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

FOCUS ON TORTS

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Bruce Walkup Celebrates Fifty Years Before the 9th Circuit Court

The above photo was recently taken on the anniversary of **Bruce Walkup's** 50 years as a member of the Bar of the Ninth Circuit Court of Appeals. Pictured with Bruce are his present partners and associates. Seated with Bruce are three of his partners who recently celebrated their 25th anniversary with the firm, from left to right: **Ralph Bastian**, **George Shelby** and **Paul Melodia**.

INSIDE

Ford ordered to produce safety studies

Bronco II Rollovers Continue

The Insurance Institute for Highway Safety has recently reported that the fatality rate in rollover accidents involving the Bronco II was the highest of any compact utility vehicle studied —some three times higher than that of the Suzuki Samurai, another off road vehicle with highly publicized problems.

Although counsel for victims have claimed for years that Ford was aware of the instability of the Bronco II, Ford continues to deny any knowledge regarding the propensity for rollovers in these vehicles. Indeed, Ford is continuing to fight battles throughout the U.S. attempting to suppress its own internal safety studies and other documents relating to the development of the Bronco II.

According to the April 27, 1992 issue of Automotive News, Ford estimated its damage liability from Bronco II rollovers at $742,000,000 in its 1991 10-K Report filed with the Securities and Exchange Commission. Ford claims that the number of suits and claims is less than 100, but it is unwilling to identify the precise number of rollover deaths and injuries the Bronco II has caused.

In March, after a two day public hearing, Judge Ann T. Cochran of Harris County, Texas, ordered Ford to produce internal company documents including safety tests, engineering records, and Ford's own internal strategy regarding how to deal with government inquiries about the rollover problem in the vehicle.

John Echeverria, Michael A. Kelly and **Daniel Dell'Osso** of this firm have investigated and resolved a number of rollover collisions, including claims involving the Bronco II. Though extremely time consuming, preparation intensive and expensive, these claims can be successfully litigated on behalf of seriously injured victims. Those readers who wish to refer or associate in a rollover case should contact one of the above partners to discuss our experience, and the feasibility of association in a particular case.

A Publication from the Law Offices of Walkup, Shelby, Bastian, Melodia, Kelly, Echeverria & Link
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Collecting Attorneys' Fees In Egregious Cases

All victims' lawyers have at one time or another been confronted by the frustrating situation where an uninsured or underinsured civil defendant produces catastrophic injury through criminal or reckless conduct. Code of Civil Procedure §1021.4 may now provide a method for obtaining attorneys' fees, in addition to available insurance, in such cases. This use of the statute increases the net recovery by the injured victim by eliminating the deduction of a contingency fee from the client's award.

CCP §1021.4 permits the trial court to award attorneys' fees to a prevailing party in any damage action premised on a felony. The statute was enacted pursuant to the Victim's Bill of Rights adopted on June 8, 1982.

Recently, in *Sommers v. Herb* (1992) 2 Cal.App.4 164, the 4th District analyzed the statute, interpreting it to provide that comparative negligence, and even the possible criminal behavior of the victim, did not prevent an award of attorneys' fees.

In *Sommers,* the plaintiff sustained substantial injuries in a motorcycle versus truck accident. Plaintiff Sommers was described as obviously drunk by the investigating officer whereas defendant Herb was described as driving with his ability "impaired."

Because Herb had a prior conviction for DUI, he was charged with felony drunk driving, and ultimately pled guilty.

In the civil action, the parties stipulated to a judgment in the amount of $115,000. Sommers thereafter accepted the insurance policy limits of $15,000 in full and final satisfaction of the judgment, and litigated the issue of attorneys' fees under CCP §1021.4. Counsel for plaintiff was thereafter awarded attorneys' fees totaling $38,000, representing 1/3 of the amount of the stipulated judgment. On appeal defendant contended that because plaintiff himself was driving under the influence, he was not "innocent" and therefore not entitled to attorneys' fees per CCP §1021.4.

