WALKUP, MELODIA, KELLY & ECHEVERRIA

FOCUS on torts

VOLUME VIII, NUMBER I SPRING 1994

DAN KELLY ELECTED PRESIDENT OF ABOTA

Daniel J. Kelly has been elected President of the San Francisco Chapter of the American Board of Trial Advocates (ABOTA). ABOTA is a national association of trial attorneys dedicated to the preservation of the civil jury system. To qualify for membership in the association, an attorney must have tried at least 20 jury trials to verdict. The San Francisco Chapter covers the geographic region from the Oregon border south to Monterey County.

Daniel J. Kelly

A graduate of the University of Santa Clara Law School (where he served as Editor in Chief of the Law Review) Dan has been a member of the firm since 1969.

A fellow of the American College of Trial Lawyers, Dan is co-author of The Rutter Group's California Practice Guide - Personal Injury. A member of the Board of Governors for the International Society of Barristers, Dan has previously served as President of the San Francisco Trial Lawyers Association and has been listed in The Best Lawyers in America since 1987.

Dan is a skilled litigator in the areas of medical malpractice, product liability and drug liability, and is a frequent guest lecturer for The Rutter Group and the California Judges Association.

We salute Dan on his recent election. ABOTA's San Francisco Chapter members have made an excellent choice.

New Associate Joins Firm

We are pleased to welcome Erik Brunkal to our firm. A native of Salem, Oregon, Erik obtained his undergraduate degree at Whitman College. His J.D. was awarded in 1993 from the University of Oregon where he attained Order of the Coif honors. He was sworn in on December 14, 1993, after successfully completing the July 1993 California Bar Exam.

While in law school, Erik was also the recipient of numerous American Jurisprudence awards for

(continued on page 2)

SUPREME COURT CONTINUES TO NARROW VICTIMS' RIGHTS

Continuing a seemingly relentless mission to limit tort recovery whenever possible, the California Supreme Court has further narrowed recovery for negligent infliction of emotional distress with its recent opinions in Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965 and Huggins v. Longs Drugs (1993) 6 Cal. 4th 124.

In Potter, Firestone illegally dumped toxic waste materials which contaminated the plaintiffs' water supplies. Some of the chemicals were known carcinogens. In a bench trial the plaintiffs recovered, among other things, general damages of $800,000, including compensation for fear of future harm. On appeal, the Appellate Court upheld the award of emotional damages including those reflecting compensation for fear of cancer. The Supreme Court refused to uphold the award, and established a new, almost insurmountable burden of proof for plaintiffs in negligent infliction of emotional distress cases involving fear of future harm. Specifically, the Court held that where there is no presently existing physical injury, a plaintiff may not recover for fear of future disease until he or she shows that it is more than 50 percent likely the plaintiff will, in fact, contract the condition or disease.

(continued on page 4)

SPECIAL NEEDS TRUSTS BENEFIT INJURED PERSONS

On January 1, 1993, AB 3328 became effective. This statute provides a procedure for using Special Needs Trusts to hold funds recovered on behalf of seriously injured (or incompetent) adults and minors. When properly utilized, such Trusts allow the injured or disabled person to maintain eligibility for benefits including Medi-Cal, Supplemental Security Income (SSI), In-Home Support Services (IHSS) and public housing benefits. Continued eligibility for such programs is of critical importance because often the disabled have lost eligibility for health insurance and must rely upon public assistance for medical services and basic care. Over 100,000 elderly people reside in California nursing homes and approximately 70% of them receive Medi-Cal. The receipt of personal injury awards can also jeopardize their continued receipt of public benefits.

Prior to the advent of Special Needs Trusts and passage of current law, attorneys representing indigent or severely disabled clients faced a dilemma in whether to bring suit. If the injured party was poor enough to qualify for SSI, Medi-Cal or some other needs-based public benefit program, the recovery of a personal injury judgment or settlement could make them ineligible for benefits. Without a Special Needs Trust, the injured person would be forced to "spend down" any recovery to below the public program limits (currently $2,000) before regaining eligibility for services or benefits. After spending down to this level, no funds remained for rehabilitation, uncovered medical services, or support services such as in-home care, computers, specially-equipped vehicles or home remodeling.

