WALKUP, SHELBY, BASTIAN, MELODIA, KELLY & O'REILLY

FOCUS ON TORTS

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Inaugural Newsletter

Updating Office Expansion

With our initial publication of this newsletter, we are embarking on a r[illegible] enterprise intended and designed to keep our friends, referring attorneys and clients up to date and well informed about the law which directly affects each of you. As recently as ten years ago such an enterprise would have been unnecessary. However, with the expansion of our firm into new areas of tort law, and a correspondingly significant increase in the number of attorneys referring cases to our office, it has become next to impossible to keep up regular personal contact with all of our associate counsel.

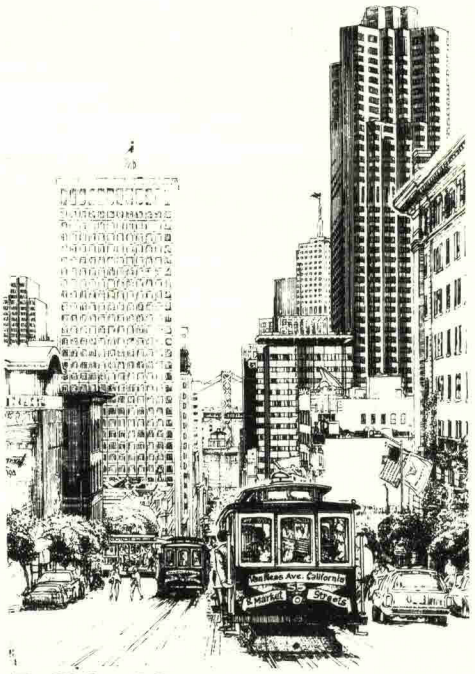
In addition, recent attacks by special interest groups on the rights o[illegible]t victims have intensified over the last few years. The Medical Injury Compensation Reform Act and Proposition 51 are but the first two steps in a well orchestrated plan intended to deprive injured victims of fair compensation. Encouraged by the recent success of Proposition 51, manufacturers, insurance industry lobbyists, and other special interest groups have recently introduced legislation known as "PICRA" (Personal Injury Compensation Reform Act). Its provisions will even further compromise the right and ability of tort victims to receive adequate compensation.

These legislative changes impact not only this firm, but all of the attorneys who work with us in association on our cases. We hope that through the pages of this publication we will be able to regularly inform and advise you regarding such proposed legislation and efforts.

Over the years our firm has grown significantly. When Bruce Walkup started this firm the concept of a "paralegal" was unknown. Now, our support staff exceeds 20 persons. The thought of having a physician on the staff would have probably brought a chuckle from other members of the Bar. Now, armed with such an asset, the firm is in a much better position to assess and evaluate the potential of many different cases.

With expanded staff comes a need for expanded space. With that in mind, the firm has recently completed a physical expansion and refurbishing of its office space so that it now occupies the entire 30th floor of the Hartford Building.

We are proud of the firm, our staff and the results which we are able to obtain for our clients. We are proud to work in association with the many fine attorneys who refer their personal injury cases to us for prosecution and welcome your comments about this new format for communication. We look forward to working with each of you in the years to come in the representation of those who fall victim to injuries which dramatically impact their lives and loved ones.



The Walkup Offices are continually expanding. Today they occupy the entire 30th Floor of the Hartford Building, 650 California Street, San Francisco (left).

Dividing Fees With Associate Counsel

After some years of relative confusion, State Bar Rule of Professional Conduct 2-108 was adopted in 1979. Rule 2-108 provides that attorneys fees may be shared amongst lawyers (i.e. referral fees may be paid) so long as the client is advised of the fact and basis of the fee split, and agrees thereto in writing, and so long as the fee is not increased to the client.

Our office will continue its practice of honoring fee sharing arrangements on referred plaintiffs' litigation in accordance with Rule 2-108.

RECENT CASES

Aviation Accidents

STEWART V. AEROSPATIALE

John Echeverria recently completed a two-month trial in the Federal District Court in Sacramento in which he represented five business professionals who were involved in a helicopter crash [*Stewart et al v. Aerospatiale* (No. 5-82-528)].

