

FOCUS

on torts

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SPRING 2007

Six Walkup Lawyers Recognized As "Super Lawyers" for 2007

Mike Kelly Selected To Northern California's Top Ten List

For the fourth year in a row, six members of the Walkup firm have been acknowledged by their peers as "Super Lawyers" in polling conducted by Law & Politics. The selection process incorporated peer voting and professional achievement. Law & Politics used a system of balloting and internal research that included mailing more than 52,000 ballots



Mike Kelly

to active Northern California attorneys. Lawyers were asked to nominate the best attorneys they had personally observed in action, including those in private practice, public service, legal aid, and in-house corporate counsel. Nominees were prohibited from voting for themselves.

Once the voting was complete, Law & Politics' research department correlated the polling results with data in national and local periodicals, legal trade journals and other on-line sources. The background and experience of candidates, their

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FIRM WELCOMES NEW ASSOCIATE

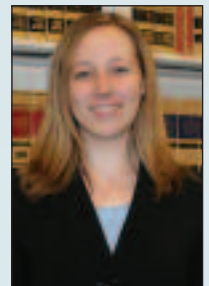
We are pleased to welcome Emily Wecht as the newest member of the Walkup team.

After graduating from Cornell University, Emily obtained her legal education at the University of California, Hastings College of the Law. While in law school she received the American Jurisprudence award for Personal Injury Litigation and an award for Best Oral Argument in Moot Court. She also served as the Production Editor for the Hastings Constitutional Law Quarterly. In the summer of 2003 Emily was a legal intern for International Strategic Group, a start-up hedge fund in New York, where she developed corporate structures and

compliance strategies and drafted employment and non-disclosure agreements. During her third year of law school, she served as a judicial extern for the Honorable Richard Kramer in the Complex Litigation Division of the San Francisco Superior Court.

In her position as a legal research assistant for the San Francisco Superior Court in 2005-2006, Emily

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Emily Wecht

\$3,000,000 Medical Malpractice Verdict Highlights MICRA Unfairness

The unfairness of MICRA's thirty year old \$250,000 cap on non-economic damages was underscored recently in a case tried by Michael Kelly and Doris Cheng on behalf of the parents of a patient who died after his head injury went undetected by an emergency room physician. Ethier v. Poindexter, M.D., (S.F. Sup. Ct. CGC-05-437623). Although a unanimous jury awarded \$3,000,000 in wrongful death damages for the loss of Charles and Shirley Ethier's 29-year-old son, the trial judge was compelled to immediately reduce

3333.2. (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

the award to \$250,000 (an 83% reduction of the jury's award) in accordance with MICRA's antiquated limits.

In Ethier, Plaintiffs' son presented to the defendant emergency room physician with a head laceration after being struck

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NEW PARTNERS — DORIS CHENG & KHALDOUN BAGHDADI

We are pleased to announce the elevation to partnership of Doris Cheng and Khaldoun Baghdadi. We congratulate each of them for the manner in which they have distinguished themselves in the courtroom and the community.

Doris is a 1998 graduate of the University of San Francisco Kendrick Hall School of Law. She has obtained successful verdicts on behalf of clients in vehicular accident cases, government liability trials, claims brought against the San Francisco Municipal Railway, and medical negligence cases involving orthopedics, infectious disease, neurosurgery and obstetrics. Her trial experience includes both State and Federal Court.

In the area of continuing education and community service, Doris has been active as a faculty member for the National Institute of Trial Advocacy (at programs held in Boulder, Colorado, San Diego, San Francisco and Albuquerque, New Mexico), as well as the University of San Francisco's Intensive Advocacy Program where she has served as a faculty member and executive committee member since 1999. In 2006, Doris received an appointment from Emory University School of Law in Atlanta, Georgia to serve as a team leader at its nationally known Kessler-Eidson Trial Techniques Program.

Doris has served as membership chair, program chair and secretary-treasurer for the USF Inn of Court. She sits as a member of the BASF Judiciary Committee. In 2006, she lectured on topics including closing argument, direct and cross of experts, handling obstreperous opposing counsel, and utilizing PowerPoint as a persuasive tool in the courtroom.

Khaldoun is a 1997 graduate of the University of California, Hastings

College of the Law. While at Hastings, Khaldoun served as the managing editor for the Hastings International and Comparative Law Review.