Special Needs Trusts fall within the category of "discretionary irrevocable supplemental trusts." When properly drafted and utilized, they can solve the dilemma described above by authorizing the trustee to supplement the minor's or incompetent adult's public benefits to enhance that person's quality of life. The beneficiary does not have an ownership interest in the trust, and control is placed in the hands of the trustee. The beneficiary's eligibility for continued public benefits is not jeopardized.

Special Needs Trusts must be selectively utilized to benefit the particular client's needs. In the proper case, they can supplement (or supplant) a structured settlement, which might otherwise result in permanent ineligibility for public benefits.

The intricacies of balancing the income eligibility requirements for public assistance with the level of income for benefits available from Special Needs Trusts requires careful drafting of the trust document and conscientious management by the trustee to ensure the program rules are strictly followed. Special Needs Trusts must be part of an overall strategy to maintain public benefit eligibility to the long-term benefit of the beneficiary. It is usually best to consult with an estate and tax attorney who is well versed in this area.

AB 3328 is codified in Probate Code Sections 3600-3612. These sections apply only to money received from resolution of a lawsuit, and do not include sums received by gift or inheritance. The new law allows the trial judge presiding over a case to order the settlement or judgment proceeds directly to a Special Needs Trust, created under the judge's supervision, provided certain findings are made.

Probate Code Section 3604 imposes four additional requirements for the use of a Special Needs Trust. They are as follows:

(1) The trust terms must be reviewed and approved by the Court.

(2) The Court shall retain jurisdiction.

(3) The trust must be established only for a minor or incompetent:

a. Who has a disability which substantially impairs his ability to provide for his own care and custody;

b. Who has a disability which constitutes a substantial handicap;

c. Who is likely to have special needs which will not be met without the trust.

(4) The amount paid to the Trust must not exceed the amount that appears reasonably necessary to meet the special needs of the minor or incompetent.

(Probate Code Section 3604(a) and (b)).

In order to safeguard both the interest of the beneficiary and the interest of the government for potential reimbursement, the new law also allows the government the following:

- Notice of the petition to create the trust and the right to object to any of the trust's provisions;

- The right to oversee the trustee-family member's actions, and petition the court to terminate if it believes the trustee should be paying for goods or services that the trustee is not paying for;

- Tolls all relevant statutes of limitations on governmental claims against the beneficiary;

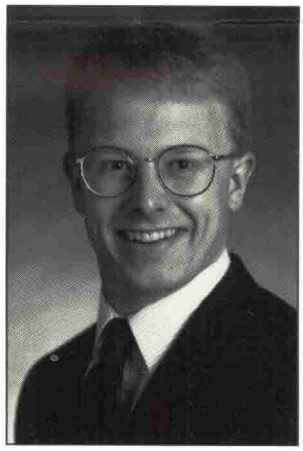
- Grants certain government agencies the right to seek reimbursement against the trust after the beneficiary dies for the value of benefits provided during the beneficiary's lifetime.

While AB 3328 provides an effective framework for creating Special Needs Trusts for personal injury plaintiffs, it does not automatically insure continued eligibility for public benefits. The provisions of the new enactment should be approached with caution and analyzed properly so that it is effectively used for those clients who will benefit in the long-term by balancing public benefit program eligibility with beneficiary status from a Special Needs Trust.

(continued from front page "New Associate")

his scholarship. Each award recognized him as the most outstanding student in his class.

During his first and second year summers, Erik clerked at prestigious firms both in the Bay Area and the Pacific Northwest. Erik and his wife Elizabeth (a sales representative for Hershey's Chocolate) re-located to the Bay Area during the summer of 1993.



Erik Brunkal

We look forward to introducing Erik to our associate counsel and clients in the months ahead. We believe that theywill find him to be a young advocate with a very bright future.