This argument was rejected. The reviewing court commented that since the stipulation was silent with respect to the plaintiff's comparative fault, it was reasonable for the trial court to take the stipulation at face value.

In evaluating an appropriate award of attorneys' fees, the appellate court relied on the declaration of plaintiff's counsel estimating that he had expended somewhere between 130 and 150 hours working on the case at an hourly rate of $250.

The opinion contains an excellent discussion of the purpose and philosophy behind the enactment of §1021.4, as well as the other restitution provisions of the statute. The opinion also unequivocally holds that causing bodily injury while driving under the influence is a crime under the statute entitling counsel to an award of attorneys' fees.

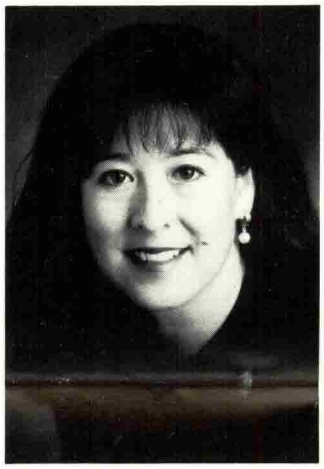
INJURIES FROM TOYS ON INCREASE

Increasingly, children are injured by toys marketed both in and out of the U.S. that present multiple hazards. As noted in the Institute for Injury Reduction's annual Toy Safety Report, toy purchasers must anticipate that a child will use a toy in the most injurious way possible. Children may dismantle it, swallow its smallest parts, throw or jab its edges, or wrap its cords or strings around their necks. Taking the U.S. Consumer Product Safety Commission to task, IIR's recent report complains that the CPSC continues to refrain from taking an aggressive pro-active position to recall or ban dangerous toys.

Jack Gillis, Director of Public Affairs for the Consumer Federation of America, concurs that the CPSC has failed to institute a reasonable system of market place protection. "Most parents believe that the government is watching the toy makers, that the government would not allow an unsafe toy to reach the market, or that they check to see that toys on the market are okay," Gillis commented in a statement last November coinciding with the release of "The Toy Safety Report."

Our firm has extensive experience in litigating damage, injury and death claims arising from dangerous toys and flammable children's fabrics. Counsel with questions about the prosecution of such claims should feel free to call to discuss referral or association. Similarly, parents or concerned adults wishing to ensure that toys purchased for their children are safe, may obtain a copy of the "Toy Safety Report" from the Institute for Injury Reduction, P.O. Box 1621, Upper Marlboro, Maryland 20773. Enclose one dollar to cover handling and postage. Multiple copy information can be obtained by calling the Institute directly at 1 (800) 544-3694.

New Associate Brings Experience To Walkup Firm



Ann Richardson

The Walkup Firm is pleased to welcome Ann Richardson as its newest associate. Born and raised in Sacramento, Ann obtained her Bachelor's Degree in 1976 from San Diego State University. In 1980, she obtained her paralegal accreditation from the University of San Diego and went to work for Casey, Gerry, Casey, Westbrook, Reed & Hughes in San Diego. While working as a paralegal at the Casey, Gerry firm, Ann obtained her law degree. Editor of the Law Review her senior year, Ann also taught legal writing and research to first year students at Cal Western.

Following her admission to the Bar, Ann joined Casey, Gerry as an associate working extensively on behalf of plaintiffs involved in product defect, premises liability, sexual harassment and medical malpractice claims. Since moving to San Francisco in 1991, Ann has worked extensively in the field of psychiatric and psychological malpractice. She also has special interest and experience in dealing with brain trauma, closed head injury and neuropsychologic impairment.

We are both proud and pleased to welcome Ann to our firm.

