WALKUP, MELODIA, KELLY & SCHOENBERGER

FOCUS on torts

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FIRM OBTAINS RECORD VERDICT

In the early evening on February 9, 2010, a jury of six men and two women in Kandiyohi County, Minnesota, returned one of the largest verdicts for an obstetrical injury ever reported in the United States. The verdict in the amount of $23,200,000 was obtained by Walkup senior partner, Michael A. Kelly, working in association with Minnesota attorneys Edward Matonich, Julie Matonich and David Arndt.

The jury's decision came after twelve days of testimony in a rural western Minnesota courthouse. Experts in the fields of obstetrics, maternal fetal medicine, family medicine, neuroradiology, pediatric neurology and perinatology testified on both sides of the case, which arose out of the post-term birth of Kylie Rodgers on June 6, 2007. Kylie's mother was one week past her due date when the defendant family medicine doctor decided to induce her labor. Over the course of the next twenty-four hours, Kylie's mother received doses of the contraction-producing drug Pitocin in amounts up to double those recommended by the manufacturer's FDA-approved instructions.

Mike and his co-counsel were able to prove that management of the mother's labor was not consistent with good and accepted standards of care. They showed that after twenty hours of chemically managed labor, the fetal heart monitoring strips documenting the child's condition showed tachycardia and worrisome loss of variability. Then, before the baby's head had ever descended beyond "0" station, so-called "variable" decelerations became manifest with each contraction. Rather than call for a bedside evaluation by a physician capable of doing a cesarean section (the managing fetal maternal medicine physician had not undergone an obstetrical residency and did not have privileges to do a cesarean) the nurse managing the mother's care either ignored, or elected not to follow up on, signs and symptoms of umbilical cord compression.

Thirty-one minutes after a cesarean section should have been called, a series of new, deeper and more ominous decelerations began. They culminated with a twenty-eight minute period of brachycardia, hypoxic ischemia and severe brain damage. The infant's Apgar scores at birth, five minutes and ten minutes, were 1, 3 and 3. Seizures developed within an hour. Laboratory testing reflected significant metabolic acidosis at fifty minutes after birth.

The defendants in the case, a local hospital and multi-specialty medical clinic that employed the family practice doctor, argued that the complication

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Toyota Recall Raises Questions About NHTSA Oversight

As Toyota announced it would recall more than seven million U.S. vehicles to correct accelerator problems and suspended production of its Prius and other models, automobile industry observers watched in awe. The scope of the recall has generated shock waves. The concern goes far beyond the suspension of sales and the implementation of safety recalls. The entire situation calls into question the overall security of Toyota as a corporation and the ability of NHTSA and the DOT to protect American consumers.

After refusing to play "hardball" with Toyota for at least two years, the National Highway Traffic Safety Administration has now demanded documents from the automaker to determine whether the company acted quickly enough in carrying out its three recent recalls. NHTSA, which for the last ten years has been the automaker's friend and the consumer's nemesis, now appears to be

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Toyota Recall Raises Questions About NHTSA Oversight

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changing its tune. Current U.S. Transportation Secretary Ray LaHood recently told the press "safety recalls are very serious matters and automakers are required to quickly report defects."

David Strickland, NHTSA's top official, now claims that safety is the top priority of his agency, and that "all manufacturers must address automotive safety issues quickly and in a forthright manner."

Toyota did a good job of placing former government executives on its payroll, and ABC News has suggested that the relationships forged by former federal employees has helped deflect inquiry by the government. Chris Tinto, a former NHTSA official who is now Toyota's vice president for regulatory affairs in Washington, negotiated a limited scope for the first investigation of random acceleration all the way back in 2004. ABC News reported that federal safety investigators agreed to exclude reports of the most serious cases of alleged "runaway Toyotas" after the intervention of Tinto and another former government safety official, Chris Santucci. As a result, the federal investigation of Toyota's computer-controlled throttle in 2004 never looked at any case in which sudden acceleration lasted longer than one or two seconds, or in which the driver attempted to brake.

Complaints about unexpected and unintended acceleration rose sharply in model years 2002-2007, a time period during which Toyota expanded its use of electronic throttle controls. More than 1,500 complaints were received for those six model years, and about one-third of the sudden acceleration complaints involved the Toyota Camry.

NHTSA's decision not to include any fatal crashes in its sudden unintended acceleration investigations was a decision that now appears to have had important consequences. Omitting the most serious incidents from consideration – particularly in the first two years of the NHTSA investigations – has greatly affected later inquiries and theoretically affected the scope of the recent recalls.

