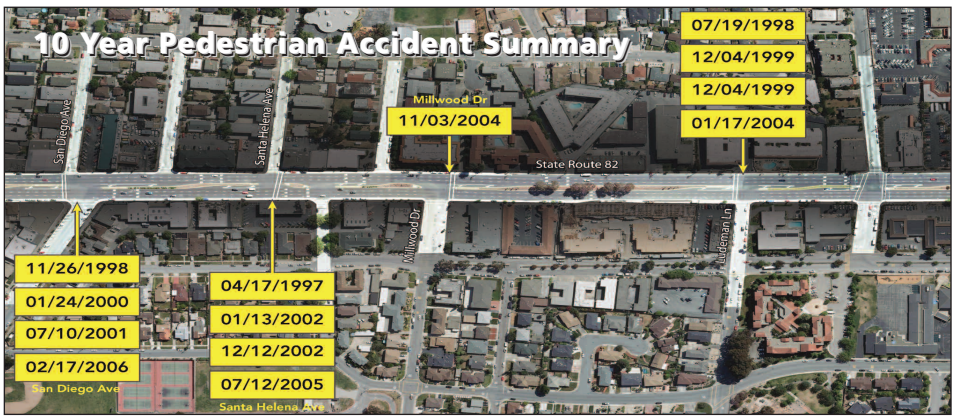
$12.2 Million Verdict Highlights Pedestrian Injury Risk

Continued from page one

25,000 vehicles a day. Schoenberger and Saeltzer discovered Caltrans had never studied the pedestrian accident rate on any of its roadways. If it had, it would have realized the danger of the crosswalk where Liou was struck, crossing El Camino Real at Ludeman Lane.

Four other pedestrians had been killed or injured in that same crosswalk over the previous ten years, and Caltrans used that as evidence of the crosswalk's safety. "Their defense was, look at how many cars went through that intersection," Saeltzer said. "They said there had been 90 million cars. But you can never adequately monitor pedestrian safety if you're not actually monitoring pedestrians. And Caltrans has never systematically measured pedestrian crossing rates."

By never doing a study to determine the number of people using the crosswalk (who had the potential to be struck), Caltrans was in essence using the wrong denominator to determine the accident rate. So Schoenberger and Saeltzer did the study Caltrans should have done, counting the number of pedestrians using the Ludeman Lane crosswalk.



"We found there were only 70 people crossing there every day," said Saeltzer. "So it was infrequently used. We found people working at businesses in the area who told us, 'I won't use that crosswalk because it scares me.'" Saeltzer and Schoenberger also determined there had been similar pedestrian injury rates at two similar crosswalks on El Camino Real within one-third of a mile.

After hearing the evidence presented by both sides, the jury awarded $12.2 million in damages, most of which will cover the costs of Liou's medical care and her lost future income. Liou was found 20% at fault for the accident because she was wearing dark clothing and did not see the oncoming vehicle in time to avoid impact.

The driver of the car was determined to be 30% at fault even though she was sober at the time of the crash, was driving well below the speed limit and had a clean driving history. The jury found Caltrans to be 50% at fault for the crash, for allowing the dangerous crosswalk to remain in place and not even attempting to study or remedy the risk there. "Caltrans blamed our client and blamed the driver," Schoenberger said. "They did their best to avoid any responsibility for their own crosswalk. The jury didn't agree."

Rich and Doug, as well as our other partners, are available to consult on all types of government liability matters including dangerous highways, structure failures and defects, and negligent acts and omissions by public employees.