IT'S TIME TO STAND UP FOR THE CIVIL JUSTICE SYSTEM

As election year rhetoric heats up, our nation's second highest office holder, Vice President Quayle, is out to blame America's economic woes on the legal profession. Complaining to the American Bar Association that American business cannot compete in the world because too many lawyers are filing too many lawsuits, the Vice President seeks to "reform" established tort law by attacking lawyers, judges and jurors. As Newsweek magazine points out, this "war against the lawyers is at bottom a camouflaged aggression against the American jury system." As Chairman of President Bush's Council on Competitiveness, the Vice President oversees a group whose very purpose is to blame lawyers for the alleged inability of U.S. companies to successfully compete with foreign firms. Writing in the most recent issue of Trial magazine, Howard Latations notes "Over the next few months, we will hear Bush and Quayle continue to blame lawyers for most of society's ills. Their re-election strategy makes lawyers the Willie Hortons of the 1992 presidential campaign." With easy access to mass media and substantial corporate financial underpinnings, the administration's national campaign of lawyer/victim bashing has reached new heights. Kenneth Jost, writing in the ABA Journal, notes that the "message is fundamentally false - the product of dubious anecdotes, questionable research, concocted statistics, factual and legal misstatements, and willful disregard of contradictory evidence." As attorneys, each of us is bound to uphold the Constitution of the United States and of our State, including the rights of all citizens to participate in the civil justice system and to demand accountability from individuals, businesses, and institutions for injury, damage or harm they generate. Those opposed to accountability are now increasing their attacks on the American justice system via slick public relations, video hit pieces and full page newspaper and magazine advertisements. The objective: to portray lawyers as crooks, victims as fakes, judges as senseless and juries as irresponsible. The "reforms" they propose will radically change the rules, eliminating an individual's right to demand accountability. We believe it is time for all members of the Bar, regardless of their area of specialty or interest, to speak out to promote respect for the Bench, the Bar and the jury system. The fact is that we as lawyers are the guardians and watchdogs of everyone's civil rights. We should stand up and make our voices heard.

> *"(Bush and Quayle's) re-election strategy makes lawyers the Willie Hortons of the 1992 presidential campaign."*

FACTS ABOUT THE CIVIL JUSTICE SYSTEM

MYTH

There is a litigation "explosion" with state courts overburdened by tort cases and federal courts overrun by product liability cases.

FACT

Tort cases, other than those filed as small claims, make up less than one-half of one percent of the total case load in the state courts, and only 2.7 percent of the civil case load. Of 217,879 civil suits filed in federal courts in 1990, product liability case filings accounted for less than 6 percent of the total. In fact, product liability filings in the federal courts *declined* by nearly 20 percent between 1985 and 1991.

MYTH

Federal court filings have increased 300 percent in the last 30 years.

FACT

Assertions such as this are utilized by special interest groups to suggest that there has been an enormous increase in lawsuits filed by individuals. In fact, the increase in civil filings in federal courts is largely business vs. business. Contract filings between 1960 and 1988 increased by nearly 250 percent, intellectual property filings increased by more than 280 percent, and business filings under Chapter 11 bankruptcy quadrupled, each category far outstripping the increase in tort cases. Tort cases as a percentage of civil cases dropped by nearly half, from 38.4 percent in 1960 to 20.1 percent in 1990.

MYTH

Product liability suits hinder job growth and handicap American corporations.

FACT

The federal government's definitive study on competitiveness found the critical factors hurting the U.S. in world markets to be capital costs, the quality of human resources, and lack of technology transfer and diffusion to small and medium sized companies, *not* the tort liability system. Moreover, foreign manufacturers who sell goods in the United States — such as Japanese automobile manufacturers — are subject to *the same liability laws* as are American manufacturers. *Thus there is a level playing field within each market.*

SOURCES

Annual Report 1989, National Center for State Courts.

Administrative Office of the U.S. Courts, Annual Reports of the Director.

Galanter, Marc, "The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days," 1988 Wis. L. Rev. 921 (1988).

Galanter, Marc and J. Rogers, "A Transformation of American Business Disputing? Some Preliminary Observations," Working Paper, April 1991.

Journal of the American Bar Association, "Facts About the American Civil Justice System", December 1991.

Mother Has Emotional Distress Claim for Negligent Delivery of Her Baby

In *Burgess v. Superior Court* (1992) 2 Cal. 4th 1064, the California Supreme Court was presented with a mother's claim for emotional distress after giving birth to a brain damaged child due to alleged medical negligence.