According to "The Safety Report," in the span of six months, from September 2003 to March 2004, there were eight deaths that were alleged to have resulted from sudden unintended acceleration events in 2002-2004 Camry models. All eight deaths were reported to NHTSA via Vehicle Owner's Questionnaires or Early Warning Reporting data beginning April 9, 2004. The Office of Defect Investigations only considered including one of these suspected deaths in any of the investigations.

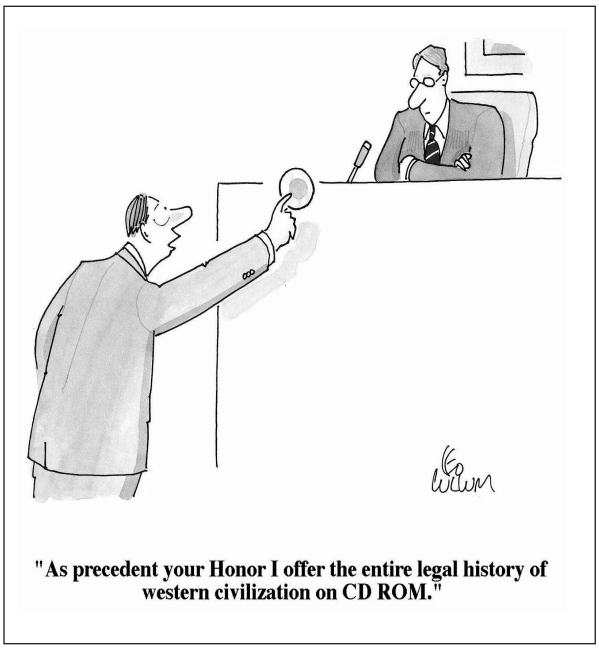
Safety advocates and attorneys involved in litigating against Toyota all believe that there is evidence suggesting that the electronic throttle controls themselves are at fault, not floor mats or "sticky pedals."

Meanwhile, a California court of appeal has entered an Order prohibiting dissemination of information about Toyota's alleged unethical and illegal litigation tactics in rollover ligation – allegations leveled at the automaker by its former national coordinating counsel Dimitrios Biller. Biller has accused his former employer of intentionally withholding and destroying relevant documents and evidence in Toyota 4Runner cases.

Biller, who was Toyota's managing counsel in charge of 4Runner rollover litigation from 2003 through 2007, alleges that Toyota failed—for 20 years—to reveal its standards for the appropriate distance between a crash test dummy's head and the ceiling of a vehicle during rollover testing. In 2004, Biller charges that in the face of increasing demands for e-discovery, he warned Toyota management that they were not producing sufficient records. Instead of complying with legitimate discovery requests, Biller says Toyota officials ignored him and gave him a poor work evaluation. By 2007, the relationship between Biller and Toyota became untenable. He claims that he was forced to resign after pressure from Toyota led him to break down mentally.

Biller's RICO claims remain in a fluid state with litigation pending in New York, Texas and California. It is not clear if his suit will be successful, or if plaintiffs in closed rollover cases will be able to reopen their cases on the basis of alleged fraud.

Finally, the safety problems which have engulfed Toyota are now focusing renewed attention on one of the most controversial components in their vehicles, the "black box" or "event-data recorder." Since the advent of airbags, all vehicles have utilized such a device. It is small, square and virtually indestructible. Tucked inside the dash, or under the front seats of many newer vehicles, the electronic data recorder logs engine speeds, vehicle speed, brake, accelerator and throttle positions as well as other data to help determine the cause or causes of accidents. To date, Toyota has not been forthcoming with information found within the data stored on vehicles reported to have sustained sudden acceleration. Toyota claims that the information is "proprietary" and refuses to hand over access or programs which will permit downloading of, or a full understanding of, the data. This type of stonewalling is different from the "Big Three" automakers whose black-box formats can be read using commercially available software.



"As precedent your Honor I offer the entire legal history of western civilization on CD ROM."

Whither The Collateral Source Rule? The Supreme Court Only Knows For Sure

In Howell v. Hamilton Meats (2009) 179 Cal.App. 4th 686, a unanimous Fourth District Court of Appeal held that when a personal injury plaintiff "has private health care insurance, the negotiated rate differential is a benefit within the collateral source rule, and thus the plaintiff may recover the amount of that differential as part of her economic damages for past medical expenses she incurred...." The trial court, citing Hanif and Nishihama, had ruled that the plaintiff could only recover the amount that her insurance company actually paid for her medical expenses, not the higher amounts that her healthcare providers had billed.

