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

# FOCUS ON TORTS

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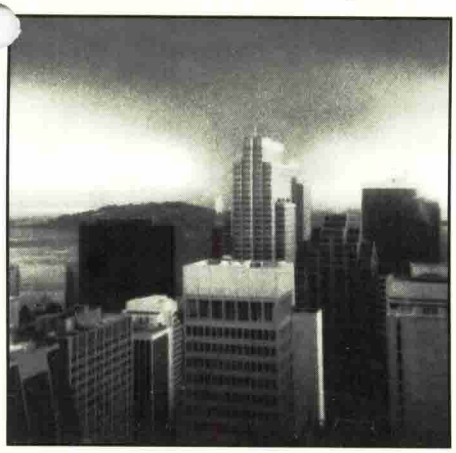
## *First Party Insurance Claims Follow East Bay Fire Storm*



*Smoke from the Oakland fire is seen from the Walkup Law Offices on the 30th Floor of 650 California Street.*

On October 20, 1991, the disastrous Oakland hills fire left over 3,000 homes damaged or destroyed. Now, as the victims rebound from the shock and turn their attention to rebuilding, a number of our clients are learning that the "replacement cost" insurance policies they purchased are not providing the protection they thought they owned.

**Ronald H. Wecht** of this office is already involved in helping multiple families understand their rights under the terms of such policies.

Many of Ron's clients have now come to learn that their policy limits, generally set by their own carrier, were based on inaccurate or unreasonable data. Many structure value estimates were made as a result of cursory drive-bys; contents insurance was too often pegged (by the carrier or agent) to the value of the structure - without regard to the actual cash value of the contents themselves.

Many of the replacement policies were tied to indexes of building costs that did not, and do not, reflect the actual cost of building in the Bay Area hills. For various reasons, homeowners who have just put the fire behind them now confront a new disaster - coverage limits which are inadequate to provide for replacement of destroyed homes and lost contents.

Further complicating the situation, in an effort to deal with the thousands of claims, carriers have brought in claims adjusters from different parts of the country who have no familiarity or experience with Northern California building costs, or problems associated with rebuilding on steep hillsides. As a result, many offers of settlement based upon unreasonably low estimates of rebuilding costs have been dangled before desperate fire victims. Most homeowners are well advised not to resolve their claims without a thorough understanding of the terms of their policy, the coverages available and the possible exposure of brokers and/or agents who procured policies with inadequate coverage.

As claims from the fire and its aftermath mount, Ron Wecht, and our other coverage experts stand ready not only to associate in litigation matters, but to provide free policy analysis to victims, and an explanation of the possible exposure of those who bear responsibility for leaving victims underinsured.

## *Earthquake Claims Concluded Prior to Trial*

Since our last issue of *Focus* went to press, **George Shelby** and **Michael Kelly** of our firm have concluded our representation of victims of the 1989 earthquake-induced Cypress Structure collapse. All told, George and Mike represented 12 clients from varied backgrounds (truck driver, fireman, bank vice-president, resident alien farm worker, machine shop owner, attorney) presenting with various disabilities, injuries and losses.

Working in conjunction with a team of experts (seismologists, geologists, accountants, financial planners, rehabilitation counselors, psychologists, structured settlement experts, etc.) George and Mike were able to negotiate pre-trial settlements which provided for fair compensation to the victims, as well as ongoing security for those who sustained impaired future earning capacity or other future losses as a result of the State's failure to remedy or warn of the freeway's substandard design and seismic instability.

Cumulatively, the total amount payable to all clients of our firm (including guaranteed sums to be paid in the future) exceeds $12, 300,000.

Resolution of the claims at the pre-trial stage resulted in economic benefit to our clients by minimizing the direct legal costs which would have been incurred at trial, and reduced the amount of attorneys' fees payable by them.