While the mother was aware her child was in fetal distress, she was actually under anesthesia when the child was delivered via emergency cesarean section. The first time she experienced distress about her son's condition was several hours after his birth after she awoke from a sedative. Thus, the case did not have clearly defined facts to fit within the "bystander" theory of recovery. (*Thing v. LaChusa* (1989) 48 Cal.3d 644)

The Court then turned to an analysis of the "direct victim" theory of recovery found in *Molien v. Kaiser* (1980) 27 Cal.3d 916. The Court first went out of its way to limit *Molien*. It noted the "perception" that *Molien* introduced a new method of determining duty, "limited only by the concept of foreseeability" and then stated that "to the extent that *Molien* stands for this proposition, it should not be relied upon and its discussion of duty is limited to its facts." After thus giving *Molien* the back of its hand, it then embraced that aspect of *Molien* that held that "a cause of action to recover damages for negligently inflicted emotional distress will lie, notwithstanding the criteria imposed upon recovery by bystanders, in cases where a duty arising from a pre-existing relationship is negligently breached."

Relying on that principle from *Molien,* the Court held that since the physician owes a duty to the mother and the child, the mother can be compensated for emotional distress resulting from the breach of that duty. In reaching its conclusion, the Court looked to the physical and emotional connection between a woman and her fetus. It took into account "the emotionally charged nature of pregnancy and childbirth and the concern of the pregnant woman for her future child's well-being."

Without using the "concept of foreseeability" that it condemned in *Molien*, the Court in *Burgess* clearly held that it was "foreseeable" that a negligent delivery resulting in severe injuries to the child will cause the mother serious emotional distress that is compensable. The Court did point out that the mother's damages do not extend to emotional distress due to loss of affection, society, companionship or similar harm that the mother may incur in adjusting to and living with the child's impairments.

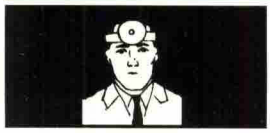
While the decision in *Burgess* was unanimous, Justice Stanley Mosk separately concurred after noting his objection to the majority's "unnecessary and uncalled for criticism of *Molien*."

Walkupdates . . .

John Echeverria recently presented a lecture on "Proving a Product Defect: First to the Judge, Then to the Jury" for CTLA/ Bancroft-Whitney . . . the August 1992 issue of *Trial Magazine* will feature an article authored by **Jeff Holl** and **Cynthia Newton** of our firm on the topic of intentional sex torts . . . **Mike Kelly** recently served as a faculty member for the National Institute of Trial Advocacy's Western Regional Program at Boalt Hall in June, and the N.I.T.A. Pacific Regional Program in San Diego in July. Mike has also received an appointment to teach Hastings' three-unit Personal Injury Litigation class during the fall semester of 1993 . . . Finally, he and **Dan Dell'Osso** recently co-authored an article on insurance coverage issues in toxic contamination cases which was published in the Santa Clara Business Journal . . . Speaking of Dan Dell'Osso, an article authored by him on issues surrounding federal preemption in auto defect cases was published as part of the materials distributed at the California Trial Lawyers recent Lake Tahoe Seminar. During the seminar, Dan presented a lecture on avoiding claims of federal preemption in the prosecution of automobile passenger restraint product defect claims... **Rick Goethals** spoke at the California Litigation Techniques Program on experts May, 13 1992. The program was sponsored by SFTLA and CTLA in association with the SF Bar Association and Bancroft- Whitney. His topic was "How to Find the Right Expert." . . . **Rich Schoenberger** recently published an article in *The Compleat Lawyer* (Vol. 9, No. 3) outlining steps for the general practitioner to follow in evaluating the merits of an auto liability case. *The Compleat Lawyer* is distributed to the general practice section of the ABA . . . **Paul Melodia** recently spoke at UCSF medical school on a continuing medical education panel on practical considerations in avoiding malpractice from the perspective of a plaintiff's counsel. The program focused on medical-legal issues in cytopathology. Paul also recently participated as co-chair of the American Board of Trial Advocates "Masters in Trial Program" held at the Sheraton Palace Hotel. Jeff Holl participated in the program playing the role of a plaintiff in a mock trial scene. Unfortunately, the verdict rendered by the jury was in favor of the defendant. Jeff plans to appeal.