The court of appeal reversed, criticizing Nishihama's reliance on the text of the Hospital Lien Act to answer a question which the Howell justices believed fell squarely within the collateral source rule. The Howell court also specifically rejected the right of the trial court to conduct a post-judgment hearing to reduce a jury's award of medical expenses to the amounts paid by insurance – a procedure which had previously been suggested by the opinion in Greer v. Buzgheia (2006) 141 Cal.App.4th 1150.

In reaching its decision the Howell court found that the plaintiff had incurred financial detriment in the full amount of the bill and that the extinguishment of that debt through a "negotiated rate differential" was a benefit plaintiff had obtained through her own thrift and payment of years of health insurance premiums. They stated: "[w]e also conclude that this benefit to Howell was a collateral source benefit within the meaning of the collateral source rule because it was conferred upon her as a direct result of her own thrift and foresight in procuring private health care insurance through PacifiCare, a source wholly independent of Hamilton as the defendant in this case."

Many commentators, citing the conflict between Howell and Nishihama, expect the California Supreme Court to grant review. As of this date the defendant's petition for review remained pending.

What we know for certain is that regardless of the holding in Howell, current law requires that the full amount of the bill be admitted in evidence. See Katiuzhinsky v. Perry (2007) 152 Cal.App.4th 1288. And Hanif still controls when the medical bills were paid by Medi-Cal or Medicare. Finally, if the patient remains personally responsible for the unpaid balance of a medical charge, the full amount of the bill must be included in any personal injury judgment. (A common example of this is a bill by the San Francisco Tax Collector's Office for the unpaid portion of charges an insured patient incurs at San Francisco General Hospital.) Under these circumstances, the patient/client still owes the unpaid balance and, consequently, there is no Howell or Nishihama issue because there is no true negotiated rate differential.

FIRM WELCOMES NEW ASSOCIATE

We are pleased to welcome Conor M. Kelly as the newest member of the Walkup team. An Honors graduate of University of California, Hastings College of the Law in 2009, Conor accumulated numerous academic awards while in law school. A four time recipient of the Witkin Award for Academic Excellence, he competed nationally as a member of the U.C. Hastings Intercollegiate Mock Trial Team.

Prior to law school, Conor attended Cornell University, receiving his bachelors degree in history. While there he was a four year letterman on the Cornell baseball team, helping to lead the Big Red to an Ivy league co–championship in 2005. As an undergraduate Conor obtained invaluable litigation experience clerking for New York's premier plaintiff's tort firm Gair, Gair, Conason, et. al. in Manhattan.

Conor M. Kelly

Conor joins Walkup with significant training and experience in trial advocacy having personally tried multiple cases to jury verdict while working at the Alameda County District Attorney's Office during law school. He has also completed trial advocacy programs through the National Institute for Trial Advocacy and currently serves as a mock trial coach at his alma mater, U.C. Hastings.

As with all of our recent additions, Conor understands the importance of technology in persuading jurors, and has had training in the effective courtroom use of videos, animations and multimedia presentations.

Conor represents individual plaintiffs in all areas of our practice and is involved in the prosecution of premises liability, governmental liability, medical malpractice and general negligence cases. We look forward to his development in providing our clients with the highest quality legal representation possible.

