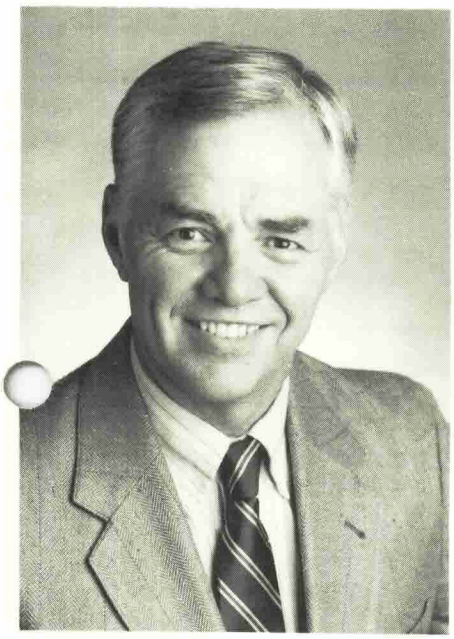
Walkup, Shelby, Bastian, Melodia, Kelly, Echeverria & Link

FOCUS ON TORTS

VOLUME III, NUMBER 1 SUMMER 1989

PROFILE:

The Doctor is In!



Dr. Wesley Sokolosky

In the event of an emergency (such as those which occur when screening possible medical malpractice cases) it's nice to have a doctor in the house. Since 1983, we have been proud to have in our house **Dr. Wesley Sokolosky**, who holds degrees in both medicine and law.

Wes obtained his undergraduate degree from Georgia Tech in electrical engineering in 1963. He earned his M.D. at the University of Texas and then came to the Bay Area to begin a 15-year general medical practice. During that time he was a clinical instructor/preceptor at the Albert Einstein College of Medicine, Stanford University Medical School, U.C. Davis and UCSF Schools of medicine.

Because of what he described as a "long standing interest in medical legal matters," Wes enrolled at Hastings College of Law, graduated in 1980, and was admitted to the bar the following year. He joined our firm in 1983.

A great asset to our firm and our clients, Wes reviews medical malpractice cases, consults with attorneys regarding medical issues in personal injury cases, researches complex medical questions and consults with medical experts.

Wes also serves on a joint Medical-Legal Committee with the Bar Association of San Francisco and the San Francisco Medical Society. He is a member of the State Bar Associations in both California and Texas and is a member of the San Francisco Trial Lawyers Association.

Prop. 103 Upheld? —Yes and No

Now that Proposition 103 has been upheld as "constitutional" by the California Supreme Court, consumers should soon be enjoying their 20% rollback and freeze on insurance rates. Right?

Wrong! The Court did uphold major elements of the initiative but also made it easier for individual insurers to gain exemptions from the rollbacks.

Prop. 103 stipulated that the only insurers free from rolling back and freezing their rates would be those who could show a "substantial threat of insolvency." The Court struck that provision down and opened the doors of exemption to any company that can prove that the rollbacks would deny them a "fair and reasonable" profit. As of late July, only 16 companies had agreed to reduce their auto insurance premiums. Over 400 companies have applied for an exemption.

Certain Prop. 103 elements are still intact. The insurance industry in California is no longer exempt from anti-trust legislation. Insurers must now open their books to justify rate increases, and there are some restrictions on cancellations. But the key provision of the initiative—the one guaranteeing a rollback and freeze on insurance rates—has been snatched back from the California voter. The *Los Angeles Times* said of the Court's decision, "neither side walked away empty-handed."

A Publication from the Law Offices of Walkup, Shelby, Bastian, Melodia, Kelly, Echeverria & Link
650 California Street, San Francisco, CA 94108 • (415) 981-7210

Seat Belt Induced Injuries—An Update

In the last issue of FOCUS ON TORTS we pointed out how rear seat automobile passengers were at a high risk of serious injury when wearing their seatbelts because of the absence of a shoulder harness. We also pointed out that the firm is presently involved in cases where rear seat auto passengers, wearing their seat belt as recommended by auto makers, sustained significant injury because of direct force across the abdomen and spine, resulting in injury to the stomach, intestines, and back. For example, in one of our cases the vehicle containing plaintiffs rear-ended a stalled car. The front seat occupants who were wearing shoulder harnesses were not injured. Both of the back seat passengers sustained fractures at L3-4, lacerated small bowels, ruptured kidneys, and other internal injuries. Had a shoulder harness been provided in the rear of the vehicle, these injuries would not have occurred.