*(Continued on page 4)*

A Publication from the Law Offices of Walkup, Shelby, Bastian, Melodia, Kelly, Echeverria, & Link
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# *Proposition 51 — Whose Fault Should Be Compared?*

Since its passage in 1986, Proposition 51 revised the old rule of joint and several liability and created a new rule of several liability for general damages contingent upon percentages of fault (Civil Code §§1431-1431.5). Left unanswered by the initiative was the question of whether employers' fault was to be included in the apportionment. If included, a tort victim's recovery could be substantially reduced by the fault of the non-defendant employer. For example, a plaintiff's special verdict for general damages of $100,000 that contains a finding of 50% employer negligence would, under one interpretation of Proposition 51, cut plaintiff's recovery in half.

Recently, two district Courts of Appeal tackled this issue and reached opposite conclusions. In *Mills v. MMM Carpets, Inc.* (1991) 1 Cal.App.4th 83, the Sixth District Court of Appeal held that an employer should be included in the Prop. 51 calculation, opining that the proposition's mechanism for sharing damages is measured against all possible tortfeasors as opposed to joined or potential defendants. In *Dafonte v. Upright, Inc.* (1991) 231 Cal.App.3d 1279 (review granted), the Fifth District Court of Appeal held just the opposite, opting for a far less strained statutory construction that remained consistent with existing case law and provided for a victim to be more fully compensated. This article briefly examines the relative merits of the decisions.

California law has long been settled that an employer is generally immune from tort liability because of the obligation to pay workers' compensation benefits regardless of fault. (*Arbaugh v. Proctor and Gamble* (1978) 80 Cal.App.3d 500, 506.) Thus, an employer can never be a court defendant in the sense contemplated by Proposition 51's drafters. The statute itself refers exclusively to court defendants, not tortfeasors, thereby suggesting that only actual or potential defendants, i.e., non-immune parties, may be included in determining percentages of fault. This analysis is further buttressed by the language of Civil Code § 1431.3: "Nothing contained in [Proposition 51] is intended, in any way, to alter the law of immunity." Clearly, by including employers among Proposition 51's contemplated tortfeasors, the *Mills* court engaged in statutory legal alchemy that seems far more result oriented than logical.

In *Dafonte,* plaintiff obtained a verdict, including non-economic damages, in the sum of $300,000. The jury assigned 45% of the fault for plaintiff's injuries to his employer. The trial court refused to impute this, holding instead that the defendant was responsible for that portion of the fault assigned to the immune employer.

In affirming the trial court, the Court of Appeal agreed that an employer is not "a defendant" within the meaning of Civil Code §1431.2, even though the verdict may apportion fault between the employer and the third party tortfeasor. Because the employer is immune from suit, the effect of employer negligence is to reduce the workers' compensation lien. Inasmuch as the language of the initiative addressed "defendants" and not tortfeasors, construing Proposition 51's provisions to permit apportionment among immune and non-immune defendants (including potentially immune governmental entities), is inconsistent with the intention of the drafters and the electorate.

The Supreme Court has now granted review in *Dafonte* and will likely do so in *Mills.* Given the vast amount of money spent by the insurance industry to promote and obtain passage of Proposition 51, it is presumed that these same interests will do their best to convince the Supreme Court to reject *Dafonte* and affirm *Mills.* However, if the court is to be intellectually honest rather than politically expedient, the initiative's language strongly compels a holding restricting allocation of liability for non-economic damages to "defendants" and not "the universe of tortfeasors." Any other interpretation would effectively "reform" the statute through what could only be called judicial legislation.

*Dalkon Shield Update*

# *Robins Trust Litigating Remaining Claims*

The Dalkon Shield Claimants' Trust has now completed its review of most priority claims. These include cases filed and in litigation prior to the Robins bankruptcy, as well as certain claims given priority as a result of participation in evaluation studies during the course of the bankruptcy. By year end, the Trust will have reviewed approximately 10,000 claims, of which 7,000 are priority. Over 35,000 claims remain to be reviewed.

Claims in which the Trust's offers of settlement have been rejected are now in the initial litigation stages. The Trust has hired law firms from across the country to defend it, including a number of firms which previously defended the A.H. Robins Company and Hugh Davis, the inventor of the Dalkon Shield.