WALKUPDATES

Rich Schoenberger was inducted into the American College of Trial Lawyers at the group's meeting in Boston. Fellowship in the ACTL is extended, only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Membership can never be more than 1% of the total lawyer population of any state or province. Qualified lawyers are selected from among advocates who represent plaintiffs or defendants in civil proceedings of all types, as well as prosecutors and criminal defense lawyers. Rich also participated as an invited faculty member at a NITA in-house trial practice program at the Washington, DC office of Howery L.L.P. in December…**Sara Peters** joined with other San Francisco attorneys to found ABC: Attorneys Bettering the Community, a non-profit organization aimed at bringing volunteer minded Bay Area attorneys together to get their hands dirty (often literally) serving their community. To date the group has passed out socks and mittens at the Holiday Bags for the Homeless event, mulched and weeded at the Lake Merced Clean-Up Day, and assembled make-your-own jewelry kits for hospitalized children in association with the Anita Chiles Foundation. Membership is open to all Bay Area attorneys and their friends and families. Learn more at www.abcoutreach.org…**Spencer Pahlke** has been appointed as UC Berkeley's (Boalt Hall) Director of External Mock Trial Competition Teams. In the past 5 years while Spencer has worked with the program, it has grown from having 2 coaches to 5 coaches and now has more than 20 students competing in external competitions yearly. In anticipation of Santa Clara University Law School's 100th anniversary, **Dan Kelly** has been named to the school's Centennial Celebration Planning Committee (no, Dan was not in the first graduating class; it only seems that way)….**Khaldoun Baghdadi** and **Melinda Derish** were selected by their peers for inclusion in the 2009 edition of Super Lawyers "Rising Stars." The "Rising Stars" list highlights up-and-coming practitioners in Northern California. To be eligible for selection, an attorney must either be under the age of 40, or have been in practice for less than 10 years. In addition to his Rising Star recognition, Khaldoun received reappointment to the faculty at Boalt Hall where he will be teaching for another year. Khaldoun has also been invited to speak at the American Bar Association's 2010 "Emerging Issues in Product Liability Litigation" program to be held in Phoenix this spring. In addition to her Rising Star acknowledgment, Melinda coached a Boalt Hall trial team to victory in the San Diego Defense Attorneys' Trial Competition…**Matt Davis** has been elected to the statewide Board of Governors of the Consumer Attorneys of California…**Doris Cheng** was elected Parliamentarian of the San Francisco Trial Lawyers Association starting a path "through the chairs" that will end with her ascending to the Presidency of the organization in 2014. Doris was also named to the 2010 list of the "Best Lawyers in America," joining **Matt Davis, Dan Kelly, Mike Kelly, Paul Melodia, Doug Saeltzer** and **Rich Schoenberger** in the list of top lawyers. Both Mike and Paul have now been listed in Best Lawyers for more than 15 years in a row…**Mike Kelly** was selected by readers of San Francisco's The Recorder legal newspaper as the "Best Personal Injury Attorney" in San Francisco. The award, announced in December, was the product of a poll of Bay Area attorneys who subscribe to The Recorder. Mike was also sworn in as President of the San Francisco Chapter of ABOTA at the group's 2009 holiday party…**Emily Wecht** married Michael Polcari in September at the Marin Art and Garden Center (see photo below). After a honeymoon in northern Italy, Emily returned to more mundane matters and coached the Boalt Hall mock trial team to the regional finals of the National Trial Competition.

FIRM OBTAINS RECORD VERDICT

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which produced Kylie's brain damage was an occult prolapsed cord, a complication they characterized as unpredictable, unforeseeable and unpreventable.

While acknowledging that an occult cord prolapse completely occluding blood flow to the fetus is rare, Mike argued that more than one hour before the tragedy there were demonstrable signs and symptoms of cord compression which should have put Kylie's providers on notice that this was not a typical labor. Kelly urged the jurors to look at the fetal monitoring strips which showed the mother had never achieved a good or productive pattern of contractions.

The verdict was obtained in a courthouse where a favorable verdict in a medical negligence claim had never been returned. The amount of the verdict reflected the extensive care required by the infant. She has a permanent tracheotomy and indwelling G-tube through which she is fed and medicated. She requires 24 hour a day attendant care. She is at risk for pneumonia, upper respiratory tract infections, skin breakdowns and other complications.

The verdict included $10,000,000 (present cash value) for future medical and allied-care expenses, $9,000,000 for future general damages, $1,000,000 in past general damages and $3,200,000 in past economic losses. Unlike California, Minnesota does not "cap" pain and suffering damages in medical negligence cases.

Our team of birth injury specialists has had a succession of favorable outcomes in birth injury cases involving midwives, urban birthing centers, Kaiser Foundation Health Plan, academic medical centers and private ob-gyn's. For associate counsel involved in the evaluation of such cases, we encourage you to call one of the firm's principals for purposes of referral, association or consultation.

Medi-Cal Required to Cooperate in Calculating Reimbursement Rights

Department of Health Care Services

Despite the advice of the U.S. Supreme Court in Arkansas Department of Health and Human Services v. Ahlborn (2006) 547 U.S. 268, it has been a struggle for injured indigents to prevent the California Department of Healthcare Services (DHCS) from seeking excessive reimbursement on Medi-Cal liens. Ahlborn, an early decision of the Roberts' Court, set forth a simple proposition: when issues of liability, causation, or collection reduce a plaintiff's recovery to less than 100% of what is owed, medical liens based on Medicaid payments must likewise be reduced. In Ahlborn, the plaintiff was determined to bear 5/6 of the fault for her injuries. Based on principles of pure comparative fault, not only was her recovery was reduced by 5/6—so too was the reimbursement claim of the Arkansas Department of Health and Human Services.

Thereafter, the California Legislature amended the Welfare and Institutions Code to expressly embed Ahlborn in California state law. The relevant statue was amended to provide that "Recovery of the director's lien from an injured beneficiary's action or claim is limited to that portion of a settlement, judgment, or award that represents payment for medical expenses or medical care, provided on behalf of the beneficiary." Welf. & Inst. Code § 14124.76(a).The DHCS recovery amount, in turn, is to be "guided by the United States Supreme Court decision in Ahlborn….and other relevant statutory and case law." Id.