Recognizing the Automobile Crashworthiness Case

Many of our readers are no doubt familiar with the scenario where a mild to moderate collision results in catastrophic injuries to one or more of a vehicle's occupants. Illustrative is the case of the 65-year-old woman seated in the right rear of a subcompact in a case we recently tried. She was wearing her lap and shoulder belt. Her husband, also wearing a seat belt, was driving. The couple was struck head on when the defendant crossed a highway center line. The husband, who was closer to the point of impact, received only minor injuries. The wife died of massive internal injuries. Her death was not caused by the other driver's negligence; it was caused by the restraint system in her car which failed to protect her in a survivable accident. However, the cause of her death was not obvious from the police report.

The following are considerations in any auto case where the injuries appear out of proportion to the impact:

1. Obtain Custody of the Vehicles Involved in the Collision.

Under no circumstances can a crashworthiness case be developed without examining, preserving and testing the car the injured party was in at the time of the crash. Photographs, no matter how detailed, are simply not adequate. Biomechanical experts, engineers and reconstruction experts cannot assess injury mechanism, speeds, impact angles, etc., based only on photographic evidence. Whenever possible, counsel should also obtain the other car(s) involved in the collision as well.

2. Identify the Type of Accident.

Auto accidents generally fall into three broad categories: head-on, the roll over and side impact. Each type invokes analysis of a variety of Federal Motor Vehicle Safety or Performance Standards. (See 49 CFR 571.200 et. al.) Each type of collision also raises certain crashworthiness issues that may impact on a decision whether to proceed with a product liability case. For example, roll over accidents involve an analysis of both a vehicle's restraint system and its roof strength. For this reason, roll-over crashworthiness cases are exceedingly complicated and costly to investigate and prosecute.

3. Assess Collision Severity.

According to Federal Standards, a vehicle and its restraint system must be designed to prevent ejection during a roll over. These same standards also require that an automobile must protect its occupants during a collision in which the car experiences a change in velocity (Delta V) of 30 MPH or less (e.g., crashing into a wall at 30 miles per hour).

Here, it is important not to be deceived by the amount of exterior damage to the accident vehicle. Most cars have crush zones designed to absorb energy during frontal and rear collisions.

Before assuming that your accident involves high speeds, have a competent engineer examine the car to give you an estimate of the Delta V. There are now multiple computer programs available that facilitate this analysis. Cases with catastrophic injury to belted occupants mandate close examination, particularly when the Delta V is low.

4. Identify the Type of Restraint System.

Several seat belt systems have been identified as the source of injury in minor accidents. Belt systems to be on the lookout for include:

-lap-only belts in rear seats. These systems have been associated with severe abdominal injury and lumbar fractures.

-two point "passive restraint" systems in front seats. These belts commonly attach to the door and automatically position diagonally across the driver/passenger when a door is closed. Because there is no lap belt component with this system, submarining injuries are often associated with this belt. Injuries reported with these systems include strangulation and cervical fracture as well as lower abdominal and spleen injury.

-motorized passive shoulder belts with manual lap belts. With this system, the shoulder belt is moved mechanically around the occupant and positioned diagonally across the body. This occurs automatically when the door is closed. Most such systems are equipped with a lap belt, but it must be fastened manually. Studies show that a majority of occupants forget to fasten the lap belt. As a result, the occupant is not fully protected. Drivers most at-risk with this type of system are those who rent a car and are unfamiliar with the passive/active interplay. Commonly, these individuals get in the rental car, turn on the ignition, feel the belt go around them and mistakenly assume that they are fully belted.

- combination passive lap/shoulder belt. This system, available in many G.M. vehicles, provides a lap and shoulder belt assembly where both attach to the door. As the door opens, the lap and shoulder belt swing away from the seat and the occupant enters under the belt system. When the door is closed, the system is positioned across the driver/passenger's body. This system provides little or no protection should the door open during a side-impact collision or roll over.