Pictured in the nerve center of our high-tech research center (also known as the library) are our 1992 summer clerks. They are (from left to right) **Tom McHugh**, **Courtney Bailey**, **Linh Ha**, **Dana Veeder** and **Ann Polus**. The group is shown during a manual Shepardizing drill, an ancient research technique still practiced in the event of power surge, electrical failure, Michelangelo's virus, loss of disk and other modern day maladies.

RECENT CASES



MEDICAL MALPRACTICE

Dean v. Kaiser Foundation Health Plan

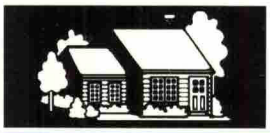
A binding arbitration award in the amount of $400,000 was obtained by **Rick Goethals** in the matter of *Dean v. Kaiser Foundation Health Plan* on behalf of a 55-year-old Antioch man who claimed that he had needlessly undergone removal of his esophagus based on an incorrect diagnosis. Over a ten year period plaintiff had presented to Kaiser Walnut Creek with complaints of indigestion, acid reflux, and ultimately, a stricture in his esophagus. The defendant diagnosed his condition as cancerous and performed esophagectomy. In fact, pathology indicated the stricture was not produced by a cancerous tumor but from reflux esophagitis. Defendant denied liability and made no offer prior to arbitration. Plaintiff claimed an income loss in excess of $200,000 as permanent dumping syndrome. Judgment has been entered on the award.

Gregory, et al. v. Kaiser Foundation Hospitals

Michael A. Kelly and **Cynthia F. Newton** recently obtained a $329,000 binding arbitration award in *Gregory, et al. v. Kaiser Foundation Hospitals,* a wrongful death claim brought on behalf of the husband and two adult children of a 50-year-old postal worker who died on October 31, 1986, as the result of codeine intoxication. Plaintiffs claimed that due to metabolic insufficiency the deceased was overcome by high levels of codeine with acetaminophen after administration in defendant's emergency room. Defendants contended that the only plausible explanation for the cause of death was a large bolus injection. The award was composed of $250,000 in non-economic damages (the MICRA maximum) and $79,000 in economic losses reflecting lost future earnings.

Andrade v. Doe M.D.

In *Andrade v. Doe M.D.* (Fresno Superior Court No. 436334-7) **Mary Elliot** negotiated a $100,000 cash settlement on behalf of a [illegible]-year-old part-time nurse who claimed that defendant physicians in Fresno and in San Francisco failed to diagnose a benign tumor in her thoracic spine, causing her to develop a neurogenic bladder. Defendants claimed that throughout their care of plaintiff she exaggerated her symptoms and presented in such a way as to suggest that her injuries were due to multiple sclerosis, and in any event, inconsistent with a spinal cord tumor. Plaintiff claimed $2,000 in out-of-pocket medical expenses and $30,000 in lost income. The claim was settled on the day before trial with contribution to the settlement by all defendants.

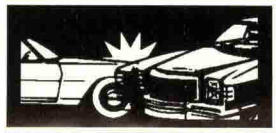


PREMISES LIABILITY

Haigh v. LeMeridien Hotel

In *Haigh v. LeMeridien Hotel* (S.F. Superior Court No. 921746) **Rich Schoenberger** obtained a $235,000 cash settlement on behalf of a 52-year-old nurse who suffered a trimalleolar fracture of the right ankle and a fractured left foot when she slipped and fell on the ramp in front of San Francisco's LeMeridien Hotel. Plaintiff argued the ramp was hazardous because of its lack of uniformity and steep grade. Discovery revealed that prior patrons of the hotel had repeatedly tripped, slipped or fallen on the ramp since it was originally built in 1985. One former hotel doorman acknowledged having discussed his concerns about the ramp's safety with hotel management months before plaintiff's fall.