DHCS has gone to considerable lengths to avoid the application of Ahlborn. In two recent cases, Bolanos v. Superior Court (2008) 169 Cal.App.4th 744 and Lima v. Vouis (2009) 174 Cal.App.4th 242, DHCS argued that Ahlborn and Welfare and Institutions Code § 14124.76(a) did not apply. Fortunately, the courts of appeal disagreed, holding that Ahlborn-like proportionality was required.

In a jury trial, which has the benefit of a special verdict form, the application of Ahlborn is a simple mathematical calculation. Settlements are a different problem, and give DHCS the opportunity to refuse to agree on an allocation. In this circumstance, it is important for plaintiff's counsel to be prepared to resort to the remedy provided by §14124.76(a): a motion seeking to have the trial court apportion the recovery to economic and non-economic components per Ahlborn. When following this procedure, plaintiff's counsel must be prepared to offer evidence on issues including comparative fault, insurance policy limits, total economic losses, and comparative recoveries of general damages in other similar cases. Based upon such evidence, the trial court can determine how much of the amount recovered via settlement is eligible to satisfy the state's reimbursement claim.

FIFTY YEAR ANNIVERSARY GALA BRINGS OUT ALUMNI

An elegant evening of cocktails and dinner at the San Francisco Ritz Carlton Hotel was the focal point of the firm's 50 Year Anniversary celebration last fall. The night's festivities brought out a number of the firm's early stalwarts (including e. robert wallach and Gerald Sterns), as well as former partners of more recent vintage (Ralph Bastian, Dan Dell'Osso and John Echeverria) together with some notable alumni (Jim Bostwick and Terry O'Reilly, just to name two). Also in attendance were former law clerks from the 1980's, 1990's and 2000's, long time staff members, current attorneys and a sampling of San Francisco's judiciary, ABOTA leadership, BASF officers, and iconic figures in the San Francisco litigation scene.

During the dinner hour, senior partners Paul Melodia, Dan Kelly and Mike Kelly all regaled the audience with anecdotes from the firm's past. Paul spoke of the early days with Bruce Walkup and Jim Downing, Dan Kelly talked about the firm's successes in the 1970's and 1980's, and Mike Kelly warmly thanked all those in attendance for having been a part of the firm's history.

Also in attendance were current and former members of the "Mighty Mouthpiece Softball Company." The team, which was founded in 1973, won its first lawyers' league softball title in 1976, and its most recent in 2009. Former Mighty Mouthpiece managers Peter Dixon and Kevin Domecus compared notes with current Mighty Mouthpiece manager, Doug Saeltzer.

The evening was rich with reminiscence and good fellowship. We can hardly wait for our 100th birthday party!

Recent Cases

Vehicular Negligence

Widow v. National Package Delivery

In Widow v. National Package Delivery (No.Dist.Ca., confidential settlement), Michael A. Kelly and Richard H. Schoenberger recovered $7,750,000 on behalf of a woman who was riding as a passenger in the family car when it was forced off of the highway as a result of the defendant truck driver's unsafe lane change. In the ensuing rollover, plaintiff's husband was killed. Her right arm was badly broken and her left leg crushed beyond repair, eventually requiring amputation. The death of her spouse of 47 years left her two adult children without their father. The defendant driver was operating his double tractor-trailer rig in the number two lane of Highway 10 in Arizona. Seeing that an Arizona State Trooper was issuing a citation to a vehicle ahead, the driver moved his tractor-trailer to its left without looking, effectively forcing the plaintiff's vehicle off of the highway. Witnesses in following vehicles gave differing accounts as to what occurred. The case was concluded at a mediation with allocation of the funds being made both to the widow and the surviving adult children.

Heirs v. Interstate Trucker

In Heirs v. Interstate Trucker (Ala. Sup. Ct. No. RG07360666), Richard H. Schoenberger obtained a mediated settlement in the amount of $1,265,000 on behalf of the mother, wife and children of a 38-year-old Bay Area resident who was killed in an automobile versus truck collision. The decedent worked at the San Francisco Public Library and provided the sole means of support to his wife and two sons. On the evening in question, he was riding as a passenger in an automobile driven by a friend as they traveled together to San Diego for a business meeting. The friend lost control of his vehicle. It rolled over and ended up straddling the number one and two lanes of southbound Interstate 5. During the rollover, a major cloud of dust was generated, blinding oncoming drivers. One of those drivers struck the decedent's vehicle after it had come to rest. Seconds later, a semi truck and trailer barreled into the decedent at approximately 40 miles an hour. Rich proved that the truck driver's reactions were too slow and his speed too fast for the conditions. The defense alleged that the driver acted reasonably in light of the fact he was confronted with an unexpected emergency at 3:30 in the morning.