WALKUPDATES

Melinda Derish was appointed a member of the Advisory Board for the East Bay Community Law Center (EBCLC). EBCLC provides free legal services to underserved people in the East Bay…**Emily Wecht Polcari** is teaching legal writing and research at Hastings…**Khaldoun Baghdadi** is serving as co-chair of the Northern District Representatives to the Ninth Circuit Judicial Conference. In addition, he has been invited to speak to the American Bar Association's product liability section on the topic of Emerging Issues in Product Liability in Phoenix, Arizona…**Conor Kelly** is teaching San Francisco high school students trial advocacy through a program sponsored by the BASF. The program places volunteer attorneys at 8 different San Francisco high schools tutoring them for participation in a statewide mock trial competition. **Conor** is working with a group of 16 students from Lowell High School. The program runs until February when trials will be held at San Francisco Superior Court…**Rich Schoenberger** was elected Secretary of the San Francisco Chapter of ABOTA…**Rich** has been extremely active in ABOTA's Civility Project. He also received a faculty appointment at U.C. Berkeley Boalt Hall School of Law teaching Trial Advocacy with Alameda Superior Court Judge Kenneth Burr who, like **Rich**, is a former Alameda County prosecutor...**Doris Cheng** has been appointed to the USF School of Law Board of Counselors, a select group of advisors to the Dean. **Doris** has also been busy teaching internationally – she recently traveled to Mexicali, Mexico training lawyers and judges under a grant from USAID. In October, for a second consecutive year, **Doris** travelled to the Republic of Kosovo to work with the Kosovo Judicial Institute, training judges from Kosovo and Albania in refining their advocacy training programs. She will serve as Treasurer of the San Francisco Trial Lawyers Association in 2011…**Doug Saeltzer** was elected to membership in ABOTA, the most selective honorary society in the country recognizing civil jury trial skills. **Doug** also skippered the "Mighty Mouthpiece Softball Co." to yet another San Francisco Lawyers League softball title, winning a thrilling one run game against the 9th Circuit…**Matt Davis** was an invited presenter at The Rutter Group's "Update" program on Summary Judgment. **Matt** also spoke at the national DePuy/Johnson & Johnson ASR prosthetic hip product liability symposium in Durham, North Carolina…**Sara Peters** is serving as Assistant Coach for Stanford's Mock Trial Team. In addition, **Sara** remains busy as a Director with the nonprofit she helped co-found: ABC (Attorneys Bettering the Community). The organization received its 501c(3) status, and completed seven community service projects in three Bay Area counties. The projects included distributing 250 holiday necessity bags to the homeless, assembling 600 craft kits for terminally ill children, partnering with Architects for Humanity to raise $10,000 for Haitian school rebuilding, refurbishing a home for a low-income family whose child is receiving treatment at UCSF, and painting and landscaping new displays at Oakland's Fairyland...**Mike Kelly** presented an exemplar final argument at the "Masters in Final Argument" program sponsored by SF ABOTA in October and was a featured speaker at the CAOC "Automobile Dynamics" seminar at Infineon Raceway where he spoke on cross-examination of defense experts. **Mike** was also nominated for the prestigious 2010 Consumer Attorneys "Consumer Attorney of the Year" Award…**Spencer Pahlke** completed the 2010 NITA National Trial Advocacy Training Program. He also was appointed Director of Trial Advocacy Competition Teams at Boalt Hall. **Spencer** will personally coach 3 teams and serve as a lecturer in Trial Advocacy at Boalt starting in the 2010-2011 academic year.

Sara Peters and Spencer Pahlke (back row, third and fourth from the left) join other ABC volunteers at a community clean-up event.

New Non-Profit Showcases Legal Community Generosity

Attorneys Bettering the Community (ABC) is a 501c(3) non-profit that connects Bay Area attorneys with local causes, hands-on volunteer opportunities, and one another. Its growing membership consists of lawyers who want to get out of their offices and get their hands dirty serving their communities while improving the profession's public image and forming lasting connections with other similarly inclined lawyers.

In ABC's first ten months, more than 55 volunteers distributed socks, scarves, and gloves to 250 homeless people, gave personalized craft kits to 600 hospitalized children, raised $10,000 to rebuild a school in Port-au-Prince, Haiti, landscaped a Lake Merced lookout point, prepped Family House residences to receive terminally ill children treated at UCSF, painted a new exhibit at Oakland Children's Fairyland, and staffed Fairyland's Halloween Jamboree.

ABC is looking for financial support as well as interested volunteers. You can help by donating to or volunteering for ABC's December 9th (5:30 to 9:00 p.m.) Holiday Bags for the Homeless event. For information, visit www.abcoutreach.org or email them at info@abcoutreach.org. To donate, use PayPal at www.abcoutreach.org/donate, or write a check to Attorneys Bettering the Community, c/o Camerlengo, Johnson, Landman & Mazza LLP, 643 Bair Island Road, Suite 400, Redwood City, CA 94063.

CONSUMER EXPECTATION TEST REAFFIRMED

A recent Court of Appeal opinion reaffirmed the consumer expectation test in products liability cases. In Saller v. Crown Cork & Seal Co. (2010) 187 Cal.App.4th 1220, the 2nd District Court held that the lack of a specific expectation about the safety of a product does not prevent the plaintiff from using CACI 1203's consumer expectation test.