5. Injury Pattern.

A final threshold item to be examined in determining if a crashworthiness case exists is the nature and location of the plaintiff's injuries. Injuries are an important source of causation evidence. As described above, lap only belts are commonly associated with low back fractures and damage to internal organs such as the spleen.

DEEP POCKETS DEBUNKED

According to an extensive 50-page article in the Duke Law Journal (Vol. 43, p. 217), the widespread claim that juries award large medical malpractice judgments against doctors and hospitals because such defendants can afford to pay big awards was determined to be unfounded.

The article, authored by Duke Law Professor Neil Vidmar, surveyed 147 North Carolina citizens who had been called to jury duty. The jurors were asked to award damages for pain and suffering to a young woman who had suffered a broken leg with complications. Jurors were given one of six scenarios as to the cause of the woman's injuries: For some jurors, negligence was attributed to an individual doctor, two doctors or a hospital. For others, culpability was attributed to either a single person driving a car, two people or a commercial corporation. The study found that the average jury awards in each of the negligence scenarios was reasonably similar.

In another part of the study, 56 highly experienced North Carolina attorneys, representing both plaintiffs and defendants, were given the same case materials and asked to render awards. The awards given by the attorneys and the jurors were found to be comparable.

Professor Vidmar's study concluded "that on present evidence, the jury's reputation for reaching into the perceived deep pockets of health care providers and giving excessive awards for pain and suffering is not warranted."

NINTH CIRCUIT REFUSES TO SHIELD BANKRUPT DEFENDANT FROM LIABILITY FOR PUNITIVE DAMAGES

The Bankruptcy Panel of the Ninth Circuit Court of Appeals has provided a new tool to aid in collecting damages from defendants who file bankruptcy. In Daghighfekr v. Laurence Mekhail (BAP No. CC-93-1194-VBaJ) filed December 22, 1993, the Ninth Circuit held plaintiff's claim for special, general and punitive damages totalling $614,942.50 nondischargeable under 11 USC §523(a)(6), as arising out of willful and malicious conduct.

In 1981, debtor-appellant Daghighfekr assaulted plaintiff-appellee Laurence Mekhail, breaking his jaw. In Mekhail's civil suit, Daghighfekr defaulted. After a prove up hearing, the state court awarded Mekhail $14,793 in special damages, $100,000 in general damages and $500,000 in punitive damages. When Daghighfekr filed bankruptcy, Mekhail commenced an 11 USC §523(a)(6) adversary proceeding.

A bench trial ensued. Mekhail, the only witness, testified as to the facts surrounding the beating. His jaw was broken, he was hospitalized for 6 days and had continuing medical problems. There was no independent evidence presented concerning the damage elements at trial.

The debtor appealed. He claimed the evidence before the trial court was insufficient to support liability for $100,000 compensatory and $500,000 punitive damages. The appeal was denied.

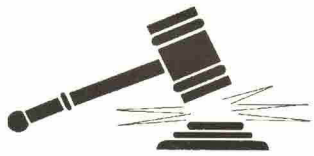
First, the Ninth Circuit court held that the state court damage award was res judicata. Second, the court held that the damages claim fell within the language of §523(a)(6) and was a proper "debt" falling within the exception to discharge. Finally, the court cautioned that while other sections of the Bankruptcy Code could be invoked to alter or amend a state court judgment, §523 cannot be invoked for that purpose. Under that section, the only issue for determination by the Bankruptcy court is whether the claim, as established, survives the bankruptcy.

The message to practitioners is clear. In a state court prove-up hearing involving claims which fall within §523(a)(6), the practitioner should specifically prove up all special damages, and strenuously argue for all reasonable compensatory and punitive damages. Once proven to the satisfaction of the state court and entered as a judgment, the amount of damages as determined by the state court has res judicata effect in the bankruptcy court. When the previously inattentive defendant stands up and takes notice , the message is: too late.