Senior v. Doe

In Senior v. Doe (Santa Clara Sup. Ct. No. 109 CV 133707), Doris Cheng negotiated a recovery of $1,250,000 on behalf of a 64-year-old retiree who was rear-ended in Mountain View in a multi-vehicle accident on Highway 101. He initially experienced headaches and neck pain. A few months later, he developed slurred speech, foot drop, and weakness in his arm and leg. His treating neurologist first thought he was exaggerating his complaints. Several months later, he was diagnosed with subdural hematomas confirmed by brain MRI. He underwent surgery to evacuate the bleeds and was forced to retire from his position as a software engineer. The defense argued that there was no causal connection between the accident and the plaintiff's head injury. He did not strike his head during the collision and he was not the first car struck in this low speed collision. Additionally, the defense argued that there was no wage loss because the plaintiff's retirement would have occurred anyway due to the economic slow-down. Plaintiff's experts opined that the whiplash event caused a slow bleed, which subsequently manifested by way of neurological deficits. The settlement represented the defendant's full policy limits.

Cyclist v. Tourist

In Cyclist v. Tourist (S.F. Sup. Ct. No. CGC-08-479992), Spencer Pahlke successfully resolved an auto versus motorcycle case in which a 29-year-old graduate student suffered a fractured tibia and fibula when hit at the intersection of California and Octavia Streets in San Francisco. Approaching from the east, the defendant motorist failed to see the plaintiff coming from the opposite direction on his motorcycle. When the defendant attempted to make a left-hand turn she cut plaintiff off causing him to strike her right front fender and be thrown over the hood of her car. The fractured tibia and fibula required open reduction and internal fixation using a 13.5-inch long tibia nail. Medical specials were $96,981. Due to the timing of the collision, plaintiff was not able to participate in the application process for his clinical psychology internships, and claimed a wage loss of highly disputed value. At mediation, the case settled for $350,000.

Pedestrian v. Bay Cab Co.

Pedestrian v. Bay Cab Co. (S.F. Sup. Ct. No. CGC-08-479367), Emily Wecht and Spencer Pahlke settled a claim for a 29 year-old-man who lost a toe in a pedestrian versus auto accident. The plaintiff was standing in the street at the corner of Duboce and Valencia when the defendant taxi traveling westbound on Duboce made a left turn into oncoming traffic. A car traveling eastbound on Valencia had to swerve to avoid the cab. It skidded out of control into the plaintiff and ran over his left foot. The first two toes of the left foot were crushed. Past medical bills were $115,000. The cab driver denied that he was making a left turn at the time of the incident and argued that the plaintiff was comparatively negligent for standing in the street while waiting to cross. After a mediation and three settlement conferences, the case resolved the day before trial for $425,000.

Premises Liability

Executive v. National Lodging Chain

In Executive v. National Lodging Chain (Bay Area Sup. Ct., confidential settlement), Michael A. Kelly and Emily Wecht successfully resolved a premises liability case on behalf of a visiting 39-year-old non-profit CEO who fell from a fourth story hotel window in the middle of the night. The plaintiff sustained a Grade III open fracture of the left ankle, a burst fracture at L-3 and a compression injury to the right ulnar nerve. The ankle injury led to extensive surgery with resulting lymphedema and a permanent limp. The plaintiff was completely amnesic for the fall. The most reasonable explanation revolved around the proba-

Recent Cases

bility of an attack of hypoglycemia with resulting fainting. After obtaining a court order to compel production of the defendant's internal safety and security manual, including specifications for window height and safety, Mike and Emily demonstrated that the window in the plaintiff's room violated corporate safety standards because it was too close to the floor and lacked positive means to prevent opening beyond 24 inches. The local operator had tried to remedy these defects by placing a wooden closet dowel across the window, but the plaintiff fell through this inadequate measure. The defendants argued that the design of its windows complied with all applicable building code(s). After mediation, the parties settled for a combination of cash and annuity payments with a present cash value of $1,750,000.