Saller was a mesothelioma matter in which the decedent worked for Standard Oil between 1959 and 1967. He was employed in a plant where pipes were wrapped with insulation made of asbestos. In 2005 doctors diagnosed him with mesothelioma. He died the next year.

At trial the court barred the use of CACI 1203 and the consumer expectation test. Instead, the judge permitted the jury to be instructed only on CACI 1204's cost/benefit test. The trial court's rationale was that CACI 1203 was "not applicable in this type of situation." The jury returned a defense verdict.

The plaintiffs appealed, arguing that it was error to disallow the consumer expectation test. The defendant responded by arguing that consumers in the 1950's and 1960's, when the decedent was exposed to asbestos, had no specific expectation about the safety of asbestos. Because they had no expectation about the dangers or risks of asbestos, the defense argued it was not possible to say that any consumers "expectations" were violated.

The court pointedly disagreed, stressing two important concepts: first, it unequivocally held that the consumer expectation test was appropriate in asbestos cases; second, and more broadly, it held that the lack of an expectation about a product's dangerousness does not bar use of the consumer expectation test.

Specifically, the court wrote: "If knowledge of the hazardous nature of the product were a prerequisite for the test to apply, then no product would ever fail to meet the safety expectations of the reasonable consumer."

The opinion is useful not only in asbestos litigation, but also in other products liability cases. In light of Saller, defendants cannot argue that the lack of a specific expectation regarding the safety of a product prevents use of CACI 1203's consumer expectation test.

Walkup Product Liability Team Leading Hip Recall Fight

Continued from page one

metal debris (primarily chromium and cobalt) with foreseeable use, which in turn prompts a reaction in the patient's body that leads to the progressive (and in some instances) irreversible loss of bone and soft tissue around the hip joint. There is also concern in medical and scientific circles that excessive metal debris may cause other serious health problems in the ASR patient.

Johnson & Johnson / DePuy press releases have suggested that the ASR will fail in 12% to 13% of patients within the first five years, and that the involved patients "may need a revision surgery." (Revision surgery is a painful and expensive process in which the defective ASR components are removed and replaced with a different device; the revision patient is required to undergo a second, needless surgery to fix the mistake.) This is an alarmingly and unacceptably high rate of failure, and it also almost certainly understates the problem. Based upon the Walkup medical product liability team's interaction with orthopedic specialists as well as our work with biomechanical engineers, biotribologists and epidemiologists, our lawyers believe that the true rate of failure will approximate 30% at the five year point, at least twice that predicted

by DePuy, and that all of these patients will need revision surgery. The ASR's have only a five year track record. Unfortunately for ASR patients, the epidemiological evidence strongly suggests that the device will continue to fail at potentially higher rates in succeeding years. Thus, the final ASR "failure" rate may reach or exceed half of the devices implanted.

Walkup, Melodia clients with claims against DePuy have experienced symptoms including pain, swelling, cup loosening, audible popping and difficulty walking, as well as elevated levels of cobalt, chromium and other heavy metals in the blood. Some ASR patients are asymptomatic; they do not feel any pain, but are nevertheless losing bone and tissue to metal debris reaction. These patients, if undetected and untreated, face the prospect of a sudden and cataclysmic failure, i.e., the device suddenly coming loose from the anchoring bone. ASR patients are advised to schedule an immediate appointment with their orthopedic surgeon. The surgeon will likely conduct blood tests and radiographic imaging studies of the hip to assess the viability of their implant.

The Walkup, Melodia team is representing ASR patients from all over the United States. Consistent with Rule of Professional Conduct 2-200 we have entered into referral agreements with a number of counsel in California and elsewhere and welcome inquiries from interested associate counsel.

Recent Cases

Government Liability

High School Student v. County School District

In High School Student v. County School District (pre-litigation settlement), Richard Schoenberger and Matthew Davis obtained a confidential seven-figure settlement in a case that drew national and international attention following a gang rape on school premises during a Homecoming Dance. The victim was a 16-year-old teenager who sustained serious physical and emotional injuries after being assaulted on school grounds at a school sponsored dance. Rich and Matt proved that the District knew for years that the courtyard where the rape occurred was dangerous, unlit and unprotected. Principals, teachers and parents had begged for the most fundamental of security measures: lights to illuminate "hot spots," fences to keep non-students out, and working – as opposed to broken – surveillance cameras. The District made promises to install these items but none was kept. Matt and Rich also demonstrated that the District had no written plans for how to safely run events such as the dance and made no effort to take reasonable precautions to protect its students. On the night of the assault, the school sent site supervisors home early (about thirty minutes before the rape began) to avoid paying overtime. As a result, the rape continued unabated for more than two hours. In an effort to spare the victim from experiencing further emotional trauma, Rich and Matt were able to put the case into a settlement posture at mediation before a lawsuit was ever filed.