He has obtained successful jury verdicts in a wide variety of matters, including cases involving insurance bad faith, medical negligence, vehicular negligence, product liability and premises liability. He has also obtained seven-figure settlements in cases involving medical malpractice, government liability, automobile product liability and drug and device product liability.

Like Doris, Khaldoun has successfully litigated matters in both State and Federal Court.

He is active in working with groups dedicated to automobile safety, crashworthiness and roof structure integrity. In this regard, he has handled cases

against both domestic and foreign automakers involving passenger protection and crashworthiness.

Khaldoun is active in both community affairs and Bar Association committees. He serves, via mayoral

appointment, on the San Francisco Human Rights Commission, and is Co-Chair of the Bay Area Arab American Attorneys Association. He has taught at Hastings College of the Law as an Adjunct Professor, and for the National Institute of Trial Advocacy at its Western Regional Trial Skills and Deposition Programs. Most recently, he accepted an appointment to the Bar Association of San Francisco's Litigation Section Executive Committee.

Both Doris and Khaldoun represent the finest traditions of our firm, providing superior representation to the victims of wrongdoing while donating substantial amounts of their time to community and educational causes. ▲



Doris Cheng



Khaldoun Baghdadi

FIRM WELCOMES NEW ASSOCIATE

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handled assignments in a variety of areas including torts, evidence, landlord/tenant, class actions, and commercial litigation. She analyzed and drafted memoranda regarding pretrial and post trial motions, demurrers, motions to compel, motions for summary judgment/summary adjudication, motions in limine, and motions for attorneys' fees.

Emily is currently assigned to our general negligence group and is involved in the prosecution of automobile, medical negligence and product liability cases. ▲

Six Walkup Lawyers Recognized Again as "Super Lawyers"

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history of verdicts and settlements, experience, honors and awards, pro bono and community service, scholarly lectures and writings, as well as other achievements were also included.

Super Lawyers represent approximately 5% of the licensed active attorneys in a given state.



Mike Kelly's selection to the Northern California "Top 10" list follows his selection to the Top 100 list in the past two years. Paul Melodia was also honored on the list of Northern California's Top 100 attorneys for 2007.

Among our other "Super Lawyers," Rich Schoenberger and Dan Kelly each made the list for the fourth year in a row, and Ronald Wecht and Matthew Davis were selected for the third year in a row.

Paul, Mike, Rich and Dan were also named among "The Best Lawyers in America" for 2007. All of our honorees have continued to fashion an outstanding track record of success in the tradition of the firm's founder, Bruce Walkup. ▲



MUNI Bus Claim Settlement Includes Moscone Memorial

A bench at Moscone Park was recently dedicated in memoriam to Betty White, a woman who was struck on March 11, 2004, while walking her dog in the Marina district by a MUNI bus that ran a stop sign. Due to massive brain injuries, the 54-year-old woman passed away the following day. Betty was survived by her seven siblings. In the case handled by Doris Cheng and Michael Kelly of our firm, the city agreed to place a permanent memorial in addition to paying a substantial sum of money.

Betty, was a highly regarded community activist and worked vigorously with

San Francisco leaders in her efforts to improve neighborhood safety and quality of life. At the time of her death, she had been lobbying for increased stop signs on Chestnut at Webster and Buchanan, out of



concern for the safety of young mothers and children crossing the street to Moscone Park.

For more than twenty years, Betty worked tirelessly with the Marina Merchants Association, promoting and securing safer conditions in the Marina District.

A founding member of the Neighborhood Emergency Response Team and Safety Awareness For Everyone, Betty was responsible for developing emergency preparedness and disaster relief protocols following the 1989 Loma Prieta Earthquake, installing safe access to the Moscone Playground and Recreation Center, and obtaining a \$50,000 grant as seed money for a new playground at the park. ▲

\$3,000,000 Medical Malpractice Verdict Highlights MICA Unfairness

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with a surfboard. Ignoring the possibility of a serious head injury, the defendant neglected to order a CT scan or palpate the wound, and merely sutured the laceration and discharged the patient with a prescription for Vicodin. Shortly after leaving the care of defendant, the patient fell unconscious in his living room and was emergently taken to San Francisco General Hospital where he underwent a CT scan and emergent craniotomy. The decedent suffered a comminuted depressed skull fracture, which lacerated the middle meningeal artery, thereby causing epidural, subdural and intraparenchymal bleeding. As a result of prolonged intracranial pressure, the patient sustained brain death.