Special damages were approximately $55,000, $28,000 of which reflected seven months wage loss from plaintiff's job as an ICU nurse. Subsequent to resolution of the case, the hotel erected a velvet rope barrier to guide pedestrians away from the ramp and protect against future injuries.



VEHICULAR NEGLIGENCE

Beaman v. Horne

In *Beaman v. Horne* (San Joaquin Superior Court No. 223812) **Daniel Dell'Osso** obtained a $154,885 net arbitration award on behalf of a 30-year-old electrician who was injured in April of 1989 while working as a volunteer at a state off-road recreation area. In the course of his volunteer duties the plaintiff, while on his motorcycle, was struck in the throat by a rope which had been strung to demarcate a hill climb event. As a result his vocal cords were paralyzed. Plaintiff acknowledged knowing the rope was in place, however, he claimed that the utilization of such an unmarked rope to close off areas in a motorcycle park was inherently dangerous because of the difficulty with visibility and the high likelihood that one or more motorcyclist would collide with it. The award included a 25% reduction reflecting plaintiff's comparative fault as well as $18,000 for a spousal loss of consortium. Judgment has been entered on the award.

Barley v. Farmer's Insurance

Jeffrey P. Holl recently obtained a favorable arbitration verdict in the amount of $19,300 in the matter of *Barley v. Farmer's Insurance* (mandatory binding uninsured motorist arbitration). The award was made on behalf of Jeff's client, an elderly woman who had been rear-ended by a drunk driver. Her symptoms persisted for approximately six months before full resolution. The defendant tried to contend that all of the complaints and injuries were minor and should have resolved within six weeks, and anything persisting beyond that date had to be the product of some underlying pre-existing arthritic condition. Total specials were $4,300.

Gunn v. Jines

A $100,000 policy limits settlement was obtained by **Rick Goethals** in *Gunn v. Jines* (San Mateo Superior Court Action No.356409) on behalf of a 49-year-old woman whose car was backed into by another vehicle in the Crystal Springs Safeway parking lot. At the time of the accident plaintiff was recovering from surgery for a rotator cuff injury, recovery from which had been interrupted two previous times by reason of falls. The most recent repair was only two weeks prior to the accident. Plaintiff contended that subsequent surgeries for shoulder problems were precipitated by this May 1990 accident. Defendant denied any relationship and claimed that the minor impact produced by the two cars backing into each other could have caused no significant injury.

Continued on page six

Continued from previous page

Moran v. Air Fresh Trucking

In *Moran v. Air Fresh Trucking* (San Mateo Superior Court No. 354144) **Michael A. Kelly** obtained arbitration awards of $283,283.22 and $92,221.35 on behalf of a 56 year old self-employed upholsterer and his spouse who were struck by defendant's semi-tractor and trailer rig on May 12, 1990. The accident happened at 2:00 a.m. in the northbound lanes of Highway 5 in San Joaquin County. Plaintiffs contended that they were overtaken and rear-ended by defendant's rig. Defendant contended that plaintiff Dolores Moran drifted out of her lane while he was attempting to pass the Morans, ostensibly because she had fallen asleep. Mrs. Moran claimed a cervical disc injury; Mr. Moran claimed a lumbar disc injury likely necessitating future surgery. Plaintiff Louis Moran claimed in excess of $200,000 in future lost earnings. Defendant's economist calculated Mr. Moran's income loss at less than $30,000. Prior to the arbitration plaintiff had demanded $400,000 in settlement. Defendant had offered a total of $60,000. for both plaintiffs.