Executive v. CCSF Municipal Railway

In Executive v. CCSF Municipal Railway (S.F. Sup. Ct.), Matthew Davis and Michael A. Kelly obtained a $3,250,000 recovery against the San Francisco Municipal Railway arising from a pedestrian versus streetcar collision. Initial investigation by the San Francisco Police Department placed all blame on the injured plaintiff for allegedly stepping in front of a moving MUNI F-Line train. Mike and Matt ultimately developed evidence suggesting that the streetcar's operator entered the accident crosswalk against a burned out red streetcar signal at an excessive speed. The City highly disputed all claims of negligence and dangerous condition. The plaintiff sustained significant brain injury requiring extensive physical and cognitive rehabilitation. The case was concluded while the City's summary judgment motion based on governmental immunities was pending.

Vehicular Negligence

Pedestrian Nurse v. Motorist

In Pedestrian Nurse v. Motorist (S.F. Sup. Ct. No. CGC-09-484951), Sara Peters represented a young woman who was struck by a distracted motorist while crossing Broadway Street inside a marked crosswalk and on a walk signal. Plaintiff sustained a lateral tibial plateau fracture and a meniscal tear, putting her in a wheelchair for three months and requiring arthroscopic surgery. The plaintiff's wage loss was difficult to prove since she had quit her job as a nurse one week before the incident and was in the process of filling out employment applications. During her convalescence, the nursing market declined, leaving her less ideal options upon her return. With approximately $10,000 in past medical bills, Sara negotiated a settlement in the amount of $187,000 including the defendant's $100,000 policy limits plus $87,000 in underinsured motorist (UIM) benefits from the plaintiff's own automobile liability policy.

Premises Liability

Tenant v. Building Owner & Elevator Maintenance Co.

In Tenant v. Building Owner & Elevator Maintenance Co. (S.F. Sup. Ct., confidential settlement), Richard H. Schoenberger and Conor M. Kelly concluded a premises liability case in the amount of $2,100,000 on behalf of a 46-year-old professional who suffered traumatic brain injuries after falling fifteen feet into an open elevator shaft. The fall occurred in a commercial building where the plaintiff rented an office on the second floor. The building owner locked the passenger elevator on the weekends to prevent ground floor restaurant patrons from accessing other floors of the building. The plaintiff was not given a key to the passenger elevator and had to use the freight elevator on the weekends. On the day he was injured, he opened the freight elevator expecting the car to be there, but when he stepped inside, the elevator shaft was empty. Suit was brought against both the owner of the building and the company that serviced and maintained the freight elevator. The elevator was designed so that the doors were not supposed to open unless the elevator car was present. At deposition it was revealed that the building owner's uncertified "handyman" performed negligent repairs to the elevator in violation of the California Labor Code. Rich and Conor proved that the elevator maintenance company should have recognized problems with the freight elevator and taken remedial action months before plaintiff's fall. The settlement included $1,000,000 from the building owner and $1,100,000 from the elevator maintenance company.

Pedestrian v. City and County of San Francisco

In Pedestrian v. City and County of San Francisco (S.F. Sup. Ct. No. CGC-09-491579), Spencer J. Pahlke obtained a mediated settlement in the amount of $270,000. The 39-year-old plaintiff, an accountant, tripped and fell on a piece of exposed rebar in Justin Hermann Plaza, suffering bilateral wrist fractures, each of which required surgery. The rebar stood in place of a bollard knocked out by an unidentified vehicle. In discovery, Mr. Pahlke found records indicating that the City left the rebar exposed for approximately one month in an area with high pedestrian traffic. The City was therefore put in the position of explaining how its inspectors – who visited Justin Hermann Plaza weekly – could have repeatedly missed this pedestrian hazard. While it had to acknowledge that its inspectors should have found and corrected the condition, it did argue that the hazard was open and obvious. Medical specials were $88,000, and the lien of $24,800 was reduced to $5,500 through negotiation.