The Ethiers filed suit against the emergency room physician for the wrongful death of their son. Knowing that MICRA prevented his liability from exceeding \$250,000, the defendant physician (who had eight prior instances of patient injury or death) refused to settle the case because his insurance policy covered liability up to \$1,000,000. In

essence, MICRA gave him a risk-free trial. (The defendant doctor actually made money sitting in court from the per diem paid by his policy.)

Mike and Doris convincingly argued that had the defendant doctor palpated the wound he would have discovered a skull fracture. The doctor argued that even if he had correctly diagnosed the patient, there would not have been time to arrange an emergency transport to a level one trauma center for evaluation, CT scan and surgical evacuation of the expanding hematoma. However, the jury rejected this argument and awarded Charles and Shirley out-of-pocket expenses and \$3,000,000 in general damages for the death of their son.

The Ethiers are just one of the many families and individuals who have been victimized by MICRA's unfair limits over the last thirty years. The most recent study conducted by the Rand Institute, examining data from actual medical malpractice trials, concluded that defendants' liability is reduced in almost 50% of cases tried in California courts.

For three decades malpractice insurance companies have misled the electorate into believing that medical malpractice cases are responsible for skyrocketing health care costs and driving qualified doctors out of California. In fact, studies show that less than a 1% of all healthcare costs are attributable to legal costs and there is no difference between capped and non-capped states in the ratio of physicians to populations.

It's time California modified its law to protect victims of medical malpractice. There is no justification for telling any parent that if his or her children were struck by a physician driving a car they would be entitled to full compensation, but if killed through the negligence of a physician in the operating room, they are only entitled to a fraction of what they are owed.

The California Medical Association has successfully argued for 30 years that any alteration or increase in the damage cap would bring about "collapse" of the health care delivery system. Such threats become more hollow with each passing year as objective data continues to verify that insurance costs make up less than 1% of California's total health care expenditures. ▲

Record Jet Ski Verdict Affirmed by First District Court of Appeal

The First District Court of Appeal has upheld the record verdict of \$3,760,000 obtained by Walkup attorneys Paul Melodia and Michon Herrin, and affirmed the Napa County Superior Court's decision holding that the doctrine of primary assumption of risk does not preclude a design defect claim in a case involving a recreational product. Ford v. Polaris Industries, Inc., (2006) 13 Cal. App. 4th 755.

Plaintiff Susan Ford was riding as a passenger on the back of a Polaris jet ski. When the jet ski hit a wake, with nothing to hold on to and only wearing a swimsuit, Susan fell backward off the rear of the watercraft. The rear propulsion nozzle generated a high-powered stream of water which tore apart her abdominal organs, causing nerve damage and severe orifice injuries.

The jury found that the defectively designed watercraft lacked adequate handholds to protect occupants from



rear ejection and that the manufacturer inadequately warned foreseeable users that riders should wear full wet suits to protect against this very hazard. The defendant argued that the doctrine of primary assumption of risk barred plaintiff's design defect claim. The Court of Appeal disagreed, holding that the doctrine does not eliminate a manufacturer's duty to produce defect-free recreational products. Without altering the fundamental nature of the sporting activity, Polaris clearly could have designed a product to prevent a passenger from falling into the jet propulsion stream.

The First District re-affirmed the rule that in a product case a plaintiff must only prove a design defect and has no burden to prove that the defect actually increased the risk of harm inherent in the activity. The Court explained that given the very nature of the dangerous defect in the Polaris jet ski, it increased the likelihood a person would fall backward and suffer severe orifice injuries. As a matter of law, "the defect escalated the risk of harm beyond the inherent risk of falling into the water."

Finally, the Court rejected Polaris' attempt to pass on liability to the innocent jet ski owner who had no knowledge that such horrific injuries could occur.

Paul and Michon's victory in Ford helps to protect consumers and justly places responsibility on the manufacturers of sporting products who have the knowledge and the ability to protect consumers from such dangerous products. ▲

Failure-to-Warn Claims Against Pharmaceutical Manufacturers Not Preempted by FDA Labeling Requirements

Victims of pharmaceutical company misconduct won a major victory in U.S. District Court in Philadelphia recently when Judge Stewart Dalzell rejected Novartis Pharmaceutical Corp.'s claim that the Federal Food, Drug and Cosmetic Act preempts state failure-to-warn tort claims against drug makers.