Plaintiffs were passengers in a helicopter manufactured by Societe Nationale Industriale Aerospatiale, a French corporation, and owned by defendant Roberts Aircraft, Inc.

The accident occurred on March 22, 1982, when the helicopter crashed as a result of the seizure of its transmission. The seizure resulted from a loss of oil in the transmission secondary to the transmission's oil filter cover having come off. The plaintiffs contended that the oil filter cover separated because of the failure of a retaining pin which was not of the manufacturer's specification. Plaintiffs contended that defendants either manufactured the pin, or if manufactured by another, failed to properly inspect the assembly and detect its non-conformance pre-delivery. In addition, plaintiffs contended that the helicopter pilot was negligent in selecting an inappropriate landing site.

Defendant Roberts denied the negligence of its pilot and further contended that the non-conforming part was made and installed by the French manufacturer (who was not a defendant).

The trial court granted a motion for directed verdict on the issue of strict liability and submitted the case to the jury for a determination of the defendant's negligence. The jury returned a plaintiffs' verdict on the issues of negligent maintenance and operation of the helicopter.

The plaintiffs (an advertising executive, a hotel manager, a self-employed business man, an attorney, and a dentist) sustained a variety of injuries ranging from fairly minor in nature (a fractured rib and back strain) to extensive back injuries requiring two surgeries and a reduction in earnings to the plaintiff dentist.

The jury returned total verdicts of $1,829,982. Verdicts ranged from $26,703 to $1,511,426.

DAVIES V. WINGS WEST AIRLINES

Ron Wecht's case of *Davies v. Wings West Airlines* [(Los Angeles County Superior No. C559960) Los Angeles Judicial Council Coordination Proceeding No. 1911] was an action for the wrongful death of Derek Davies, a 13-year-old boy survived by his mother and father.

Derek was an above-average student who excelled in a number of fields. He was active in the school choir and band. He had been selected most valuable player on his sixth grade football team. He and his family lived on a small 10-acre farm near San Luis Obispo. Derek was primarily responsible for the maintenance of the animals and the crops. He was also active in community and civic affairs. In short, he was a remarkable 13-year-old boy.

He was killed as the result of a mid-air collision between an aircraft operated by Wings West Airlines and a general aviation aircraft. All of the passengers' cases settled with the exception of that involving the death of Derek Davies. The case was tried in February, 1987, and resulted in a verdict of $600,000.

Wings West made a motion for new trial which was denied by the trial court. As the verdict was in excess of the Plaintiff's CCP §998 offer to settle, plaintiffs were also entitled to pre-judgment interest.

Vehicular Negligence

LIEW V. ANYWHERE USA

In *Liew v. Anywhere USA Transportation, Inc.* (Alameda No. 614878-6) Dan Kelly negotiated a wrongful death case settlement of $750,000. The facts of the case are briefly summarized as follows:

The decedent, age 28, was operating her car on Interstate Highway 880 in Alameda County. Her husband, age 27, was a passenger in the right front seat of the vehicle. As decedent was proceeding south-bound on Interstate 880 in the far right lane, the defendant's truck merged to the right, into her lane, causing a collision between the truck and her vehicle. The car then skidded out of control, veered to its left and went under the truck trailer. As a result of that subsequent collision, decedent received fatal injuries. Her husband's injuries were minor in nature and were treated with chiropractic care. In addition, plaintiff contended emotional distress damages for witnessing his wife's fatal injuries.

The defendants contended that the truck had a "blind spot" that prevented the driver from seeing the Mitsubishi vehicle. It was also contended that decedent over-corrected and caused the fatal subsequent collision.

The wrongful death case and the personal injury action were settled for the $750,000 amount. Decedent's only heirs were her husband and her mother.

RICH V. ARISTON

George Shelby settled a personal injury case, *Rich v. Ariston* (Alameda No. H 90822-9), for $900,000. The plaintiff, a 55-year-old bread route supervisor, was injured in 1983 when his company car was rear-ended on the San Mateo Bridge by a food service van. Liability was undisputed.