Recent Cases

Transportation Negligence

Passenger v. CCSF Municipal Railway

In Passenger v. CCSF Municipal Railway (S.F. Sup. Ct. No. CGC-09-484208), Douglas S. Saeltzer and Spencer J. Pahlke reached a mediated resolution of a common carrier negligence case against the San Francisco Municipal Railway in the amount of $2,095,000 on behalf of a visitor from Texas injured on the Powell Street cable car line. At the intersection of Mason and Washington, the cable car lost momentum in the turn and became stuck. Instead of calling for assistance from a MUNI tow truck, the MUNI operators decided to leave the car and push it by hand. Once the cable car was free and moving, they re-boarded to discover that the front door was jammed closed, blocking access to the car's main brakes. The runaway cable car then picked up speed heading down Washington Street before derailing in the turn onto Powell. The derailment ejected plaintiff onto the street, causing a badly fractured right leg. Following the injury, plaintiff required two surgeries and developed a non-union at the fracture site. The 52-year-old plaintiff was unemployed at the time of the accident and was fluent only in Spanish. As part of the settlement, the City and County agreed to pay plaintiff's outstanding $345,000 medical bill owed to San Francisco General Hospital.

Medication Negligence

Senior HMO Member v. National Health Maintenance Organization

In Senior HMO Member v. National Health Maintenance Organization (arbitration, confidential settlement), Melinda Derish negotiated resolution of a claim brought by a 76-year-old man who suffered brain damage due to excessive anti-coagulation with Heparin. Originally hospitalized for symptoms of a minor stroke, the plaintiff's initial symptoms spontaneously resolved but a staff physician at the hospital decided to treat him with high dose intravenous Heparin. By the next morning a blood test revealed the patient was excessively anticoagulated. The ordering physician never repeated the blood test or discussed it with the treating neurologist. The drug was not discontinued until 24 hours later, when the patient complained of headache and confusion. The event was witnessed by the patient's daughter. An emergency head CT scan revealed a brain hemorrhage, which ultimately caused coma. After weeks of intensive care the client was left with global cognitive deficits that require 24-hour care. Plaintiff's retained expert witnesses testified that high dose Heparin was contraindicated. The defendant health maintenance organization argued that the Heparin was dosed according to a computer protocol which was used system-wide and that the plaintiff senior would have needed 24-hour care because of his age in any event. The case was resolved for a seven-figure sum that included general damages, the cost of future care, and payment to the daughter for her emotional distress.

Underinsured Motorist

Pedestrian v. Underinsured Motorist Carriers

In Pedestrian v. Underinsured Motorist Carriers (mandatory UIM arbitration), Spencer J. Pahlke obtained a global settlement in the amount of $550,000 from three underinsured motorist carriers on behalf of a 62-year-old artist. On a quiet afternoon in north Berkeley, a passing motorist struck the plaintiff as she crossed the street in a marked crosswalk, lifting her onto the hood of his car. She then fell backwards to the ground. Witnesses saw the rear portion of her skull forcefully strike the ground. The resulting brain trauma destroyed her sense of smell and substantially eliminated her sense of taste. Medical specials in the case were only $29,500, and all liens were waived after negotiation. The third party defendant carried only a minimal $15,000 insurance policy, requiring an underinsured motorist claim. After substantial medical discovery and analysis of the mechanism of the pedestrian's brain injury and resulting loss of the sense of smell, the three auto carriers who insured plaintiff's own vehicles jointly contributed to fund a global settlement of $550,000.

Medical Negligence

Survivors v. Academic Medical Center

In Survivors v. Academic Medical Center (S.F. Sup. Ct., confidential settlement), Paul Melodia, Doris Cheng and Melinda Derish concluded a wrongful death claim against a teaching hospital in the amount of $5,000,000 on behalf of the husband, 6-month-old child, and dependent parents of a UCSF hematology/oncology fellow who tragically died as a result of a cardiopulmonary arrest during the course of an ERCP procedure. The decedent suffered a respiratory arrest 20 minutes into the procedure as a result of claimed airway compromise and over-sedation. The sedation was administered by a nurse rather than an anesthesiologist and there were additional issues relating to her recognition of, and response to, the emergency that developed. The decedent was 32-years-old and six months away from completing her fellowship. She had accepted a position which would have paid her a six-figure annual income. The decedent's elderly parents also participated in the settlement, as the decedent was providing them with financial support.