The issue of FDA preemption has been a hot one since new drug labeling regulations were issued in January 2006. At that time, the agency claimed that federal drug labeling regulations preempted most state failure-to-warn claims. New language on preemption was added to the notice of final rulemaking, even though it was never included in—and directly contradicted—the notice of proposed rulemaking.

In Perry v. Novartis, (2006) 432 F.Supp.2d. 514, the plaintiffs claimed that use of the prescription drug Elidel for the

treatment of a two-year-old's eczema caused lymphoma. Novartis argued the suit should be dismissed because the claim was preempted by the FDA labeling requirements for the product. The Perry court concluded that the FDA was not entitled to such deference when it attempts "to supply on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption."

Judge Dalzell rejected the FDA position, advanced in an amicus brief, that the appropriate test is whether the warning sought by the plaintiffs "would have rendered the drug misbranded" or "would have been rejected by the agency as unsubstantiated." Instead, he adopted a far narrower rule: "to allow state law to require the addition of warnings so long as there has been no specific FDA determination as to the sufficiency of the scientific evidence to support



a particular warning." Dalzell also rejected the FDA's argument that the claim could disturb the "delicate balance" of the FDA regulatory scheme, noting, "given the recent concerns about the effectiveness of the FDA's safety monitoring of recently approved drugs, the availability of state tort suits provides an important backstop to the federal regulatory scheme." ▲



Defects in SUVs Lead to Low Ratings in IIHS Whiplash Tests

The Insurance Institute of Highway Safety has just completed evaluation of seat and head restraint combinations in SUVs and pickup trucks for protection against whiplash injuries in rear-end collisions.

The IIHS measured the height and distance of a head restraint behind the head of the average-size man, and with a seat that received a rating of acceptable or good for head restraint geometry, its investigators then performed dynamic testing simulating a rear-end accident.

The results were disconcerting—only six of the forty-four SUVs tested were rated “good” for protection against whiplash injuries and an astounding twenty-six received a rating of “poor.” None of the fifteen pickup trucks received a “good” rating and nine received a rating of “poor.” The ominous nature of the results is heightened by the fact that whiplash injuries account for two million insurance claims each year.

In other vehicle safety related news, Honda has recalled over 500,000 vehicles to replace a faulty ignition switch. When repeatedly used over time, the faulty part sustains heat damage, causing the vehicle's engine to stop suddenly. Melting parts have caused five drivers in Japan to suffer burn injuries.

Ford has announced its recall of 6,164 Escape Hybrid SUVs to inspect and replace the drivetrain intermediate shaft which may not have been properly heat treated and can fracture while being driven. If a fracture does occur, the powertrain will lose its ability to transmit torque to the drive wheels and the trans-

WALKUPDATES

Khaloud Baghdadi was invited to speak at the Vehicle Dynamics and Handling Seminar sponsored by the Consumer Attorneys of California. His presentation focused on emerging issues in product liability litigation. Khaloud also participated as an instructor in the National Institute of Trial Advocacy regional program in San Francisco. Additionally, he now serves as Chair of the San Francisco Human Rights Commission.

Mike Kelly was elected to a second term on the Board of Trustees of the National Institute of Trial Advocacy (NITA), and appointed (with William Hunt of Cambridge, Massachusetts) as co-director of NITA's Harvard Teacher Training program. In October, Mike's peers in the San Francisco Chapter of ABOTA elected him secretary of the San Francisco chapter. In the fall he chaired a San Francisco Trial Lawyers educational seminar entitled "On Suing Muni" and in December participated in the ABOTA "Masters in Trial Program" in Sacramento.

Rich Schoenberger was invited to teach trial advocacy at several national law firms this year, including Jones Day, Howrey, and King & Spaulding. In addition, he served as a team leader at the National Institute of Trial Advocacy's two week National Program in Boulder, Colorado and was an instructor at NITA's Midwest Regional in Chicago. For the third consecutive year, he was listed among "The Best Lawyers in America." Unfortunately,

mission will not hold the vehicle stationary when placed in a parked position.