The Federal Government has now acted in this regard. On June 12, 1989, the National Highway Transportation Safety Administration released a press release mandating that *all* automakers be required to provide rear shoulder belts in new cars sold in the United States, effective in six months.

This new N.H.T.S.A. rule assures 100% coverage of all new cars and establishes minimum technical requirements for belt systems.

While it is commendable that the Federal Government has taken this action, it is unfortunate that it has taken so long.

We continue to be involved in litigation to ensure the safety of the motoring public, including cases alleging inadequate passenger restraint systems, and seat belt induced or exacerbated injuries. In any case where severe injuries have occurred to vehicle occupants and the vehicle is less than 10 years old, counsel must investigate whether or not the restraint system and seatbelt design were adequate. Because these cases are complex, expensive and involve substantial discovery, we encourage our referring attorneys to contact us early in the course of these cases if they wish our assistance.

Discovery of Hospital Committee Records in Medical Malpractice Cases

Defense counsel in medical and hospital malpractice cases are frequently claiming the privilege against discovery of "quality assurance records" (Evidence Code §1157) as an objection to requests for production of hospital records that are not a part of an individual patient's personal chart. Such objections are improper. Evidence Code §1156, as interpreted in *Santa Rosa Memorial Hospital v. Superior Court* (1985) 174 Cal.App.3d 711, clearly authorizes discovery of many such records.

Evidence Code §1156 provides that medical and dental committees of hospitals may engage in studies for the purpose of reducing morbidity (the rate of complications) or mortality (the rate of death) and may make recommendations pursuant to such studies. Subsection (a) provides that while the written reports of the studies are subject to discovery as provided for in the Code of Civil Procedure, the reports themselves are not admissible in any civil action. Too often, discoverability and admissibility are confused.

Section 1157 does *not* completely bar discovery of all documents relating to quality assurance activities. The scope of this statute was given thorough consideration in *Santa Rosa Memorial Hospital v. Superior Court*, supra. There it was noted that §1157 must be read in conjunction with the holding of *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332, which established direct and independent responsibility upon hospitals to insure the competency of their medical staffs and the quality of medical care. The *Santa Rosa* court held that hospital administrators may not evade their duty to insure the adequacy of medical care simply by delegating this responsibility to "quality assurance" committees. Nor can the hospital rend[illegible] its files immune from discovery simply by disclosing their contents to a medical staff committee. (*Id.* at 724).

Once the existence of documents or records reflecting administrative quality assurance activities are established through interrogatory or deposition testimony, the opinion in *Santa Rosa*, supra, provides clear authority to compel the hospital to submit such documents for *in camera* inspection by the court. The court is thereafter empowered to compel production of any document, or portions of documents, which do not fall within the proper scope of Evidence Code §1157's protection. The party seeking immunity from discovery bears the burden of showing that the documents come within §1157's scope.

Wrongful Termination Field Narrowed

On December 29, 1988, the California Supreme Court handed down its long-awaited wrongful termination ruling in *Foley v. Interactive Data Corp.* (1988) 47 C.3d 654.

The *Foley* majority affirmed the covenant of good faith and fair dealing as part of an employment contract, but limited recovery to contract remedies such as back wages, reinstatement, and consequential damages.

The decision marked a vast departure from the previously settled principle that a cause of action alleging breach of the implied covenant of good faith and fair dealing sounded in both contract and tort.

I. THE PLAINTIFF IN FOLEY AND WHY HE WAS FIRED

Foley was an employee of the computer marketing firm from June of 1976 until March of 1983. He began as an assistant product manager at a starting salary of $18,500 and when fired was the branch manager of defendant's Los Angeles branch office earning $63,000 per year. Along the way he received salary increases, promotions, bonuses, awards and superior performance evaluations.

