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

FOCUS ON TORTS

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I-880 Collapse Compels ADR Legislation

Photo by Steve Ringman/*SAN FRANCISCO CHRONICLE*

Since the disastrous earthquake of October 17, 1989, many of our associate counsel have contacted us with questions regarding the prosecution and/or resolution of claims against the State of California arising from death or injury occurring due to the collapse of the Cypress Structure section of Interstate 880 in Oakland.

As this issue of FOCUS goes to press, this firm has filed a number of administrative claims on behalf of plaintiffs who lost loved ones, or sustained injury, in the freeway tragedy.

Shortly following the collapse of the Cypress Structure, in an unprecedented step, the legislature enacted Government Code §§997 et seq. to provide emergency and permanent relief to victims of the disaster.

In addition, the new Government Code provisions also set up a streamlined procedure for attempting early resolution, prior to formal litigation, of all claims arising from the collapse of the Cypress Structure.

Under the alternative dispute resolution program established by the bill, all claims filed in a timely manner will first be submitted to a mediator appointed by the presiding judge of the Alameda County Superior Court [G.C. 997.3(a)]. In the event that mediation is unsuccessful, the claimant has the right to proceed with litigation, in the traditional method utilized in all government claim cases. If the mediation is successful, and the State's settlement offer is accepted, the claimant is deemed to have waived any and all other legal remedies as against the State, its agencies, officers and/or employees [§997.3(b)].

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INSIDE

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Setback For Passenger Restraint Advocates

The Second District Court of Appeal has recently held that common law claims for strict liability alleging design defects for failure to install passive restraints (e.g., air bags) are impliedly preempted by the federal motor vehicle standards enacted by the Department of Transportation.

The case, *Nissan Motor Corporation v. Superior Court* (1989) 212 Cal.App.3d 980, involved a wrongful death action where it was alleged that the vehicle in which plaintiff's husband was killed was defective by reason of the absence of an automatic air bag system. The manufacturer, Nissan, moved for summary judgment on the air bag issue arguing that the claim was preempted by federal motor vehicle safety standards. The trial court denied the summary judgment motion. Thereafter, the matter proceeded by way of writ.

The Court of Appeal granted Nissan's writ in a brief and poorly reasoned opinion. The opinion completely disregarded the Second District's prior holding in *Buccery v. General Motors Corporation* (1976) 60 Cal.App.3d 533. *Buccery*, decided in the same district some fifteen years ago, is frequently cited as correctly stating the California rule on preemption.

Buccery involved an attempt by General Motors to defend a product liability claim (premised upon a failure to install headrests) on preemption grounds. The *Buccery* court noted the language of the enabling Federal Motor Vehicle Safety statute and held that federal safety standards do not grant an exemption from common law liability (15 U.S.C. 1381-1431). The *Nissan* court ignored this language, and made no effort to distinguish the holding in *Buccery*. Rather it arbitrarily declared that "it was not bound by the decisions of other California Courts of Appeal" (at p. 982).

The *Nissan* court grounded its decision on the premise that absent preemption the gates would be opened to a flood of actions against manufacturers who had been following the custom of the industry and acting in compliance with federal regulations. Such a result, reasoned the Court, would "work a hardship on manufacturers and encourage litigation."

Clearly this argument is flawed. One need only look at the post-*Buccery* years to see that no flood of headrest litigation has resulted. Moreover, custom and practice do not set the standard in a product liability case; it is hornbook law that an entire industry can be negligent for incorporating defects in design. Liability is not to be limited or eliminated simply because all manufacturers are acting inappropriately.

Most disconcerting about the holding in *Nissan* is the possible long range impact on any common law product liability claim that involves a federally regulated industry.

As of this writing, the plaintiff in *Nissan* has petitioned for review before the California Supreme Court. Given the importance of the issue, and the differing opinions within the same Court of Appeal District, it is hoped that the California Supreme Court will grant a hearing and remedy the step backwards taken by the *Nissan* decision.

I-880 Collapse Relief *continued*

Continued from front page.

In addition, the bill also provides for emergency payment to certain designated classes of claimants. Up to $25,000 is available to those who have lost income and/or sustained medical expense by reason of personal injury. In cases of death, the bill provides for emergency payments ranging from $25,000 to $50,000 per heir, depending upon the degree of dependency and/or blood relation between claimant and the decedent.