Government Liability

Pedestrian v. State of California

In Pedestrian v. State of California, et al. (San Mateo Sup. Ct. No. CIV 460659), Paul Melodia and Douglas Saeltzer obtained a $1,000,000 partial settlement on behalf of a 17-year-old girl who is in a permanent vegetative state as a result of being struck in a crosswalk at the uncontrolled intersection of El Camino Real and Ludeman Lane in San Mateo County. Plaintiff sued the negligent driver who struck her, the State of California dba Caltrans as the owner of the roadway, and the City of Millbrae who had a duty to maintain the vegetation along the roadway. Evidence established that an overgrown street tree obscured a pedestrian warning sign intended to alert drivers (such as the vehicle-driving defendant) to the presence of pedestrians as they approached the intersection. The City of Millbrae and plaintiff reached the $1,000,000 settlement while a motion for summary judgment was pending. The motion was brought by both the city and state. The trial court denied the motion (based on design immunity) as to Caltrans. The case against the driver and Caltrans is set for trial in May 2010.

Aviation Crash

Survivors v. Air Ambulance Co.

In Survivors v. Air Ambulance Co. (District Court of New Mexico, confidential settlement), Michael A. Kelly and Emily Wecht concluded a wrongful death case on behalf of the survivors of a 40-year-old mother and her 1-year-old daughter who died forty minutes after boarding a King Air ambulance for transport of the child to a regional medical center. Shortly after takeoff the plane crashed killing all passengers and crew members. Mike and Emily argued that the pilot was not properly trained to fly the aircraft because he had only three hours of night time training in the plane. Further, they argued he had selected a dangerous departure route from the rural airport and as a result became spatially disoriented and flew the plane into the ground. The defense argued that the pilot was properly trained and the departure route FAA approved. Our clients were the deceased mother's heirs, including her siblings and mother. The matter was concluded by way of a mediated settlement for a confidential seven-figure amount.

Insurance Coverage

Plaintiff v. Farmers Insurance Exchange

In Plaintiff v. Farmers Insurance Exchange (Los Angeles Co. Sup. Ct. No. NC042970), Douglas Seltzer obtained a $1,000,000 judgment on a coverage issue for a client ejected from a golf cart when the driver crashed on Santa Catalina Island. Plaintiff suffered a distal tibia fracture that required multiple surgeries. The defendant driver's personal automobile policy tendered its $100,000 policy limits early in the litigation. The golf cart was gas powered, and licensed as a motor vehicle with the California Department of Motor Vehicles. Discovery revealed that the golf cart was insured through a "Golf Cart Endorsement" to a homeowner's policy issued to the condominium owner from whom the defendant driver had rented lodging for the weekend. This policy had limits of $1,000,000. FIE (a Farmers company) denied plaintiff's claim on the grounds that permissive users were not included within the definition of an "insured" in the homeowner's policy. Doug proved that the policy was effectively an automobile liability policy because it insured a motor vehicle licensed with the DMV and, therefore required that it extend coverage to permissive users. Doug obtained a stipulated judgment against the driver for $1,000,000 as well as an assignment of his rights to pursue FIE. Following entry of the judgment against the driver, plaintiff sued FIE for breach of contract. Following a bench trial the court ruled in favor of plaintiff, finding that the subject policy qualified as an automobile liability policy and, therefore, must extend coverage to permissive users.

Medical Negligence

Minor v. Medical Care Provider

In Minor v. Medical Care Provider (confidential settlement), Khaldoun Baghdadi obtained a cash and structured medical negligence settlement with a present value of $3.25 million on behalf of a 5-year-old child arising from a failure to diagnose and treat a brain anomaly which caused blindness, quadriplegia and severe mental compromise. The infant plaintiff presented to her pediatrician with a gradually increasing head size over the course of two months. Though referral was made to a pediatric neurosurgeon, and the diagnoses of the brain malformation made, nearly a year elapsed before the child was referred to an interventional radiologist for definitive treatment. By the time the specialist was able to perform an embolization, the delay had caused

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Recent Cases

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irreparable neurologic harm. The defense contended the child was disabled due to an in utero infection, or other pre-existing genetic condition. According to experts retained by both sides, life expectancy estimates for the child ranged from 12 to 25 years. All of the settlement proceeds were employed to fund a special needs trust to maintain government benefit eligibility while providing for home modifications, an accessible vehicle, and 24-hour attendant care for the rest of the plaintiff's life.

Minor v. Health Maintenance Organization

In Minor v. Health Maintenance Organization (confidential settlement), Paul Melodia obtained a settlement in the amount of $4,450,000 on behalf of a 2-year-old boy who suffered a delayed diagnosis of a perforated appendix, which resulted in peritonitis, metabolic acidosis and ultimately a cardiac arrest. The child's symptoms began a week before his anoxic episode, and during this period his father brought him for outpatient treatment to the defendant health maintenance organization on three separate occasions. He was finally hospitalized two days before the arrest occurred. Following resuscitation, he required two major abdominal surgeries and was hospitalized for almost five months. He suffered extensive brain damage which resulted in blindness, impaired cognition, and spastic quadriplegia. He requires around-the-clock care. $2,950,000 of his settlement was paid in cash, and $1,500,000 was used to purchase an annuity to fund his ongoing care needs.