Most recently, Ford Motor Company announced two major recalls. In the first recall campaign, Ford announced that it will be calling back 156,000 model year 2002-2003 trucks to repair a vehicle speed control problem that could cause underhood fires.

The National Highway Traffic Safety Administration has reported that the speed control deactivation switch may overheat resulting in either fire or smoke. Trucks covered under the recall include the 2003 Excursion, F-150, F-250, F-450

his Little League baseball and youth basketball coaching was not as successful, leaving him without any titles...

Doug Saeltzer lectured at CEB's fall Law & Motion Seminar held in San Francisco (with co-panelists Michael Laurenson and the Honorable Ronald Quidachay). As captain of the Mighty Mouthpiece, his team repeated as champions of the SF Lawyers Softball League....

Ronald Wecht was named a "SuperLawyer" for the second consecutive year as well as being cited among the Best Lawyers in America for 2006.

Doris Cheng was appointed to the Judiciary Committee of the San Francisco Bar Association. A Board member of the San Francisco Trial Lawyers Association, Doris was also named the organization's Education Committee Chair. This past spring, she served as a team leader for the Kessler-Eidson Trial Techniques Program at Emory University Law School. She also spoke at the 6th Annual Bay Area Conference of the Asian Pacific American Law Students Association....

Melinda Derish spoke at the Bridges Symposium sponsored by the American Association of Critical Care Nurses. Her discussion focused on aspects of nursing malpractice in the ICU environment and California case law relating to nursing negligence. Melinda also addressed the National Hospice and Palliative Care Organization's conference in April and the Pediatric Palliative Care Conference in October on "Mature Minors and the Right to Refuse Life Sustaining Medical Treatment".... [▲](#)

and the Lincoln Blackwood. Dealers have begun the program of re-wiring the speed control devices.

Ford's second recall covers model year 2003-2005 police vehicles. Real world experience has demonstrated that on vehicles equipped with steel wheels, the wheels may develop cracks in the rim near the weld line that connects the rim to the disc. The cracks can ultimately result in rapid air loss from the tires, and a resulting loss of control, increasing the risk of a crash. On March 12, 2007, dealers began replacing the four wheels and spare rim on all such vehicles. [▲](#)

RECENT CASES

VEHICULAR NEGLIGENCE



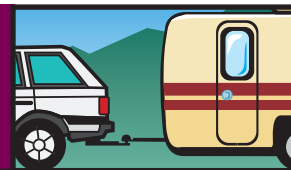
Pedestrian v. Driver

In Pedestrian v. Driver (Santa Clara Sup. Ct.), Richard Schoenberger and Matthew Davis negotiated a multi-million dollar settlement on behalf of a 31-year-old man struck by a car while crossing the street in a marked crosswalk. Even though the defendant driver was clearly at fault, the employer of the driver argued that she was not acting within the course and scope of her employment at the time she struck the plaintiff. Plaintiff claimed that the driver was traveling between the employer's campuses as part of her job and was on the clock when the accident occurred. The case ultimately settled at a second mediation for \$4,050,000.

Walker v. Motorist

In Walker v. Motorist (confidential settlement), Douglas S. Saeltzer negotiated a \$700,000 settlement on behalf of a 62-year-old registered nurse who was struck in a crosswalk by a left-turning vehicle while walking to work as a fitness instructor. As a result of this collision, she suffered a comminuted left knee tibial plateau fracture requiring two surgeries, including a total left knee arthroplasty, and a peroneal nerve injury causing a left "foot drop." Medical bills approached \$60,000, and plaintiff claimed a past wage loss of \$61,000. She also claimed a diminution in earning capacity based on her residual disability. The case resolved one month prior to trial.