Plaintiff was originally thought to have a low back strain and knee bruise. Over the course of litigation he went on to have three low back surgeries: a bilateral laminectomy at L-4 in May, 1983, in January, 1984, a laminectomy at L4-5 and disc removal, and in November, 1986, a bilateral lumbar laminectomy and disc excision. He also had two arthroscopic procedures of the left knee. In addition, he developed a TMJ syndrome which cleared after treatment.

Plaintiff was well-motivated and returned to work in 1985. The workers compensation carrier reduced its lien to $74,000 from an amount in excess of $100,000. Medical expenses were approximately $85,000 and actual past income loss was approximately $85,000.

GREGORY V. SPECKCAB

In *Gregory v. Speckcab* (San Francisco No. 801168) Paul Melodia recently negotiated a $500,000 settlement involving the wrongful death of 77-year-old semi-retired movie actress Janet Gaynor. She and her husband (along with fellow actress, Mary Martin) were injured in an intersection collision in San Francisco when their cab was broadsided by a van. All these injury cases were settled for the van's policy limit ($300,000). Two years post accident Ms. Gaynor died. Her heirs contended that her death stemmed from her accident injuries. Defendant (cab company) disputed this.

Plaintiff's theory as to the cab defendant involved a claim that the lap belts in the cab's backseat were stuck under the seat and not available and that these belts would have greatly reduced the magnitude of Ms. Gaynor's injuries. This causation question as to the seatbelts was likewise disputed by the defense.

Plaintiff relied on a computerized simulation of the accident as well as a biomedical engineering expert to explain the seatbelt theory of the case against the cab company.

Medical Malpractice

McLEOD V. CHILDRENS' HOSPITAL

In *McLeod v. Childrens' Hospital of San Francisco* (No. 783-597) Terry O'Reilly tried a birth injury case resulting in a verdict for $6,967,662 against the obstetrician. Pre-trial settlements of $500,000 and $750,000 had been made with the anesthesiologist and hospital respectively.

The minor plaintiff, who was six years old at the time of trial, sustained athetoid cerebral palsy with spastic quadriparesis. However, he has normal intelligence with a normal life expectancy.

Of particular interest was the agency question in the case. The attending obstetrician claimed he was ill and phoned another physician (uninsured) to cover for him. The covering physician had not practiced full-time obstetrics for many years. The case was presented on a theory that the covering physician was the agent of the attending obstetrician. The jury so found and the judgment survived post-trial attack and has now been satisfied.

The *McLeod* verdict is one of the largest in California for a single personal injury victim.

WRIGHT V. U.S.A.

In *Wright v. United States of America* (N. Dist. C85-7052) Richard B. Goethals, Jr. negotiated an annuity settlement of a medical negligence action.

Plaintiffs contended that a nine hour delay in the diagnosis and treatment of meningitis in a 17-month-old child resulted in serious brain damage.

The minor plaintiff was brought by his parents to the Silas B. Hays Army Hospital emergency room at Fort Ord on August 27, 1978, at approximately 5:00 a.m. He had been vomiting for 12 hours and had a temperature of 105.6°. His parents testified that he was lethargic, while the emergency room physician testified that he did not appear to be extremely ill. The emergency room physician found the neck to be supple without pain or stiffness. He prescribed aspirin suppositories and a sponge bath, which reduced the temperature to 100.6° before he was released from the emergency room at approximately 6:00 a.m. The emergency room physician's diagnosis was viral gastritis.

Later that day the boy's father found him to be very warm and lethargic. He rushed him to the Silas B. Hays Hospital emergency

Continued next page.

Know Your Contract Law, Too!

Many of our referring attorneys have requested that we clarify questions regarding the proper wording of their contingent fee contracts. As many of our cases are referred by associate counsel who have previously done some work on the case under the terms of their own retainer agreements, we have the opportunity to see numerous exemplars of contingent fee agreements.

Because some types of cases have statutorily mandated fee schemes, it is not prudent to operate under a single form of agreement. The retainer agreement must be tailored to the particular case, even though many terms may be common to all contingent fee situations.