Infant v. Obstetrics Group

In Infant v. Obstetrics Group (arbitration, confidential settlement), Doris Cheng settled a birth injury action on behalf of a mother and infant in the amount of $4,875,000. Following prolonged labor, the child was neurologically depressed at birth and required resuscitation. Her medical providers had induced labor with Pitocin for over 24 hours without any progress. Although nurses charted worrisome changes on the fetal heart

Continued on back page

Recent Cases

Continued from page seven

monitor, they continued to increase the doses of Pitocin to unusually high levels. The attending obstetrician ordered the mother to begin pushing in the face of ongoing fetal heart rate decelerations. The mother's contractions were occurring too frequently giving the fetus little resting time between contractions. After pushing for more than 3 hours and depleting the baby's reserve, the attending obstetrician ordered delivery by Cesarean section. Delivery was finally accomplished almost an hour later. Head CT scans showed brain injuries consistent with hypoxic ischemic encephalopathy. The baby girl was diagnosed with cerebral palsy and right-sided hemiplegia. The defendants disputed the extent of the baby's injuries, claiming through experts that she had enough cognition to live with a measure of independence and would not require 24-hour attendant care.

Minister v. Gastroenterologist

In Minister v. Gastroenterologist (Contra Costa Co. Sup. Ct., confidential settlement), Michael A. Kelly and Emily Wecht Polcari concluded a failure to diagnose colon cancer case on behalf of a 37-year-old East Bay minister, in a confidential seven-figure amount equal to the defendant physician's insurance policy limits. The patient had complained to his healthcare provider of blood in his stools for more than two years. In October 2007 he underwent colonoscopy which the defendant gastroenterologist reported to be negative for polyps or tumors. Mike and Emily produced expert testimony that the tumor found in 2010 was present at the time of the colonoscopy, and was missed because the gastroenterologist's technique was below the standard of care. They argued that if the gastroenterologist had correctly performed the colonoscopy in 2007, he would have found the cancer and the patient would have been easily treated with local excision. If the cancer had been found at that time it likely would not have metastasized. Faced with a policy limit demand and a preferential trial date due to the patient's health, the gastroenterologist settled the case for his liability policy limit.

Defective Drug Liability

Surgical Patient v. National Drug Maker

In Surgical Patient v. National Drug Maker (confidential settlement), Khaldoun Baghdadi and Emily Wecht Polcari negotiated a $2,000,000 settlement on behalf of a man who suffered a heart attack after receiving a drug intended to reduce bleeding during heart surgery. The drug was subsequently taken off the market because it caused blood clots. The plaintiff had undergone four vessel cardiac bypass surgery (CABG) to treat multiple blockages in his coronary arteries. Intraoperatively he was given the medication. Postoperatively, his physicians discovered that three of the four bypass grafts had clotted off, greatly impairing his cardiac function. The plaintiff spent more than six months in the hospital and ultimately required cardiac transplant. Khaldoun and Emily argued that the clotting was caused by the administration of the drug. The pharmaceutical company's attorneys argued that the clotting was caused by poor surgical technique on the part of plaintiff's surgeon. Further, the drug maker alleged that it could not legally be held responsible for graft clotting because it had warned physicians of this risk, and the plaintiff's own treating physician chose to use the medication in spite of knowing this risk. The case ultimately settled after more than three years of litigation.

Product Liability

Heir v. Heater Manufacturer

In Heir v. Heater Manufacturer (San Mateo Sup. Ct., confidential settlement), Michael A. Kelly achieved a confidential seven-figure settlement on behalf of the surviving mother of a university student who was killed when the family's pool heater generated excessive amounts of carbon monoxide, which was thereafter transmitted into the child's bedroom via forced air heating ducts. Although advertised as including "fail-safe" components which would prevent generation of excessive amounts of carbon monoxide, the heater malfunctioned when installed in a way contrary to the instructions. The installer, who was uncertified, failed to comply with venting the unit to outside air. When the heater malfunctioned internally, burning a too-rich mixture of fuel and air, the improperly vented system recirculated co-filled air which had already become contaminated, further elevating the CO levels to ultimately fatal limits. Mike's experts demonstrated that the heater could have been designed in an alternate manner which would have prevented the too-rich fuel mixture; he also argued that the failure to include a CO monitor or kill switch also contributed to the tragedy. The manufacturer defended on the basis that no injury would have occurred, even if the heater malfunctioned, had the installer vented the device correctly.

We are available for association and/or referral in all types of personal injury matters. Fees are shared with referring counsel in accord with Rule of Professional Conduct 2-200.

Additionally, if there is a particular subject you would like to see discussed in future issues of ***Focus on Torts*** please contact Michael Kelly. Visit us on the web at www.walkuplawoffice.com.

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