The Trust has made the arbitration track of its litigation process virtually impossible for many women to utilize because of the extremely short statute of limitations period incorporated into the arbitration rules. Thus, the lengthier, more expensive and difficult process of trial provides, for many women, the only means of obtaining a fair resolution.

For many claimants, this marks their 10th year of waiting since they initially filed suit against A.H. Robins for injuries resulting from the Shield.

Any questions regarding Dalkon Shield cases should be directed to **Jeff Holl** of our office.

# *Investigation Wins "Going-and-Coming" Case*

Our experience in a recent case highlights the importance of investigating the factual circumstances of any car accident involving a defendant commuting to or from work.

In *Norton v. O'Neill* (See "Recent Cases" for further discussion), the defendant O'Neill was driving his personal truck on his way to work as a maintenance mechanic at an office park, when he collided with the plaintiff's car. The defendant testified that he used his truck at work to run occasional errands, but that he was not engaged in any special project at the time of the accident. The defendant was not paid for the time spent in the commute, was not reimbursed for commute mileage, and did not carry any special tools or other equipment. He did testify that he was told during his job interview that he would need his own truck to get the job. The employer's managers were prepared to testify that there was no such express vehicle requirement, that company vehicles were always available for employee use, and that while employees occasionally used their own trucks as a matter of convenience, the company manual clearly stated that only company vehicles should be used for company business.

The "going-and-coming" rule holds that employees are outside of the scope of their employment while engaged in the ordinary commute to and from work. Exceptions will be made to this rule if the commute has some incidental benefit to the employer, such as if the employee is on a special errand at the employer's request at the time of the accident. In *Norton*, we argued that the employer would be held responsible under another exception to the going-and coming rule known as the "required vehicle" exception, which was best outlined in *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803.

In *Huntsinger*, the plaintiff's decedent was killed after being struck by an automobile being driven by an employee of Glass Containers Corporation. The employee, a Mr. Fell, was driving home from work when the accident occurred. Fell was required to use his car for field work as part of his employment, although he was simply driving home at the time of the accident. In reversing a non-suit in favor of the corporation, the court held that the going-and-coming rule was inappropriate and inapplicable when the commute involved an incidental benefit to the employer, and that such a benefit was present whenever the employer either expressly *or impliedly* required the use of a personal vehicle on the job. More recent cases describing this exception include *Laraey v. Intrastate Radio Telephone Inc.* (1982) 136 Cal.App.3d 660, 668 and *Felix v. Asai* (1987) 192 Cal.App.3d 926, 932.

While each case will turn upon its own facts, the key is to look for situations where the employer derives an incidental benefit from the employee's use of the personal vehicle. In *Norton*, we successfully argued that O'Neill's use of his truck made his employer more flexible in responding to customer needs, and also saved the employer maintenance and insurance costs on the company vehicles. Thus, in any case where an employee even intermittently uses his or her own personal vehicle on the job, it may therefore be possible to demonstrate an incidental benefit to the employer, justifying the "required vehicle" exception to the going-and-coming rule.

# *Supreme Court Abolishes "But For" Test of Causation*

In *Mitchell v. Gonzales* (1991) 54 C.3d 1041, Chief Justice Malcom Lucas, writing for six members of the Court, finally disapproved the confusing and awkward wording of BAJI 3.75. That instruction, which embodied the so-called "but for" test of causation in California for many years, had been roundly criticized. The Court, in its opinion, quoted Dean Prosser as observing that "there are probably few judges who would undertake to say just what this means, and fewer still who would expect it to mean anything whatever to a jury." The Court also noted that "in a scholarly study of fourteen jury instructions, BAJI 3.75 produced the most misunderstanding among lay persons." In relegating the instruction to the legal junk pile, Justice Lucas noted that the instructions' "deficiencies may mislead jurors, causing them...to focus improperly on a cause that is spatially or temporally closest to the harm."

The facts of the *Mitchell* case dramatically pointed out the problems with the "but for" test embodied in BAJI 3.75.