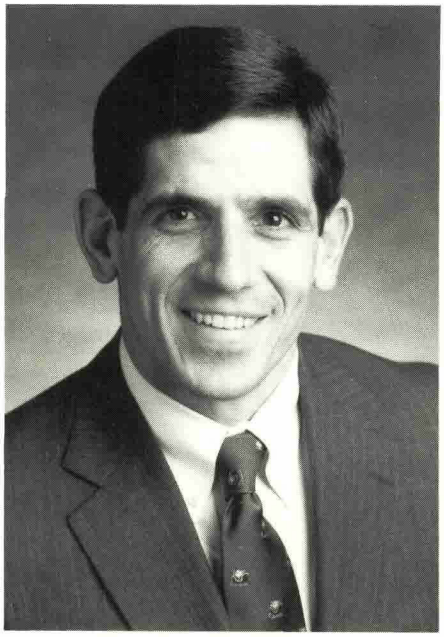
Because the emergency payments are to be made without the need for determining fault, or litigating the amount of total damages, no attorneys' fees are permitted to be charged for recovering those funds due as emergency payments. Where emergency payments are made, and the claimants later litigate their claim against the State, any payments made pursuant to the emergency legislation do not constitute an admission of liability, nor are they admissible in any way (§997.2).

Special claims forms *must* be utilized in order to process Interstate 880 claims. The standard form of claim authorized by Government Code §911.2, and utilized in all other government claims cases alleging defective roadways, are *not* adequate to properly protect a claimant's rights in the special context of an I-880 claim.

We encourage our associate counsel to contact us if they have questions about prosecution of Interstate 880 claims, or if they desire to associate with this firm in the prosecution of their claims. At the present time a plaintiff's steering committee has been formed to streamline the litigation, and hopefully, reduce the cost to all litigants involved in the process. **George Shelby, Michael A. Kelly** and **Daniel Dell'Osso** of our firm have primary responsibility for prosecution of our Interstate 880 claims, and all would be happy to discuss with you any questions relating to appropriate prosecution and/or litigation tactics.

Walkup's "Top Gun" Litigators

Over the years our firm has been extremely active in handling aviation accident cases. Two of our attorneys are trained pilots. We are pleased to profile them in this issue of FOCUS.



Daniel Dell'Osso

Ronald H. Wecht

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A partner in the firm since 1981, Ron graduated from the United States Naval Academy in 1965. He served in the United States Marine Corps until 1972, originally as an infantry officer and later as a Marine Corps jet pilot. In that role he flew the A-4 Skyhawk aircraft, a single-seat light attack plane. Following the service, Ron received his law degree from Hastings College of Law in 1[illegible]. There he was Order of the Coif, a member of the Thurston Society, and a member of the Editorial Board of the Hastings Law Journal.

A member of the San Francisco Trial Lawyers, California Trial Lawyers Association and The Lawyer Pilot Bar Association, Ron has handled all types of tort litigation, including numerous claims involving aircraft related death and injury.

Recently, Ron served as lead counsel in the cases arising out of the PSA aircrash disaster that occured near San Luis Obispo.

Daniel Dell'Osso

[illegible]n obtained his undergraduate degree from the Virginia Military Institute in Lexington in 1975 and was the State of Virginia's nominee for a Rhodes Scholarship. Upon graduation he was commissioned a 2nd Lt. in the United States Marine Corps. Following six months at the Basic School in Quantico, Virginia, he reported to naval flight training in Pensacola, Florida. Dan was designated a naval aviator in 1977 after completing advanced jet training in Beeville, Texas.

Following his active duty career, Dan attended law school at Golden Gate University, graduating in 1984.

Since leaving active duty he has continued to fly with the Marine reserves at Alameda Naval Air Station, accumulating more than 2100 hours of flight time in various jet and propeller aircraft, including the F-4, A-4, TA-4, F-18, T-34B and the T-28. In addition, he has also completed the U.S. Navy's Aviation Safety and Accident Investigation school.

Aviation accident litigation is indeed a highly specialized field. Thanks to Ron and Dan the firm is particularly well suited to efficiently and effectively handle such complicated cases.

U.S. Supreme Court Upholds Robins Reorganization

On November 6, 1989, the United States Supreme Court upheld the Fourth Circuit ruling affirming the A.H. Robins Plan of Reorganization. The Supreme Court's action paves the way for Robins to be purchased and merged into American Home Products Company. The successor corporation will pay approximately $2.3 billion into the Dalkon Shield Claimants Trust to be allocated to persons injured by the Dalkon Shield intrauterine device (IUD).