PRODUCT LIABILITY



Family of N. v. Motor Home Retailer

In Family of N. v. Motor Home Retailer (Alameda Co. Sup. Ct.) Michael A. Kelly and Khaldoun Baghdadi negotiated a cash and annuity settlement having a present value of \$5,250,000 on behalf of the surviving widow and two minor children of a 42-year-old fire captain who was killed when his SUV rolled over on Highway 50 while pulling an "Ultralight" travel trailer. Plaintiffs claimed that the defendant motor home retailer inappropriately sold the decedent a trailer which was too large to be safely pulled by his small SUV. Plaintiffs also claimed that the retailer failed to advise the decedent that if the travel trailer were loaded to its maximum capacity (as specified by the trailer manufacturer) the trailer would weigh 1,400 pounds more than the maximum weight recommended by the SUV manufacturer. While traveling on Highway 50, passing a semi-truck, the trailer was hit by a gust of wind causing it to fishtail, go out of control, and roll over, pulling the towing vehicle with it. Defendants claimed that had the decedent read the owner's manual for his vehicle and the trailer he would have observed warnings in both manuals regarding overloading,

and, by weighing the vehicles he could have avoided the situation which produced his death. The settlement was reached after three mediations. A companion case against the manufacturer of the trailer is still pending.

Family v. Device Maker

In Family v. Device Maker (San Mateo Sup. Ct.), Paul Melodia and Melinda Derish successfully concluded a medical device wrongful death case for \$1,190,000 on behalf of the family of a 44-year-old husband and father who died after undergoing heart surgery. The patient had presented to the hospital following an abnormal stress echocardiogram and an episode of cardiac arrhythmia. His physicians performed coronary artery bypass grafting on four coronary vessels. The decedent developed an aortic dissection intra-operatively which resulted in multi-organ failure and death.

Plaintiffs contended that the aortic dissection was caused by an experimental catheter that was being tested by the defendant medical device company in clinical trials. The case settled during trial for a combination of structured settlement payments after the jury was shown a video, prepared by the plaintiffs' expert, that demonstrated how a safer alternative design would have avoided this injury.

Motorist v. Foreign Automaker and County

In Motorist v. Foreign Automaker and County (S.F. Sup. Ct.), Ronald Wecht and Khaldoun Baghdadi negotiated a settlement of \$1,500,000 on behalf of a woman who became quadriplegic when the roof of her SUV crushed during a roll-over accident. As Plaintiff was driving along the highway, her right-side tires left the roadway. She was unable to steer the vehicle back onto the road because the drop off from the paved edge of the road at the point of the gravel shoulder measured nearly 6 inches. When she reached an area where the road leveled out, she was able to get the SUV back onto the road, but not without steering into oncoming traffic. When she corrected her steering, her vehicle rolled over into a ditch, the roof crushing on impact.

Plaintiffs claimed that the County had a duty to inspect the road for hazardous conditions and had the capability of making the road safer by filling in and correcting the roadway edge drop-off. Plaintiffs also contended that the automaker had knowledge that its SUV roof would not withstand a foreseeable rollover crash and failed to implement an alternative design that would have made the vehicle safer.

Passenger v. Foreign Automaker

In Passenger v. Foreign Automaker (confidential settlement), Khaldoun Baghdadi negotiated a multi-million dollar settlement on behalf of an SUV passenger who was ejected from his vehicle when it rolled while traveling at 70 miles per hour on Highway 580 in Alameda County. Our client claimed that the vehicle lost control when a component of the front suspension fractured, causing the driver to make contact with the center median, lose steering input, and tumble end over end for approximately 300 feet. Khaldoun's client sustained substantial brain injury that prevented him from returning to work as a general contractor. Additionally, his wife was also ejected and died in the collision. Under the terms of the settlement, both cash and future structured payments were contributed by the vehicle manufacturer.

RECENT CASES

GOVERNMENT LIABILITY



Citizen v. State

In *Citizen v. State of California* (Marin Sup.Ct. No. CV044456), Douglas S. Saeltzer and Michael A. Kelly obtained a settlement of \$3,049,000 on behalf of a 53-year-old financial planner injured while she was riding in a passenger car that hydroplaned off State Route 101, crashing into a large portable message signboard owned by Diablo Contractors, Inc. Diablo crews placed the CMS board on the dirt shoulder of the roadway, just outside an enclosed storage area, as part of a construction project to upgrade the 101 center median. At the time of the incident, the CMS board was turned off and had not been used for several days.

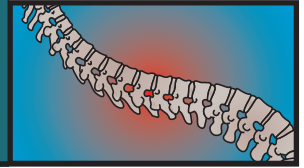
Plaintiff claimed that the construction company was negligent for failing to place the CMS board in an off-site designated storage area, that the State created a dangerous condition of public property by allowing the contractor to store the unused signboard outside of its storage area, and that the driver of the vehicle was negligent for driving too fast for conditions. The construction company and the State claimed that it was both safe and customary to leave such signboards on the side of the roadway for the duration of a project. They further defended the action on the basis that the location of the signboard did not violate the approved contract plans.