There, a twelve year old youngster had been invited on an outing by neighbors. The youth's mother had warned the neighbors that her son could not swim, and consented to let him accompany them only when the neighbors agreed to restrict him to the shallow edge of the lake. Notwithstanding this agreement, the neighbors ultimately let the boys rent paddle boards, and the youth drowned during horseplay in the lake.

At trial, the jury concluded in a special verdict that the defendants were negligent, but their negligence was not a proximate cause of the young boy's death, as defined in BAJI 3.75. Instead, they determined that the "proximate" cause of his death was his own inability to swim. In rejecting BAJI 3.75, the Supreme Court noted that this jury, having found the defendants negligent, could not logically or consistently determine that such negligence was not at least, in part, a cause in fact of the young boy's death. They determined that it was the confusing language of BAJI 3.75 in overemphasizing the "but for" nature of causation which lead to this improper result.

For now, the only appropriate causation instruction to give in any tort case will be BAJI 3.76, the so-called "substantial factor" test of causation. Unlike BAJI 3.75, the substantial factor test has met with relatively uniform acceptance among legal scholars. The Supreme Court found it to be less confusing and conceptually misleading than BAJI 3.75. Further, the Court felt that continued use of BAJI 3.75 would lead to needless appellate litigation.

BAJI 3.76 is derived from Restatement of Torts, 2d. §431. It avoids the use of the misleading and confusing word "proximate" and overcomes the inapplicability of the "but for" rule of causation to two or more responsible causes. Further, as noted in the BAJI use note, "the phrase is sufficiently intelligible to any layman to furnish an adequate guide to the jury."

# *Earthquake*

(*Earthquake* cont from page 1)
Hopefully, the lessons of the Loma Prieta quake will not be lost on those government planners and administrators with responsibility for insuring public safety. In their October 1989 volume entitled "Preliminary Report on the Seismological and Engineering Aspects of the October 17, 1989 Loma Prieta Earthquake," U.C. Berkeley's earthquake engineering research scientists commented: "The Loma Prieta earthquake has stimulated all of us to continue our commitment to research and development for reducing earthquake hazards, but we need to join our efforts to those of researchers in public policy, and government affairs to be able to develop the necessary strategies to convince the private and public sectors of the importance of earthquake hazard reduction and the need for rapid implementation of the technical solutions." (Report No. UCB/EERC-89/14 P.47)

# *Dog Case Compels Award of Attorneys' Fees*

In *Hayworth v. Lira*, (1991) 232 Cal.App.3d 1362, the 2nd District held that a horse owner is entitled to attorneys' fees and double damages for the injuries to his equine companion resulting when a neighbor's dog takes a bite out of his horse.

Almost simultaneously, the 4th District in *Schneider v. Freidman. Collard, et al.* (1991), 232 Cal.App.3d 1276, reached a different result regarding attorneys' fees when people, not animals, were involved.

In both cases, the Court of Appeal displayed dogged adherence to the so-called American rule which denies attorneys' fees to prevailing parties in all but a few circumstances. The *Hayworth* holding is consistent with this preference against awarding of attorneys' fees because statutory authority existed in CCP §1021.9 and Food and Agriculture Code §31501 to support an award of fees. Outside the immediate pasture of animal litigation, the decision has little application.

Though the *Schneider* opinion may be considered a dog by advocates of prevailing party attorneys' fee awards, the reviewing court had little choice but to reach this result. Absent statutory authority or some third party beneficiary situation, the American rule prohibits a recovery of fees.

Though the 4th District suggests the Supreme Court might wish to change this rule, from recent results, man's best friend stands to receive better treatment before this body than does a prevailing plaintiff.

# **Walk**updates . . .

Pictured at left are Walkup associates **Dan Dell'Osso**, **Mary Driscoll**, **Cynthia Newton** and **Rich Schoenberger** together with winning jockey Don Miller at a recent "Night at the Races". Dan and Rich, who inadvertently forgot to wear pants to the track, were forced to borrow trousers from winning jockey Miller. Although hesitant to be photographed in such garb, Mary and Cynthia assured them there was nothing to fear as no one would ever see this photograph. Over 200 attorneys, friends and associates were in attendance. A good time was had by all...