Those areas where we see contracts persistently deficient include the following:

A. Medical Negligence Cases.

The Medical Injury Compensation Reform Act of 1975 placed strict fee limitations on attorneys who represent clients on a contingent fee basis. [Business and Professions Code §6146(a)] Some attorneys have attempted, and continue to attempt, to circumvent the provisions of MICRA by asking their clients to waive its provisions. Such an approach is unethical and illegal. [*Hathaway v. Baldwin Park Hospital* (1986), 186 Cal.App.3d 1247; California Rules of Professional Conduct, Rule 7-10] The correct practice is to use the language of the statute in your contract. (Of course, the contract must also point out that the statute does not *require* this fee schedule, but only sets a maximum fee.) All contingent fee retainer agreements must point out that legal fees in cases are not set by law but are subject to negotiation by the parties. (Business and Professions Code §6147)

B. Evaluation/Collection of Fees on Annuities.

While structured settlements have become less popular with the decrease in interest rates, they are still a common tool utilized in the settlement of personal injury cases, particularly in cases involving young children, or persons incapable of intelligently investing and managing large sums of money.

Many of the contracts used by our referring attorneys do not spell out how the legal fee is to be computed when an annuity is involved, and when that fee is to be paid. Unless the retainer agreement specifically spells out that the fee is to be computed upon the present cash value of the future annuity payments, and collectible in one lump sum from any upfront cash, the fee may not be collected except at the time each periodic payment is received. [*Sayble v. Feinman* (1978), 76 Cal.App.3d 509] Also, the proper and ethical way to evaluate the amount of your fee on any future periodic payments (assuming the fee is to be collected entirely from the lump sum cash payable at settlement), is on the basis of the *cost* to the defendant of the annuity. An attempt to calculate the fee based upon the ultimate payout, or the "benefits" to the client (including tax benefits) is improper. [*Johnson v. Sears, Roebuck & Co.* (Pa.1981), 436 A.2d 675; *see also, Franck v. Polaris* (1984), 157 Cal.App. 3d 1107]

C. Identify Advanced Costs.

Too many of the contracts we see prepared by referring counsel fail to clearly identify what is meant by "advanced costs." To avoid later problems with interpretation, we recommend that all contingent fee contracts specifically enumerate the type(s) of advanced costs counsel intend to deduct from any gross settlement before their legal fee is computed.

D. Make Sure Your Client Receives a Copy of the Agreement.

California law requires that all clients receive a copy of their contingent fee retainer agreement. The failure to make a copy available to the client will result in the contract being voidable at the wish of the client, and the attorney's services being compensated on a rate other than as set forth within the contract. (California Business and Professions Code §6147)

E. Federal Tort Claims.

Most of our referring counsel appear to be unaware that the Federal Tort Claims Act (28 U.S.C. §§2671, et seq.) provides for a maximum fee in contingent fee cases of 25% of the *gross* recovery in cases against the U.S. Government. A one-third fee in such cases is prohibited by the statute. The Act makes no provision for additional fees in the event the case is tried to verdict, or appealed. Any attempt to charge a contingent fee in excess of 25% is a violation of federal law.

The five areas discussed above are only a few of the areas where we see problems in contracts of referring counsel. We are happy to answer individual questions in particular cases at any time they arise. Similarly, we will be happy to make sample copies of our own retainer agreements available to our referring attorneys at their request for comparison with their own agreements.

Dalkon Shield Plaintiffs Continue to Wait

In July of 1975, we filed our first cases against the A.H. Robins Company for injuries caused by the Dalkon Shield I.U.D. In 1980, one of those initial cases, *Rounds v. A.H. Robins, et al.*, was settled for $1,375,000—still one of the highest settlements nationwide in a Dalkon Shield case. To date, the firm has settled or tried over 65 cases against A.H. Robins and has over 100 pending cases. Unfortunately, nearly 12 years after the first complaints were filed, many women are still awaiting just compensation for the injuries they have suffered as a result of Robins' product.

On August 21, 1985, the Robins Company filed for Chapter 11 protection from creditors. Thereafter, the U.S. District Court in Richmond, Virginia, (Robins' corporate headquarters) assumed jurisdiction over all matters pending against the company. Some 9,000 Dalkon Shield cases were on file when Robins sought bankruptcy protection; there are now over 300,000 claims before the Bankruptcy Court. Almost two years after the bankruptcy filing, no precise method or forum for evaluating and resolving the claims has been decided.