The resolution of claims had begun even prior to the Supreme Court's affirmance of the plan. In October 1988, a trust was funded with $100,000,000 to commence organization, operation and payment of claims. Between December 1988 and the present, over 80,000 claimants have accepted offers of $725 or less in full settlement of their Dalkon Shield related claim. Most of these claimants had little or no proof of use of the IUD or damage therefrom.

Approximately 120,000 claims remain to be resolved under options 2, 3 and 4 of the plan (ADR, arbitration and trial). This process is in the planning stages, with publication of details due in March 1990.

The Claims Resolution Facility authorized by the Trust is now staffed and ready to begin payment of claims. The amount of time required to settle individual claims will be directly related to the Option selected.

Associate counsel with questions relating to details of the Dalkon Shield claims procedure are encouraged to contact **Jeffrey Holl**, our partner in charge of IUD cases.

Foul Fowl Faire Held Fair Game

Imagine ordering a double bacon chili cheeseburger and, simultaneous with your first bite, being greeted by a sudden CRACK and stabbing pain. Much to your dismay (after removing your left rear molar) you note that a piece of Bossy's hoof has been included, without charge, in your burger. Got a right to complain? Not according to the holding in *Mexicali Rose v. Superior Court*, (1989) 214 Cal.App.3d 238. Indeed, under the holding in *Mexicali Rose*, your chef could have included the steer's foot right where the tomato slice is supposed to be and it would not matter.

In *Mexicali Rose*, the plaintiff ordered a chicken enchilada at a local restaurant and was seriously injured when a one inch chicken bone lodged in his throat. He sued alleging the restaurant was responsible for his injuries based upon theories of both negligence and product liability. The defendant demurred on the basis of a 1936 Supreme Court case, *Mix v. Ingersol Candy Company,* (1936) 6 C.2d 674. In *Mix*, the Supreme Court had held a restaurant immune from liability for breach of implied warranty or negligence where the plaintiff swallowed a chicken bone concealed in a chicken pot pie.

The trial court overruled *Mexicali Rose*'s demurrer, but the Court of Appeal reinstated the *Mix* rule. In doing so, the court held: "A dish containing a bone natural to the food served is not a defective dish regardless or whether negligence was used in its preparation and irrespective of the size of the bone or the damage it caused." (At p. 242).

Unfortunately, the court did not explain how it determined that bones are "natural" to enchiladas. In any event, it is clear that from this date forward consumers should specify boneless enchiladas whenever possible.

While this decision appears to place vegetarians in a most favored position under the law, a change may be brewing. In a separate concurring opinion, Justice Poche' suggested that the *Mix* rule is "ripe for reconsideration" by the Supreme Court.

Ripe or not, we suggest that our readers take Justice Poche"s advice and "pass up the chicken enchilada," unless of course, it has been made with boneless chicken.

EDITORS' NOTE: Just before going to press the California Supreme Court granted a hearing in *Mexicala Rose* (SO12707). Perhaps Julia Child will be asked to file a brief as amicus.

The Dust Finally Settles in N.W. Reno

In our Fall 1988 issue of FOCUS we reported on the verdict in *Gunn v. Seeno Construction* (Washoe County Nevada, Action No. 85-4209), where **George J. Shelby** and **John Echeverria** of this firm obtained a jury verdict in the amount of $9,500,000 on behalf of hundreds of N.W. Reno residents. The *Gunn* verdict, the largest environmental pollution judgment in the history of Nevada, was in the amount of $9,500,000.

Recently, following the denial of multiple motions for a new trial and judgment notwithstanding the verdict, a settlement in the amount of $11,400,000 was approved by the trial judge.

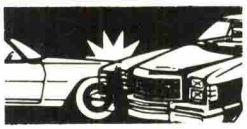
As part of the settlement, a special master was appointed to appraise and apportion the settlement funds.

Initially, the trial court had sought to allocate the entirety of the punitive damage judgment to public purposes. However, once it became apparent there was no legal authority for such a position, the court modified its order by ruling that any funds which were "unclaimed funds" would be utilized to purchase an annuity benefitting the University of Nevada at Reno. Such "unclaimed funds" result in "common fund" class action recoveries when less than all of the anticipated class members assert claims upon the pool of available money. While various methods of dealing with unclaimed funds have been used by courts throughout the country, the use in the instant case is an excellent example of how punitive damages can serve the public good while simultaniously deterring socially unacceptable behavior.