Pictured to the right are four members of the Walkup Pro-Tem Judiciary in their ceremonial robes. **George Shelby**, **John Link**, **Daniel Kelly** and **Rick Goethals** have all served as jurists presiding over San Francisco Superior Court civil trials. (Not pictured, but also having presided as a judge pro-tem is **Ralph Bastian**.) Having tasted judicial power, these firm members are hoping to be appointed pro-tem members of the Supreme Court. As pro-tem Justices, they hope to lend objectivity to the court and give Justice Mosk the opportunity to participate in a majority opinion...

...Both **Dan Kelly** and **Mike Kelly** were recent CLE panelists at the CTLA Annual Convention held at the San Francisco Hilton...January marked Mike's 10th anniversary as a member of the adjunct faculty at Hastings College of Law. It also marked his 5th anniversary as a panelist for CEB's Recent Developments in Torts program...**Dan Dell'Osso** has been asked to speak at a Practicing Law Institute program on toxic torts scheduled in March...**Ralph Bastian** presented a demonstration of effective voir dire techniques for the San Francisco American Inns of Court Edward J. McFetridge Chapter...**Paul Melodia** was recently inducted into membership in the American College of Trial Lawyers at the association's annual meeting in Boston. The college, a national association of 4,500 trial lawyers throughout the U.S. and Canada, exists for the purpose of improving the administration of justice, standards of trial practice, and the ethics of the profession. Paul joins **Bruce Walkup** and **Dan Kelly** of our firm who preceded him into membership in the American College...**Cynthia Newton** recently served as a presenter at LSI's personal injury seminar for legal secretaries and legal assistants held at the Mark Hopkins Hotel in San Francisco....

# RECENT CASES

## WORKPLACE INJURIES

### Owens v. Giannetta-Henrich Construction

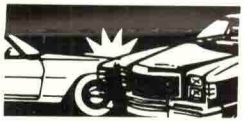
A $171,202 net verdict (after setting off a worker's compensation lien of $84,000 and 65% comparative fault) was obtained by **Paul Melodia** in *Owens v. Giannetta-Henrich Construction.* Plaintiff, a 35-year-old drywall installer, was injured when he fell while sheet-rocking the ceiling of a custom designed home without adequate scaffolding, safety rails or other protection. Plaintiff claimed that the general contractor was liable on theories of general negligence and peculiar risk of harm for failing to take special precautions to protect against falls. Defendants disputed the cause of the accident, and claimed that the fault was entirely that of plaintiff or his co-workers. Plaintiff sustained bilateral calcaneus fractures resulting in impaired gait and chronic foot pain. The pretrial settlement offer was $35,000. The gross verdict was $447,000 with liability apportioned 65% to plaintiff, 15% to defendant Giannetta-Henrich, and 20% to plaintiff's employer.

### Fountaine v. CF & T

In *Fountaine v. CF & T* (San Francisco Sup. Ct. No. 89969) a 65-year-old construction worker, was injured during the pouring of cement to build a retaining wall. During the pouring process, the flexible cement hose that plaintiff was using to direct the concrete pour broke loose and landed on his head and shoulders, knocking him to the ground. The concrete pouring equipment was owned, maintained and supplied by the defendant.

Plaintiff sustained a cerebral concussion, a compression fracture of a lumbar vertebra, and a severe contusion of the right shoulder with torn ligaments requiring surgical repair.

At a judicially supervised settlement conference, **Dan Kelly** settled this matter for $240,000 and the worker's compensation carrier waived its lien of $90,000.



## VEHICULAR NEGLIGENCE

### Britsch v. Niles Building Supply. et al.

In *Britsch v. Niles Building Supply. et al.* (Alameda County Sup. Ct. No. H-146537-4), **John Echeverria** negotiated settlements totalling $625,000 on behalf of the heirs of a 68-year-old retired railroad worker killed when he was struck by a trailer which had broken away from a truck.