Originally Robins was to have proposed a plan of reorganization by February 5, 1987. Robins' reorganization plan was finally filed on April 17, 1987. Under the plan, the company would establish a $1.75 billion trust fund, financed primarily through letters of credit and the sale of approximately $800 million in bonds. Compensation to victims ranges from as little as $100 to women with little proof of their injuries, to $2,000 to women who prove injuries from premature delivery with a Dalkon Shield in place. If claimants reject these initial offers, they may seek a settlement conference and ultimately they may choose between binding arbitration or a jury trial.

Hearings on the adequacy of Robins' proposal begin July 21, 1987 in Richmond, Virginia. It would seem unlikely that the final plan adopted will resemble Robins' proposal due to mounting opposition from claimants and their representatives. Before the Court can confirm a reorganization plan, each creditor and shareholder will be allowed to vote on the proposal. For the plan to be accepted by a class of creditors, it must receive favorable votes from at least two-thirds of the creditors representing more than one-half of all allowed claims of the class.

In the meantime, on May 21, 1987, the Court approved a special $15 million fund to provide for reconstructive surgery and *in vitro* fertilization to eligible Dalkon Shield claimants. The program is for those women who are in immediate need of and meet the program's eligibility requirements. Payment from the special fund will be deducted from awards later made to claimants under a reorganization plan. The reason for this program is that many claimants will be beyond child-bearing years before they will be compensated through their claim against Robins. Most insurance plans do not cover infertility reconstructive surgery or *in vitro* fertilization.

Hopefully, a plan will be in effect before the end of 1987. Many crucial issues which will affect the viability of numerous claims, such as the statute of limitations, punitive damages and attorneys' fees, still remain to be resolved by the Court. While the claimants wait, A.H. Robins Company remains a profitable corporation.

Recent Cases

Continued from previous page.

room again at approximately 2:15 p.m. the same day. In the emergency room David began to experience seizures. A lumbar puncture then indicated that he had meningitis.

Plaintiff's expert testified that if the child was lethargic at 5:00 a.m., he should have been hospitalized, and prompt treatment probably would have enabled him to recover with little or no brain damage. The defendant's experts testified that the delay in treatment probably did not cause a significant difference in plaintiff's permanent condition.

The cost of the total settlement with the Federal Goverment was $1,136,610.

Workplace Injuries

POTTS V. CITY OF TUSTIN

In *Potts v. City of Tustin* (Orange County No. 357976) John Echeverria settled (via an annuity) a construction site accident case for a present cash value of $1,789,358.

The plaintiff was employed as a laborer for a construction company. During the course of the construction project the plaintiff was engaged in disconnecting a spreader bar suspended from a crane which was being operated by his co-employee. The crane contacted a 16,000 volt overhead electrical conductor owned by Southern California Edison Company. As a result of the contact, plaintiff suffered severe injuries to his right dominant hand which necessitated its amputation, and severe and disabling injuries to the left hand which rendered it virtually useless.

Plaintiff contended that the City of Tustin and the County of Orange were negligent and failed to take special precautions to prevent injuries arising from the peculiar risk of harm created by cranes working in close proximity to overhead electrical conductor. Plantiff also contended that the Edison company was negligent in the ownership and maintenance of the electrical conductor.

Sports Injuries

DAY V. VISALIA SCHOOL DISTRICT

Michael A. Kelly recently settled *Day v. Visalia Unified School District* (Tulare No. 116796) on an annuity basis with a present cash value of $1,350,000.

The plaintiff, a high school senior, suffered a fracture dislocation at C-5-6 and incomplete quadriplegia when he false started during a high school swim meet and struck the bottom of the pool. Plaintiff contended that the design of the pool was defective and that starting blocks should not be placed in depths of water less than six feet. The depth of the water immediately below the starting platform was four feet, three inches. The defendants contended that the pool met all State and local standards and exceeded national high school standards. In addition to the high school district, the pool architects and contractor contributed to the settlement. The settlement package included an immediate cash payment to the plaintiff of $700,000 plus two annuities. The annuities, guaranteed for 20 years and payable for life, provide for monthly payments of $1,100 and $2,700 respectively, increasing at 3% per annum.