The settlement actually exceeds the jury verdict by $1,900,000. This overage is due to accumulated interest, and the fact that payment of this settlement will be made in three installments over a thirty-six month period.

As part of the settlement procedure, the compensatory and punitive damage components of the verdict will be handled differently. Distribution of the compensatory funds will be made to 830 households in accord with values placed on the individual claims by the special master. The punitive damages, on the other hand, will be distributed equally to all of the households.

RECENT CASES



VEHICULAR NEGLIGENCE

Pearce v. S.F. Newspaper Agency

In *Pearce v. S. F. Newspaper Agency* (S.F. Superior Court No. 900000), **Rick Goethals** negotiated a $350,000 cash settlement on behalf of a 49-year-old Oregon truck driver who was rear-ended in January of 1988 as part of a three-car chain collision. The defendant Newspaper Agency's driver alleged that he was momentarily distracted, causing him to plow into the back of a Honda Accord, pushing that vehicle into the rear of plaintiff's tractor-trailer rig. The rig sustained only minimal damage. Plaintiff admitted feeling no pain at the scene, but contended that after returning home to Oregon the following day he developed pain in his back. Eight months of conservative treatment followed before a herniated disc was diagnosed at the C7-T1 level. Ultimately, disc removal and a two level fusion were required. The defendant contested the extent of the injuries and causation inasmuch as plaintiff had been in another accident some 13 months prior. Defendant's doctors testified that the prior accident was the cause of the majority of plaintiff's injuries and symptoms. Plaintiff continues to suffer from pain, and is precluded from driving big rigs.

McCarthy v. Perluss

In *McCarthy v. Perluss* (S.F. Superior Court Action No. 891543), **Jeff Holl** negotiated a $175,000 settlement arising out of an automobile versus pedestrian accident that happened at the San Francisco Veteran's Administration Hospital.

The defendant claimed that he suffered an unforeseeable diabetic blackout, which caused him to lose control of his vehicle, strike two cars, and ultimately pin Mr. McCarthy (who was a pedestrian) between his car and a parked car. Mr. McCarthy sustained fractures of both knees. Mrs. McCarthy sued for loss of consortium.

The settlement provided for payment of the $100,000 policy limit to Mr. McCarthy, and an additional $75,000 to Mrs. McCarthy in satisfaction of her loss of consortium and *Dillon v. Legg* claims.

Hurtado v. Pouls

Jeff Holl also recently concluded *Hurtado v. Pouls* (San Mateo Superior Court Action No. 335318), a motorcycle versus automobile accident which occurred on Skyline Boulevard in San Mateo. The plaintiff, a motorcyclist, sustained multiple fractures when he was struck by the defendant's automobile which had crossed the center dividing line. Ultimately, Mr. Hurtado underwent a below the knee amputation of his left leg.

Under the terms of the settlement, the defendant's insurance carrier, which had issued a 250/500 policy, paid its policy limits to Mr. Hurtado and an additional $200,000 to his wife in settlement of her consortium claim.

MEDICAL MALPRACTICE

Roe v. Doe Hospital, et. al.

In *Roe v. Doe Hospital, et. al.* **Kevin L. Domecus** negotiated a cash settlement in the amount of $1,740,000 on behalf of a 78-year-old physician who suffered brain damage through a combination of medical negligence and medical product failure. The settlement also included resolution of a companion loss of consortium claim.

Plaintiff alleged that the brain damage occurred because the defendant hospital's nurses failed to clamp and aspirate a broken and defective intravenous line thereby permitting an air embolism to travel to the heart and lungs. The defendants (hospital, device manufacturer and treating physicians) denied that an air embolism had occurred, and claimed that the plaintiff's brain damage was due either to a stroke or to a pre-existing respiratory disorder, as the plaintiff had manifested confusion and disorientation in the hours before the intravenous line separated. Moreover, they alleged that all post-incident diagnostic tests failed to show any evidence of air in the heart, brain or lungs. As a condition of the settlement the defendants required that their identities be kept confidential.