During the collision, the frame of the signboard knifed through the passenger door striking plaintiff in her right hip, causing massive injuries, including an open and unstable pelvic fracture and a below-the-knee amputation. A portion of the settlement was devoted to an annuity. The case settled two weeks before trial.

Heirs of R. v. City of Pacific Grove

In *Heirs of R. v. City of Pacific Grove* (Monterey Sup. Ct. No. M74289), Matthew Davis and Michael Kelly negotiated a settlement in the amount of \$1,000,000 on behalf of the surviving heirs of a woman killed when a thirty-foot length of a diseased pine tree fractured and fell, striking and killing her at the Monarch Butterfly Sanctuary in Pacific Grove. Matthew and Mike were able to prove, through both percipient and expert witnesses, that at least six pine trees, each in excess of 100 feet in height, had been tagged three years earlier for removal because of the very risk which resulted in the death of plaintiffs' decedent. The City defended on the basis that it did not have actual notice of the specific danger, and further, it was unreasonable to expect that it could marshal sufficient assets and personnel to remove all damaged trees in public parks and spaces given the extraordinary number of trees killed by pine pitch canker and other diseases each year. The plaintiffs included the son and daughter of the deceased, and three of her grandchildren. The son and grandchildren witnessed the actual events, and had claims for both emotional distress and wrongful death. Under the terms of the settlement, the City contributed funds in the form of cash and future structured payments. The recoveries by the minor children were structured so as to help offset their college education expenses. The parties are in the process of negotiating an appropriate memorial in the Monarch Butterfly Sanctuary to commemorate the decedent's life.

MEDICAL NEGLIGENCE



Jastrab v. Ling, et al.

In *Jastrab v. Ling, et al.* (El Dorado Sup. Ct. No. PC20040405), Michael A. Kelly and Melinda Derish obtained a jury verdict in the amount of \$3,156,000 after a six-week trial on behalf of a 17-year-old boy who suffered ARDS, osteomyelitis, hip fusion, and chronic pain by reason of a failure to diagnose a soft tissue staph infection. The minor claimed that his orthopedic surgeon, in association with the surgeon's physician assistant, failed on two separate occasions to conduct diagnostic tests necessary to identify a staph infection which had seeded in his thigh following a minor injury at football practice. Over time, the infection worsened, the child became septic, went into septic shock, developed ARDS, multi-system organ failure, and required 11 surgeries to debride the infected musculature of the left leg. Ultimately, the infection progressed to the bone, producing osteomyelitis and necrosis of the hip joint, requiring two fusion surgeries. Future medical care costs sought at trial exceeded \$500,000. Expert testimony produced by Mike and Melinda demonstrated that the child would have future impairment in his earning capacity because of his restricted mobility. The defendants argued that the child's symptoms were non-specific and were consistent with a host of conditions including a resolving bruise. They further argued that by the time the symptoms were sufficient to warrant a workup for sepsis, antibiotic therapy would have been unsuccessful in reversing the infectious process.

The jury deliberated three and a half days after a six week trial. The verdict is believed to be the largest medical negligence verdict in the history of El Dorado County.

Pediatric Patient v. HMO

In *Pediatric Patient v. HMO* (confidential settlement), Michael Kelly and Doris Cheng negotiated a settlement having a present cash value of \$6,350,000 after a neurosurgeon on contract to an HMO misdiagnosed a spinal cord abnormality and performed a high-risk neurosurgery on a 6-year-old girl, causing her to suffer permanent quadriplegia.

The child had previously undergone surgery shortly after birth for placement of a ventriculo-peritoneal shunt to treat hydrocephalus, and had been undergoing regular checks of the VP shunt up until the time her parents reported problems with coordination shortly after her fifth birthday. Her condition during her first five years was essentially normal. She was able to play sports and was enrolled in a normal kindergarten class. Experienced neurologists examined the child and ruled out the possibility of a congenital Arnold Chiari malformation or tethered cord. Despite the fact that the treating doctors ruled out a rare and complicated neurological conditions, a contract neurosurgeon misdiagnosed the child and performed a high-risk surgery. As a result of intraoperative complications, the young girl was rendered quadriplegic.