Foley alleged he was fired because he informed his employer that an individual appointed as his supervisor was under FBI investigation for suspicion of committing embezzlement. He was asked by the employer to "forget what he heard."

The employer/defendant claimed that he was fired for "performance reasons."

II. FOLEY DOES NOT DO AWAY WITH ALL TORT RECOVERY IN EMPLOYMENT CASES

While the court's abolition of the "tortious" discharge is dramatic, the *Foley* decision does leave a few wrongful termination remedies intact.

A. Implied-In-Fact Contract.

The cause of action for breach of the "implied-in-fact" contract as set forth in *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, is still alive. The attempt to abrogate the theory by reliance upon the statute of frauds failed. Remember, the facts sufficient to allege this cause of action are not constrained by rigid rules, but rather by a more liberal "totality of the circumstances" test.

B. Public Policy Violations.

Even after *Foley*, the employer's right to discharge an employee is still subject to limits imposed by public policy "[O]therwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal," *Foley v. Interactive Data Corp.*, supra, at page 665. The tenor of the majority's opinion leads us to believe that its holding that plaintiff failed to allege sufficient "public policy" grounds is strictly limited to the *Foley* facts.

C. Independent Torts:

The cause of action for intentional infliction of emotional distress still survives where the circumstances surrounding the termination are egregious enough to constitute "outrageous" conduct. Conceivably, the same facts which would have justified a "bad faith" tortious discharge could form the basis for an intentional infliction of emotional distress cause of action. Certainly, nothing in *Foley* eliminates that possibility. CAVEAT: *Giorgi v. Verdugo Hills Hospital* (1989),210 Cal.App.3d 252, has recently held that most causes of action for the intentional infliction of emotional distress and possibly other tort claims are preempted by the worker's compensation act. A request to depublish this opinion is now pending before the California Supreme Court.

As of this printing, we are not aware of the subsequent case history of the *Giorgi* case.

The spectre of punitive damages still hangs over the heads of employers with the successful application of the intentional infliction of emotional distress cause of action. So too with allegations of fraud, tortious interference with prospective advantage, discrimination and defamation.

III. THOSE HARMED BY FOLEY

Lower-paid employees fired without good cause (but in a polite manner) will have a tougher time getting an attorney, much less a large damage award, unless the reason for the termination involves a violation of public policy, discrimination, defamation or some other inflammatory tort cause of action.

Even the highly paid employee will struggle with the decision of whether to file a lawsuit if damages can easily be mitigated.

IV. FOLEY IS RETROACTIVE

On May 25, 1989, the California Supreme Court in *Newman v. Emerson Radio Corporation* (1989), 48 Cal.App.3d 973, held that the *Foley* case is fully retroactive.

V. CONCLUSION

The *Foley* decision unquestionably favors employers. On the other hand, under the right circumstances, employment related lawsuits are still very much alive.

DON'T Ignore Liens

Over the last few years we have found that many of our referring counsel are ignoring their obligation to notify Medi-Cal and/or Medicare of the pendency of third party cases.

Referring counsel should keep in mind that both Medi-Cal and Medicare are entitled to statutory liens against any personal injury recovery, and that it is every attorney's obligation to notify them of the existence of third party claims (Welfare & Institutions Code §14124.74; 42 U.S.C. §1395).

We recommend that each agency be notified via certified mail, return receipt requested, by letter enclosing a copy of any pending complaint.

Immunities Limit Aquatic Injury Cases

Each summer, as people flock to beaches, pools, lakes and waterways, we are consulted to represent the victims of aquatic injuries. Diving accidents, boating mishaps and drowning make up the majority of such claims.

Often we find that our associate or referring counsel in such cases are unaware of all available theories of recovery, and/or operative immunities or defenses that may frustrate a successful action.