Supreme Court Continues to Narrow Victims' Rights

(continued from front page)

In a lengthy and cogent dissent (joined by Justice Mosk), Justice George noted that the majority opinion "eliminates an important legal protection to which all persons, including victims of toxic waste exposure, long have been entitled." Rebutting the majority's contention that the "flood of litigation" argument justified restriction of plaintiffs' rights, Justice George noted "...the majority opinion suggests that in the case of 'toxic torts,' a variety of 'public policy' reasons support its departure from generally governing legal principles. Distilled to its essence, however, the majority's position amounts to a determination that, when a defendant's conduct has the potential to cause serious physical and emotional harm to **a large number of persons**, such conduct should be afforded a greater shield from liability than conduct possessing the potential to harm only a more limited number of persons.... It appears distressingly ironic and inconsistent with legislatively prescribed public policy to accord the individual victim of a so-called 'toxic tort' less protection than would be accorded the victim of a more traditional course of negligent conduct...there is no justification for limiting the recovery to which this class of persons is entitled simply because the defendant's wrongful conduct has endangered the personal safety of a large number of individuals...."



The policy reasons invoked by the majority in support of their decision is the fear that in toxic tort cases the defendants have endangered so many persons that permitting recovery under ordinary negligence standards might impose an onerous risk of liability upon such defendants. However, as pointed out by Justice George, a defendant's liability for a particular category of negligent conduct does not contract as the number of injured persons increases.

The Court made one exception to its "51 percent rule." Where the plaintiff can show that the defendant's conduct amounts to malice or oppression as defined in Civil Code Section 3294(c)(1), the plaintiff is relieved of the burden of proving that the feared disease is more likely than not to occur.

In Huggins, the parents of an infant were given erroneous instructions by a pharmacist regarding how much medication to give their baby. The parents sued under a "direct victim" theory after the improper instructions resulted in severe injuries to the child.

In Molien v. Kaiser (1980) 27 Cal. 3d 916, the Supreme Court first identified a cause of action for negligent infliction of emotional distress based on a direct victim theory. There, a defendant physician negligently misdiagnosed Mrs. Molien as having syphilis. The physician instructed her to go home and tell her husband of the diagnosis and of the couple's need for treatment. The diagnosis was incorrect, and the husband sustained foreseeable emotional distress.

Although there was no significant difference between the instructions given by the physician to the wife in Molien, and the erroneous instructions given by the defendant pharmacist in Huggins, the Supreme Court denied recovery to the Huggins parents, rationalizing that "the progeny of Molien have allowed recovery **only** when the plaintiff is also a patient of the defendant physician." (Citing Burgess v. Superior Court (1992) 2 Cal. 4th

1064; Marlene F. v. Affiliated Medical (1989) 48 Cal. 3d 583)

Both Justice Mosk and Justice Kennard disagreed with their brethren, finding that the "public policy" rationale relied upon by the majority could not be supported. As noted by Justice Kennard:

"Inevitably, when the patient is an infant, the pharmacist's duty to provide appropriate directions for use of prescribed medication will be met through communication with someone other than the infant patient. In most such cases, including this one, that agent of the patient is one of the infant's parents. Thus, it is clear that when the patient is an infant, the pharmacist must, in the performance of his or her professional duty, provide the parent with directions to be followed in administering the medication to the infant..." (6 Cal. 4th at 137)

While result-oriented jurisprudence is not new, the "flood" of such holdings being generated by the Supreme Court has set a record pace. Repeatedly, the Court recites a whole bromidic litany of now-familiar (but unsupported) justifications for restricting liability: concerns about enlarged liability of wrongdoers; increased insurance costs; increased liability exposure of medical and health professionals; opening the "flood gates of litigation," etc. The message in all of these opinions is clear: this Court is not concerned with individual or consumer rights — it is concerned with the rights of business, insurance carriers, health care providers and manufacturers. In a state whose Supreme Court was once known for charting new waters in the protection of its citizens (Greenman v. Yuba Power (1963) 59 Cal. 2d 57; Barker v. Lull Engineering (1978) 20 Cal. 3d 413; Cobbs v. Grant (1972) 8 Cal. 3d 229; Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245) we now see that Court taking a piquant step backwards by focusing on improving the business climate rather than engaging in careful judicial analysis and the pursuit and protection of citizens' rights.