Ashworth v. Mark Twain Hospital

In *Ashworth v. Mark Twain Hospital* (Calaveras County Superior Court) **Rick Goethals** recently obtained a $1,105,493 settlement on behalf of an infant boy who suffered brain damage after being treated in a hospital emergency room. The 10-month-old boy was rushed to the hospital when a plastic toy nail was lodged in his trachea. The emergency room physician sprayed a cocaine solution into his throat to anesthetize and relax the trachea. Unfortunately, an adult dosage, several times the acceptable dosage for an infant, was used. As a result, the young boy suffered a respiratory arrest with subsequent seizures. He is now developmentally delayed and requires special education, speech therapy and occupational therapy.

The settlement consisted of lump sums in amounts from $25,000 to $100,000 over the next 15 years, plus $38,000 annually increasing at the rate of 4.5% per year, commencing on the plaintiff's 22nd birthday, plus $1,000 per month increasing at 4% per year, payable to his parents over the next 12 years.

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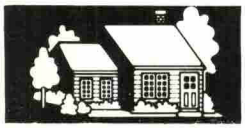
More RECENT CASES, continued from previous page.



PREMISES LIABILITY

Grace v. Duffy's

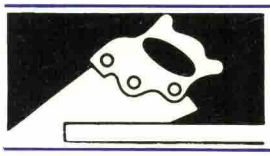
In *Grace v. Duffy's* (Napa County Superior Court Action No. 57628), **Michael A. Kelly** achieved a structured settlement on behalf of a 36-year-old man injured during alcohol detoxification at the defendant's facility. Plaintiff suffered an unwitnessed seizure, fell and struck his head shortly after admission to defendant's facility. In the fall he sustained a closed head injury and residual brain damage. Defendant contended that the incident was one which could not have been anticipated, and that it complied with all appropriate standards. Plaintiff claimed that he should have been more closely supervised during the acute phase of alcohol detoxification. Plaintiff required extensive brain surgery and three months of intensive rehabilitation. He can no longer work as a commercial salmon fisherman. The case was settled on the basis of a combination of cash and future payments. Plaintiff will receive a lump sum payment of $250,000 in cash, and $1,500 per month, increasing 3% per year, for the balance of his life. The annuity is guaranteed for 20 years. The present cash value is approximated at $550,000.

Jaccarino v. El Torito Restaurant

In *Jaccarino v. El Torito Restaurant* (Contra Costa County No. C88-03605), **Daniel Dell'Osso** negotiated a $53,000 settlement (following a judicial arbitration award of $67,800) on behalf of a 58-year-old woman who fractured her left elbow when she slipped and fell while leaving the defendant's restaurant. Plaintiff alleged that the fall occurred when a tile step on which she was standing gave way. Plaintiff sustained a fractured elbow, which healed without complications. She missed eight months of work as an in-home child care provider. The defendants did not actively dispute liability, but challenged the extent and nature of plaintiff's injury and damages. No offer in the case was made until following the arbitration award at which time the above settlement was negotiated.

Macias v. Carrow's Restaurant

In *Macias v. Carrow's Restaurant* (Alameda County No. H-134134-0), **Dan Dell'Osso** obtained an arbitration av[illegible] almost four times the pre-arbitration offer. The award, $24,104, was made in favor of a 43-year-old legal secretary who slipped and fell at the defendant's San Leandro restaurant, sustaining soft-tissue low back injuries. The defendant disputed liability. The pre-arbitration offer was $6,500. Defendant contended that there was absolutely nothing wrong with the floor where plaintiff fell. At arbitration, plaintiff was able to demonstrate that the floor had not been cleaned in almost five hours, which was wholly inconsistent with internal company policy. Moreover, plaintiff was able to introduce evidence that subsequent remedial measures, including acid treatment of the floors, had been undertaken following plaintiff's accident to correct the known slippery condition.



INDUSTRIAL ACCIDENTS

Crayton v. C & H Sugar Company

In *Crayton v. C & H Sugar Company* (Contra Costa County Action No. C88-01849) **Michael A. Kelly** negotiated a $175,000 settlement on behalf of a laborer who fell through an undermined area of asphalt while doing jackhammering work at the defendant's premises in Crockett.

Plaintiff alleged that the defendants knew or should have known of the area of subsidence, given the close proximity of the Carquinez Strait to the area being excavated. Defendants contended that at no time during the preceding 80 years had they identified any areas of similar subsidence. Plaintiff proceeded on a "peculiar risk of harm" theory, claiming this type of work fell within the scope of Restatement of Torts, §416.

Plaintiff sustained a torn rotator cuff and required surgery, and contended he was unable to return to his job as a cement raker. As part of the settlement the worker's compensation carrier waived 50% of its lien.