In any diving injury case, identification of the owner and maintainer of the place of injury is of prime importance. Where the situs of injury is owned or operated by a public entity, two critical Government Code immunities must be contended with. Newly enacted Government Code §831.21 provides almost blanket immunity to public entities for injuries occurring at public beaches, deeming them to be "natural conditions of unimproved property" even when public safety services such as lifeguards, police, medical services, beach cleanup, warning signs or fire protection are available. In addition, Government Code §831.7 (Hazardous Recreational Activity Immunity) now immunizes public entities and public employees from any liability for "any form of diving into water from other than a diving board or diving platform."

Where the location of a diving injury is a private pool, close attention must be given to the depth, design and adequacy of warnings in place at the time of injury. Most small in-ground pools owned by private citizens are not sufficiently deep to safely accommodate diving from a diving board. Nonetheless, builders of private pools continue to install thousands of diving boards each year.

Many diving injuries occur in above-ground pools. Such pools are universally recognized to present a significant danger of injury from head-first diving, and the manufacturers of such pools now routinely include warnings prohibiting diving. The failure to supply adequate warnings may subject a manufacturer or retailer to product liability for defect in design.

With regard to pleasure crafts, many people are injured each year as the result of contact between outboard propeller drives, and swimmers or skiers. Presently, there are multiple cases pending across the nation involving allegations of defect in design for failure to equip outboard motors and inboard/outboard stern drives with appropriate propeller guards. Information generated in these cases indicates that most propeller manufacturers have had the knowledge and technical ability to make such a guard for a number of years, but have refused to do so because guards would markedly reduce replacement propeller sales, a component of the industry estimated to generate millions of dollars in revenue each year.

Notwithstanding the feasibility of guards, boating industry interests continue to resist mandatory guarding, arguing that guards are not feasible, reduce top-end speed, and compromise fuel efficiency. None of these arguments seems to justify leaving an unguarded propeller in a place where it is capable of taking off an innocent victim's arm or leg. Certainly, any boating injury case that involves propeller/victim contact may well include a claim based upon defect in design against the manufacturer of the vessel and its propulsion unit. Failure to do this can expose the plaintiff to a less than 100% recovery under Propostion 51.

Proper investigation of cases involving drownings must include inquiry into the amount of supervision available (where the victim is a minor) and the state of sobriety of the victim where the decedent is an adult. Our experience is that there is often a correlation between excessive alcohol intake and adult drowning. Many cases involving child drownings revolve around issues of adequate supervision (or lack thereof) and/or the absence of appropriate fences or guards which would have prevented access to the site of injury. Most cities and counties now require by statute or ordinance that fences of particular dimension be installed around any permanent above-ground or in-ground pool.

We continue to work in association with attorneys across the country in litigating aquatic injury claims. We are always happy to assist referring counsel in the prosecution of such claims, or to simply answer questions about networking, trial tactics or experts.

Announcements . . .

We are pleased to announce that **Ralph Bastian, Dan Kelly** and **Paul Melodia** were named in the 1989-90 edition of *The Best Lawyers in America*.

The honor of fellowship in the American College of Trial Lawyers was recently bestowed upon Dan Kelly at the College's convention in Boca Raton, Florida.

Both Dan and **Mike Kelly** now serve on the Board of Governors of the California Trial Lawyers Association. Mike also was recently named the "Alumnus of the Year" by Sacred Heart High School in San Francisco. In the Fall Mike will begin his tenth year on the faculty at Hastings College of the Law.

Paul Melodia has been named vice chairman of the Litigation Section of the San Francisco Bar Association.

Rich Schoenberger is active in the San Francisco chapter of the American Inns of Court where trial lawyers and judges (both young and old) gather monthly to hone their skills.

Ron Wecht recently spoke at the annual Air Law Symposium at Southern Methodist University in Dallas, Texas.

Congrats are again in order for **Kevin Domecus** who as player-manager led the firm's softball team to an undefeated first half in the San Francisco Lawyers League. His team does not want for experience. In a recent game the bases were loaded with Dan Kelly, Hal Stone and Jim Taggart: a total of 156 years on the basepaths.