Appellate Courts Refuse to Lean on Lienholders

Nowadays, it is nearly impossible to resolve a third party negligence case without contending with liens. Potential lienholders include Kaiser, Medi-Cal, Medicare and the injured party's own insurer. With budgets tightening and health care costs increasing, lienholders are becoming more aggressive in pursuing recovery of their liens. Indeed, lienholder representatives are often more contentious in negotiations than third party representatives. Since liens are typically deducted from the client's net share of the proceeds, effective handling of lien negotiations is important in generating client satisfaction.

A good overview of handling liens is presented in Coping with Liens in Personal Injury Cases (Program Handbook, CEB, May 1993). This article is limited to recent decisional law clarifying reimbursement rights of Kaiser and auto insurer medical pay providers.

In Samura v. Kaiser Foundation Health Plan, Inc. (1993) 17 Cal.App.4th 1284, Kaiser's third party liability ("TPL") provision was upheld, subject to the common fund rule and the doctrine of unconscionability. In Samura, plaintiff-appellant challenged the TPL provision which provided:

"If injury or illness is claimed to be caused by any act or omission of a third party... benefits are furnished or arranged by Medical Group physicians and Kaiser Permanente medical facilities at non-member rates.

Payment is the member's responsibility, except that the member is not required to pay any portion of such charges for services which is in excess of the total amount collected from or on behalf of the third party on account of such acts or omissions, whether by settlement or judgment and Health Plan shall have a lien on the settlement or judgment for that purpose. At Health Plan's request, the member (or his/her estate) shall execute form(s) directing his or her attorney or the third party to make payments to Health Plan (or its designee)..."

The trial court ordered Kaiser to rewrite the

(continued on page 6)

TOY RELATED CHILD INJURIES CONTINUE TO MOUNT

According to the 1993 *Toy Safety Report,* published by the Institute for Injury Reduction, the number of toy-caused injuries continues to climb.

Annual toy-related deaths and injuries rose 57% percent between 1986 and 1992. During that same 6 year period, the U.S. population rose by just 6%.

Even toy manufacturers now admit that some toys are dangerous. For instance, Fisher-Price has recently acknowledged that its "Little People" dolls have killed 7 children who swallowed the figures and choked. Unfortunately, under current Federal regulations the tide of injury and death has not been stemmed. Even though the Consumer Product Safety Commission (the agency responsible for keeping dangerous toys off the market) has determined that one out of six toys is dangerous enough to require corrective action, nothing effective has been done to stop the sale of dangerous toys.

With rising deaths, strong industry lobbies, and little federal intervention, the 1993 Report calls out for parents to educate themselves on the dangers of toys, anticipating that children will use toys in the most injurious ways possible. Experience teaches that children will dismantle toys, eat small parts, jab themselves with sharp edges, and wrap strings or cords around their necks.

In testing for strangulation hazards, parents can utilize a "choke test" tube. The "No Choke Tube" from Safety First (on sale at stores such as K-Mart and Wal-Mart) can be purchased for about $2.00.

Now more than ever, counsel, judges and juries are called upon to be the guardians of public safety in this area. We are often requested to represent children and parents who have suffered injury or damage at the hands of dangerous toys. A "pound of cure" in these case is far less satisfactory than "an ounce of prevention."

The 1993 *Toy Safety Report* is a valuable resource for parents and consumer advocates interested in preventing injury or death to children, as well as a valuable resource for counsel involved in toy-related litigation. It is available through the Institute for Injury Reduction, 2191 Defense Highway, Suite 222, Crofton, MD 21114.