The settlement was reached after two days of mediation and included both up-front cash and multiple structured programs, as well as the establishment of a special needs trust.

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RECENT CASES

MEDICAL NEGLIGENCE



Continued from page seven

Child v. Cardiologist

In Child v. Cardiologist (confidential settlement), Khaldoun Baghdadi and Michael Kelly negotiated a cash and annuity settlement having a present cash value of \$4,000,000 on behalf of a 13-year-old boy who was left in a persistent vegetative state because of his doctor's failure to diagnose a genetic heart condition known as Prolonged QT Syndrome.

At age seven the child presented to the emergency room with symptoms of a seizure. At age nine he returned again to the ER after losing consciousness and falling. The underlying cause of the loss of consciousness was never investigated. At age eleven the boy began having involuntary body spasms, convulsions and drooling. His primary physician diagnosed the problems as seizures and referred him to a neurologist. Unfortunately, his condition was cardiac in origin as his heart was not supplying sufficient blood to his brain. His physicians did not recognize that his symptoms required an EKG and cardiac evaluation. The young boy ultimately suffered cardiac arrest and hypoxic brain injury. He was rushed to the emergency room, but resuscitation could not reverse the severe damage already done. The settlement negotiated at mediation provided for the young boy's continuing attendant care, medical expenses and future wage loss.

Injured Child v. Medical Center

In Injured Child v. Medical Center, Ronald Wecht obtained a wrongful birth settlement in the amount of \$875,000 for a child born with Down syndrome. The pregnancy was considered high risk because the mother was 34 years old and pregnant with twins. In violation of its own policy regarding high risk pregnancies, the Medical Center failed to offer the mother an opportunity to undergo amniocentesis and chorionic villus sampling early in the course of her pregnancy. Had the doctors detected Down syndrome with these tests, the mother could have been offered "selective reduction" to terminate the fetus with a birth defect.

The parents brought claims for emotional distress and economic damages resulting from the complications of Down syndrome. In addition, an economic damages claim was brought for the child himself, for the cost to treat complications in his majority.

Ethier v. Poindexter, et al.

In Ethier v. Poindexter, et al. (S.F. Sup. Ct. No. CGC-05-437623), Michael A. Kelly and Doris Cheng obtained a jury verdict in the amount of \$3,035,000 on behalf of the surviving parents of a 29-year-old single male who died following a missed diagnosis of skull fracture. The decedent, while surfing in the Half Moon Bay area, was struck in the head. He visited a local urgent care center/emergency room where the physician on duty failed to palpate the wound, take an x-ray or suspect a fracture. In fact, the young man had sustained a fracture of his skull with resulting laceration of the middle meningeal artery. The decedent was discharged with a prescription for Vicodin. One and a half hours later he collapsed at home from mounting intracranial pressure. Emergent neurosurgery at San

Francisco General Hospital was unsuccessful in saving his life. The defendant emergency room physician claimed that the decedent acted normally and showed no signs whatsoever of significant head injury or concussion when he presented to the emergency room, and there was no reason to seek an x-ray or explore the depth of the head wound since it had stopped bleeding at the time of the visit. After a three week trial a San Francisco jury deliberated for two and a half days before returning its verdict. The verdict was ultimately reduced in accord with California's malpractice damage limitation as set forth in Civil Code §3333.2.

PREMISES LIABILITY



Minor v. Door Manufacturer

In Minor Child v. Defendant Manufacturer (San Mateo Sup. Ct.), Richard Schoenberger and Khaldoun Baghdadi negotiated a settlement of \$1,500,000 on behalf of a 3-year-old girl who sustained permanent brain injuries when her head was crushed by an automated revolving door at SFO. Plaintiff contended that a design defect, or alternatively, a manufacturing defect, prevented the safety sensors from sending a signal to shut off power and engage the brake when her head became trapped. As engineered, the door should have stopped when any object made contact with the sensors.

The child sustained fractures to her skull, hemorrhaging and diabetes insipidus, ocular nerve damage and severe prosis. The past and future medical bills exceeded \$300,000. ▲

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 or Kevin Domecus. Visit us on the web at www.walkuplawoffice.com.



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