The decedent was standing with his wife on the sidewalk admiring a field of gladiolas when the runaway trailer smashed into him. Inspection of the trailer proved it to be grossly defective, having inoperative brakes, insufficient safety chains, and a worn coupling. Complex insurance issues and an aggravated emotional distress claim (the surviving spouse suffered a stroke several months after her husband's death) presented significant obstacles to settlement.

### Norton v. O'Neill

In *Norton v. O'Neill* (Sonoma County Sup. Ct. No. 171895), **Kevin Domecus** recovered $700,000 on behalf of 35-year-old heavy equipment operator who suffered severe injuries as the result of a head-on collision on Stoney Point Road in Santa Rosa. Plaintiff claimed that defendant, who was on his way to work in his personal vehicle, made an illegal left-hand turn directly in front of him, leaving no opportunity to avoid the collision.

Plaintiff sustained a head injury which left him comatose for nearly two weeks. He also sustained a ruptured aorta, a badly fractured femur, and facial fractures. Although he was back to work within ten months following the accident, residual symptoms, including short-term memory difficulty and depression, persisted. No medical care is presently required. The defendant had a personal auto liability policy in the amount of $100,000. Because his job required him to use his personal vehicle, the employer was joined as a defendant. The employer defended on the grounds that employees were prohibited from using their own vehicles at work, and that company vehicles were always provided to employees if needed during the workday. In addition, company employment manuals expressly provided employees were to use company vehicles for any errands required during the day. Other witnesses disputed the company policy, and testified that it was common for employees to use their own vehicles for work-related purposes.

### Doe v. Graham

In *Doe v. Graham* (San Mateo Sup. No. 347110), **Kevin Domecus** negotiated a $250,000 settlement on behalf of a 46-year-old woman who suffered multiple fractures when struck by a car while crossing El Camino Real.

The plaintiff's injuries included left and right shoulder fractures, a carpal tunnel injury and a non-displaced pelvic fracture. She was hospitalized for 12 days, incurring medical expenses of roughly $15,000. Employed as a part-time seamstress, earning approximately $8,000 per annum, plaintiff claimed that her injuries permanently disabled her. Although her physicians believed that she was capable of returning to some type of work in the future, her poor English skills hampered her attempts to obtain substitute employment. Defendant denied that plaintiff was unemployable.

### Guttridge v. CSAA

In *Guttridge v. CSAA* (Sonoma County Sup. Ct. No. 160089), **Daniel Dell'Osso** negotiated a settlement in the amount of $177,500. Plaintiff was in the course and scope of his employment as an assistant fire chief with the Valley of the Moon Fire Department when he was rear ended by a CSAA adjuster, also in the course and scope of his employment.

As a result of the collision, plaintiff suffered injury to his neck and shoulder for which he was placed on disability retirement by the Fire Department. Plaintiff's medical bills totalled just over $13,000. The claimed wage loss exceeded $125,000. Defendants admitted liability but disputed the nature and extent of plaintiff's injuries and disability. Plaintiff's employer and the State claimed liens in excess of $135,000. As part of the settlement, lienholders agreed to reduce the lien to $60,000.

### Smithline v. Oh

In *Smithline v. Oh* (San Francisco Sup. Ct. No. 924344), **Rick Goethals** recovered $100,000 (the available insurance policy

(continued on page 6)

limit) on behalf of a local law firm's messenger who was injured when his motorcycle collided with a left turning auto at the intersection of Bay and Mason Streets in San Francisco. Witnesses claimed that plaintiff, traveling in the far right-hand lane, passed autos stopped in the two lanes to his left and struck the defendant who was making a slow left turn from the center most oncoming lane. Plaintiff's injuries included a bimalleolar fracture of the left ankle which was reduced without surgery. Special damages were approximately $16,000.

### Lanier v. Bowen. et al

In *Lanier v. Bowen. et al.*(Marin County Superior Court No. 148844), an $85,000 cash settlement was obtained by **Cynthia Newton** on behalf of a 22-year-old student who was a passenger in a pickup truck driven by a friend which was involved in a rollover accident on Highway 1 near Stinson Beach. The defendant lost control on a hairpin turn. Plaintiff claimed a ruptured disc in the accident. Defendants claimed that all of plaintiff's problems were due to a prior accident (another rollover) from which radicular pain had ensued and a diagnosis of ruptured disc had been made. Special damages, disputed by the defendants, were $21,000.