Surviving Parents v. Community Medical Center

In Surviving Parents v. Community Medical Center (confidential settlement), Rich Schoenberger negotiated a wrongful death settlement in a MICRA-governed medical negligence case arising from the death of a 25-year-old woman. The claim was brought on behalf of her parents. The decedent died following what was anticipated to be a routine lymph node biopsy. Intraoperatively, her oxygen mask erupted into flames causing serious burns to her face. Because the facility where the procedure took place did not have a burn center, she was transferred to a hospital offering a higher level of care. There, while recuperating from her burns, the patient underwent a specialized procedure involving another biopsy. This procedure, which includes substantial risk because of the proximity to vital organs, was carried out by a Fellow who had only performed one similar biopsy in the past. Although there was no urgency to perform the procedure, the physician went ahead, and inadvertently punctured the decedent's heart. She died minutes later. Rich argued that the conduct of the Fellow constituted a battery, and as such, was outside the limits of MICRA. He successfully opposed a summary judgment motion on the battery issue, and thereafter the matter settled for $900,000, $650,000 in excess of the MICRA cap.

Newborn and Parents v. Obstetricians and Hospital

In Newborn and Parents v. Obstetricians and Hospital (court and case no. confidential), Michael Kelly and Melinda Derish achieved a major confidential settlement on behalf of a 3-year-old Central Coast girl who sustained hypoxic brain injury during labor and delivery. Mike and Melinda proved that the mother's delivering obstetrician recognized that the baby's head was in a position that contraindicated vaginal delivery by vacuum and that the baby was demonstrating intermittent episodes of fetal distress. In spite of this he transferred care to a less experienced junior member of his OB group who was unsuited to manage such a difficult birth. The junior physician had no experience in delivery via vacuum for fetal distress. Shortly after the senior obstetrician left the hospital, the inexperienced obstetrician attempted to perform vacuum delivery. It was unsuccessful. Although the standard of care requires immediate delivery by C-section after failed vacuum, the inexperienced obstetrician did not proceed to cesarean section. The baby's fetal heart rate tracing continued to demonstrate fetal distress but the hospital nurses did not invoke the "chain of command" to obtain proper response to the situation. The child was ultimately born severely depressed, with permanent and significant neurologic damage.

Twins v. Academic Medical Center

In Twins v. Academic Medical Center (confidential settlement), Khaldoun Baghdadi and Matthew Davis negotiated cash and structured settlements with a present value of $2.4 million in a wrongful birth claim on behalf of twin infants born with Down Syndrome. The children's parents alleged that the defendant medical center failed to offer or perform specialized invasive pre-natal testing which would have diagnosed the condition. The twins were conceived by way of in vitro fertilization, and underwent pre-implantation genetic diagnostic testing. The defense contended that pre-natal testing (amniocentesis) was offered, but refused by the parents. The case settled at mediation, and the proceeds were devoted to the funding of future attendant care, medical procedures and mobility equipment.

Adolescent v. Health Maintenance Organization

In Adolescent v. Health Maintenance Organization (confidential settlement), Doris Cheng recovered a seven-figure settlement on behalf of a 16-year-old boy who experienced a delay in diagnosis and treatment of meningitis with consequent brain swelling. After being hospitalized with classic meningeal signs, his attending ICU doctors failed to monitor his condition as his neurologic function began to worsen. The doctors stood by as the patient lost his gag reflex and brain stem function – failing to check his intracranial pressure or seek consultation from a neurosurgeon. After three days of diminishing neurologic function, the attending ICU physician ordered an MRI, which showed severe herniation. A consulting pediatric neurosurgeon ordered emergency surgery. By the time surgery was undertaken the symptoms produced by delay included paralysis from the chest down. After more than a year of rehabilitation, the young patient was able to move his arms and legs. In addition to denying liability, the defendant HMO argued that the patient had made an excellent recovery and that he would be able to attend college and work competitively in the labor market. The case settled in the amount of $1,750,000.

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.

WALKUP, MELODIA
KELLY & SCHOENBERGER

650 California Street, 26th Fl., San Francisco, CA 94108
(415) 981-7210 Fax (415) 391-6965
1 (888) SF ATTYS www.walkuplawoffice.com

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