Recent Cases

PREMISES LIABILITY

Mazzanti v. Alameda Apartments

In *Mazzanti v. Alameda Apartment and Home Rental* (Alameda No. 609238-8) **Rick Goethals** negotiated a cash settlement in the amount of $990,000 on behalf of a two-year-old boy and his parents. The child had stood on the headboard of his parents' bed and leaned against an allegedly defective window screen causing the screen to fall away. The child fell two stories and struck his head on the concrete driveway below, rendering him paralyzed.

Defendants disputed liability, contending that such screens were only intended to keep bugs out and not to keep children in. A demurrer to the original complaint was sustained on those grounds. The court subsequently overruled a demurrer to a first amended complaint. The settlement in the amount of $950,00 was reached with the defendant landlord while its motion for summary judgment was pending. The child subsequently died. Following his death, defendant Alameda Repair Shop, which had inspected the windows in the apartment, contributed and additional $40,000 to the settlement.

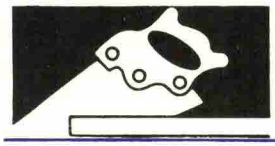
Gosselin-Stratton v. Miracle Recreation Co.

In *Gosselin-Stratton v. Miracle Recreation & Equipment Company* (San Mateo No. 301207), **Jeff Holl** settled a case stemming from a playground accident at San Bruno City Park.

The plaintiff, who is deaf and works as a teacher's aid, suffered a degloving injury to her right ring finger. Ms. Gosselin-Stratton (who communicates through sign language) was accompanying a pre-school child down a tall corkscrew slide when her right ring finger was hooked on a bolt protruding from the side of the slide, tearing all of the tissue from her hand. Plaintiff contended that the slide was defective because the bolting direction should have been reversed so that the nut and bolt were on the exterior of the slide. It was also contended that the slide had been improperly assembled by Palo Alto Landscape Company and that the City of San Bruno had negligently maintained the slide. No prior accidents had occurred as a result of this problem.

Ms. Gosselin-Stratton's finger was micro-surgically repaired and she has made a full recovery.

In the week prior to trial plaintiff reached a settlement agreement for $20,000 with the City of San Bruno and had also negotiated a sliding scale guarantee with defendant Palo Alto Landscape. The manufacturer had refused to contribute to settlement until the morning of trial when the case ultimately was settled for $70,000.



WORKPLACE INJURIES

Damele v. Mack Trucks Inc.

In *Damele v. Mack Trucks Inc.* (Alameda County No. 581614-1) **Kevin Domecus** obtained a $637,000 verdict for a sixty-two year old supervisor at Oakland Scavenger. The plaintiff suffered severe shoulder injuries when he was caught between a backward moving tractor and its forward rolling trailer at Altamont Landfill. The trailer's emergency brakes failed after it was disconnected from its tractor. Plaintiff was trying to reconnect the trailer when the trailer gained speed and crushed him against the back of the truck.

Inspection of the trailer brakes indicated that the brake drums and other components were badly worn, although it had been sent to Mack Trucks for a brake installation and adjustment just weeks prior to the accident. Mack Trucks contended that Oakland Scavenger had wanted the job done on a rush basis and instructed them to install nothing other than brake shoes, knowing that certain worn parts also needed replacement. Defendant also contended that the plaintiff was negligent for even attempting to recouple the 40,000 pound trailer with a moving truck.

Plaintiff suffered numerous fractures, was hospitalized on four different occasions and was off work for ten months. His recovery left him with 50% normal strength and function of his left, minor shoulder.

Having found the plaintiff 2% negligent, the jury reduced its verdict from $650,000 to $637,000. Responsibility for the accident was assessed equally between the defendant and the plaintiff's employer.

Causey v. Aries Helicopter

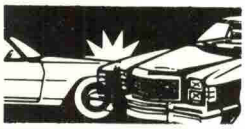
In *Causey v. Aries Helicopter* (Santa Clara County Action No. 632638) **Rick Goethals** negotiated a $400,000 cash settlement on behalf of a 41-year-old P.G.&E. lineman. The plaintiff was injured while standing atop a power pole working in conjunction with the defendant's helicopter operator in the stringing of electrical conduit. Plaintiff's job was to catch and tie off the conduit at the last pole. Plaintiff claimed that defendant's helicopter dropped the large gauge wire upon him, causing him to bend backwards and sustain a herniated disc at L4-5/L5-S1. Plaintiff ultimately underwent two surgeries. According to his physicians he was unable to return to work as a lineman, but was retrainable in a sedentary occupation. Defendants denied liability and claimed that the injuries were overstated and unrelated to the accident.