## PRODUCT LIABILITY

### Pochop v. Toyota

In *Pochop v. Toyota, State of California* (Placer County Sup. Ct. No. 5-0670), **Daniel Dell'Osso** obtained an arbitration award of $42,837 against Toyota of Sacramento for injuries sustained in a 50-plus mile per hour head on, cross-median collision. Plaintiff,a 47-year old woman, was self-employed at the time of the accident, but made no wage loss claim. The driver who struck the plaintiff was uninsured. Additionally, because it was a cross median accident, the State was sued on a dangerous condition theory.

The matter then proceeded to arbitration against Toyota of Sacramento who sold the plaintiffs the 1984 van involved in the collision without a shoulder harness restraint system. Plaintiff alleged that the absence of the restraint system caused her to strike her face on the dashboard resulting in fractures to her jaw, the loss of four teeth and lacerations of the lip and chin. Her medical bills totalled $5,387.

## MEDICAL MALPRACTICE

### Rodrigo Rodriguez v. Kaiser

Following fractures to his tibia and fibula sustained in a soccer game, the 14-year old plaintiff was too tightly casted by defendants. This eventually resulted in a below the knee amputation. Because plaintiff had a pre-existing learning disability, his future diminution of earning capacity was strongly contested by defendants. As a medical malpractice case, non-economic damages were limited to $250,000. **Paul Melodia** successfully concluded this matter for a total settlement of $930,000.

### Doe v. Roe, M.D.

In *Doe v. Roe, M.D.*, a $250,000 cash settlement was negotiated by **Rick Goethals** on behalf of plaintiff, a 35-year-old male, for failure to diagnose and treat melanoma. The defendant physician removed a mole from plaintiff's thigh in August of 1989 but failed to diagnose the lesion correctly. In January of 1990 a subsequent treating physician correctly diagnosed plaintiff's cancer. Although negligence was clear, causation in the case was highly disputed. Given the relatively short delay, defendant's experts contended that there could have been no significant change in plaintiff's chances for survival. Plaintiff claimed the delay caused the cancer to change from Stage II to Stage III, significantly worsening his prognosis. The settlement was for the maximum amount of non-economic damage permitted by MICRA.

### Schneider v. Kaiser

In *Schneider v. Kaiser*, **Ronald H. Wecht** obtained a $210,000 cash settlement on behalf of a 51-year-old retired Teamster who sustained a permanent partial foot drop of the right foot following outpatient surgery to remove a non-malignant cyst in his knee. Plaintiff alleged that the general practitioner who attempted to remove the cyst from the posterior patellar area was not qualified. Plaintiff further contended that the procedure should have been performed by a neurosurgeon who could easily have removed the nerve sheath tumor without residual disability.

## SPORTS INJURIES

### Coleman v. Fiscus

In *Coleman v. Fiscus* (Santa Clara Sup.Ct. No. 706527), **Rich Schoenberger** obtained a $268,000 judicial arbitration award on behalf of a 33-year-old salesman who was injured in a knee-boarding accident when he was thrown into a rocky shoreline in the San Joaquin Delta.

Plaintiff claimed that the defendant operator made a U-turn in a narrow channel without warning. Plaintiff, who was an inexperienced water sportsman, had never executed a U-turn while knee-boarding. Plaintiff claimed that the driver's maneuver was negligent. Defendant claimed that plaintiff was comparatively at fault by failing to steer the board with competency. Moreover, defendant claimed the action was barred by reasonable implied assumption of risk.

The arbitration award followed defendant's unsuccessful motion for summary judgment on the assumption of risk issue. Plaintiff's injuries included a fractured hip, elbow and toe resulting in medical expenses exceeding $50,000.

We are available for consultation, association and/or referral in all types of personal injury matters. Additionally, if there is a particular subject you would like to see discussed in future issues of Focus on Torts please contact Michael Kelly or Lisa LaRue.

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