DENTAL NEGLIGENCE

Fabri v. Doe

In *Fabri v. Doe* (San Francisco Superior Court No. 937272) **Cynthia F. Newton** obtained a $60,000 settlement on behalf of a 62year-old retired historian. Plaintiff had treated exclusively with the defendant for a period of over ten years, during which he failed to provide adequate periodontal care, hygiene, teeth cleaning and plaque removal. After ten years under the defendant's care, plaintiff's subsequent dentist diagnosed severe periodontitis and bone loss requiring the extraction of multiple teeth and the fitting of dentures. Dental expenses were $8,000. Defendant contended that plaintiff was herself at fault for practicing poor self dental hygiene and that any bone loss diagnosed in 1990 existed when she commenced care and treatment by the defendant in 1980. The settlement was achieved prior to the commencement of discovery.

GOVERNMENT LIABILITY

Sneed v. BART

In *Sneed v. BART* (Alameda Superior Court No. 623541-1) **Daniel Dell'Osso** obtained an $18,000 arbitration award (after a 25% reduction for comparative fault) on behalf of a 71-year-old woman who fell exiting a BART station elevator that had failed to level with the loading platform. Plaintiff suffered bruises, abrasions and residual complaints of chronic knee pain. Plaintiff claimed the fall aggravated underlying arthritis. BART defended on the ground that there was no notice of any defect as required by Government Code §835 (no actual or constructive notice of prior failure to level) and therefore plaintiff failed in her burden of proof. Plaintiff claimed that because BART was a common carrier, she was entitled to shift the burden of proof under the doctrine of res ipsa loquitur.

Anderson v. USA

In *Anderson v. USA,* **Dan Kelly** and **Wes Sokolosky** successfully concluded this wrongful life case against the federal government. Plaintiffs contended that the military hospital failed to undertake maternal serum Alpha Fetoprotein testing of the pregnant mother before the twentieth week of her pregnancy. This test is done to lead to the diagnosis of an open neural tube defect (open spina bifida) and allow the parents the option of a therapeutic abortion. The child was born with a relatively large open spinal neural tube defect as well as other associated central nervous system deformities. The case was concluded via a cash and structured settlement at a total cost to the government in excess of $1,250,000.

MEDICAL PRODUCT LIABILITY

Hu v. Howmedica, Sequoia Hospital. et al.

In *Hu v. Howmedica. Sequoia Hospital, et al.,* (San Mateo County Superior Court Action No. 352388) **Paul Melodia** obtained a $750,000 cash settlement on behalf of an elderly Chinese immigrant who underwent femoral prosthesis placement at defendant Sequoia Hospital in September of 1989. Plaintiff claimed that defendant Howmedica's surgical cement set up too quickly during the hip surgery causing malposition of the device, requiring removal and reinsertion of a second prosthesis thereby extending a planned two hour surgery to in excess of six hours. During the course of the extended surgery plaintiff suffered oxygen deprivation. Postoperatively plaintiff was comatose for approximately six weeks. Mrs. Hu was ultimately left with a combination of both orthopedic and neurologic deficits including short term memory loss, personality change, irritability, and some loss of bowel and bladder control.

Defendant Howmedica contended the surgical cement performed properly and that other defendants (hospital personnel and treating physicians) were responsible for failing to keep the medical product at a proper temperature, or otherwise failing to follow instructions. Plaintiff's treating orthopedic surgeon claimed malpositioning of the prosthetic device was unavoidable and that the standard of care was complied with in all respects. Defendants also contended that plaintiff was capable of weight bearing, that she did not require a wheelchair, and that her neurologic residuals were mild. The matter settled on the eve of trial.

CONSUMER FRAUD

Bacho v. Hayward Auto Center

In *Bacho v. Hayward Auto Center* (U.S.D.C. C91-3787) **Mary Elliot** negotiated a $35,000 settlement on behalf of an 18 year old woman who purchased a used car from the defendant for $10,000, relying on the odometer which reflected 20,000 miles of past use. Fortuitously, post-purchase, plaintiff learned from the prior owner that he had replaced the odometer, and had advised the defendant of this when he had traded in the car. He estimated true mileage to be in excess of 50,000 miles. Plaintiff claimed a violation of USCS §1901, common law fraud and intentional misrepresentation. Defendant claimed that the failure to inform plaintiff of the accurate odometer reading was unintentional and a bookkeeping error.