In addition to the cash contribution by the defendant above, plaintiffs were able to convince the workers' compensation carrier to waive his lien in the amount of $98,763.72 and to pay an additional $40,000 in compensation benefits.

LAW OFFICES OF
WALKUP, SHELBY, BASTIAN, MELODIA,
KELLY, ECHEVERRIA & LINK
A PROFESSIONAL CORPORATION
THE HARTFORD BUILDING - 30TH FLOOR
650 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94108

Recent Cases

Continued from previous page.



VEHICULAR NEGLIGENCE

Anciso v. Jack T. Baillie Company

In *Anciso v. Jack T. Baillie Company* (Monterey County Action No. 82720), **John Echeverria** obtained a structured settlement with a present cash value of over $1,900,000 on behalf of a 29-year-old garbage truck driver who lost both legs below the knee in a work related truck accident.

Defendants in the action were the Baillie truck driver, and the driver of the third tractor-trailer rig who had parked so as to obscure the vision of the Baillie Company driver.

Plaintiff can no longer function as a garbage truck driver because of his bilateral prostheses. Special damages, paid through workers compensation, were approximately $195,000.

In addition to a lump sum cash payment of over $1,000,000 and satisfaction of the compensation lien, plaintiff will receive guaranteed payments of $2,834 per month, increasing 5% per annum, for the balance of his life.

Pochop v. California State Automobile Assn.

In *Pochop v. California State Automobile Association* (U.M. Arbitration), **Michael A. Kelly** obtained a $114,000 arbitration award on behalf of a 46-year-old aircraft mechanic injured in a head-on automobile collision in Placer County. Plaintiff contended that the driver of an uninsured pickup truck lost control on snowy pavement on Highway 80, crossed a median divider, and struck him. Defendant contended plaintiff failed to take appropriate evasive action. Plaintiff sustained a trimalleolar fracture of the right ankle requiring open reduction and internal fixation. Plaintiff had demanded the policy limits ($100,000) on multiple occasions in advance of the hearing. Defendant's pre-hearing offer was $75,000. The entirety of the award was paid in return for a waiver of any bad faith action.

MEDICAL MALPRACTICE

Alves v. Doe Hospital

In *Alves v. Doe Hospital* (Superior Court No. 3645710), **John Link** and **Rick Goethals** recently settled a birth injury claim via a lifetime annuity package for a nine-year-old boy who was born with a beta strep infection which went untreated for 12 hours after his birth. Plaintiff claimed that as a result the child is profoundly retarded, has uncontrollable seizures, and is unable to care for himself and, therefore, will be confined to a board and care facility at a cost of $1,300 per month for life. Plaintiff contended that had he been treated with antibiotics earlier, he would not have suffered such brain damage.

The structured settlement included a lump sum payment of $275,000 cash and monthly payments of $2,000, increasing at 4% per annum, for life, guaranteed for ten years.

In addition, the boy will receive lump sum payments of $50,000 every ten years for the balance of his life. As a condition of the settlement, plaintiff agreed not to disclose the name of the defendant health care provider.

Pasion v. Kaiser

In *Pasion v. Kaiser,* **John Link** obtained a $175,000 wrongful death arbitration award against Kaiser Hospital for failure to perform a timely C-section resulting in a uterine rupture and death of the infant, who was brain dead at birth but survived for five days.

Plaintiff was undergoing a trial of labor and vaginal delivery of her second child following a C-section for her first child three years earlier. The Kaiser obstetrician failed to order a C-section even though fetal heart monitor abnormalities occurred two hours prior to complete rupture and an abdominal bulge was noted one hour earlier in the area.