WALKUPDATES

On January 21, 1994, San Francisco's Archbishop Riordan High School awarded Jeff Holl the Father William Joseph Chaminade Award for outstanding service. Archbishop John Quinn presided over the ceremony, during which Jeff addressed the assembled student body and Marianist community on the importance of community service. Jeff is Vice Chairman of the Archbishop Riordan Board of Directors...

Cynthia F. Newton continues to be active in the State Bar Litigation Section Education Committee. She recently helped organize the committee's instructional luncheon program on Direct and Cross Examination held in San Francisco in January.

Appellate Court Reaffirms Wrongful Life Recovery

California is one of three states willing to recognize that a child born with birth defects flowing from negligent genetic counseling of the parents has a legally cognizable injury, but limits the child's recovery to special damages alone. Most other jurisdictions have refused to allow any recovery under a wrongful life theory on the grounds that being born with a disability does not cause a legally cognizable injury.

In Custodio v. Bauer (1967) 251 Cal.App.2d 303, the appellate court first recognized that the parents of a healthy child were entitled to sue for wrongful birth flowing from negligent performance of a sterilization procedure. The court left unanswered the issue of whether the healthy child had his own cause of action for pre-conception negligence. This issue was resolved in Stills v. Gratton (1976) 55 Cal.App.3d 698, where both the unmarried mother and her **healthy son** brought consolidated malpractice actions against health care providers who negligently performed a therapeutic abortion. The court held that the normal child has no independent cause of action, since he sustained no cognizable damage in simply being born.

Curlender v. Bio-Science Laboratories (1980) 106 Cal.App.3d 811 was the first case to deal with the issue of whether a **genetically impaired child** could recover tort damages. In that case, the defendants negligently failed to inform the parents that they carried Tay-Sachs Disease genes. Their daughter was born with the disease, which caused physical deformities, pain and mental retardation. The court allowed the minor plaintiff to recover both general and special damages related to her disease.

In Turpin v. Sortini (1982) 31 Cal.3d 220, the Supreme Court roundly criticized the Curlender court for its failure to address the inherent dilemma presented by wrongful life cases: how does one measure the value of an impaired life compared to nonexistence? Joy Turpin was born with congenital deafness which the defendants had negligently failed to diagnose in her older sister, and prior to plaintiff's conception. Noting that nothing the defendants could have done would have allowed Joy to be born normal, the Supreme Court followed the reasoning of courts in other jurisdictions, and **disallowed recovery of general damages** on the grounds that it would be impossible to determine whether the plaintiff had in fact suffered an injury in being born impaired rather than not being born at all. The Turpin court went on to hold that **special** damages could be recovered.

Most recently, in Gami v. Mullikin Medical Center (1993) 18 Cal.App.4th 870, the Second District upheld a genetically impaired child's right to sue for **post-conception** negligence. In Gami, defendants negligently failed to determine that the fetus had spina bifida, and the parents alleged that had they been informed, they would have terminated the pregnancy. Following Turpin, the court noted that there is no logical distinction in pre-conception versus post-conception negligence giving rise to such claims.

In summary, recovery in wrongful birth and wrongful life cases are limited to special damages flowing from the cost of raising a child, with or without disabilities, to majority.

(continued from page 5 "Appellate Courts")

TPL term in plain English; give greater prominence to it; include a provision standardizing and clarifying the reduction method where the claimant is not adequately compensated; and recite the common fund rule. (Id. at 1291.)

The appellate court reversed, finding the order unnecessary. First, even though the rule was not stated in the TPL provision, the well-established common fund doctrine (Lee v. State Farm Mut, Ins. Co. (1976) 57 Cal.App.3d458) applies. That doctrine requires reduction of the Plan's lien by its pro rata share of costs and attorneys fees.

Furthermore, the appellate court relieved the Plan from including a formula to reduce the lien where the victim is inadequately compensated. In that situation the doctrine of unconscionability would be invoked to avoid "a harsh and one-sided impact." (Id. at 1297.) The court did not provide any examples of unconscionable situations, and admitted it was unaware of a decision actually adjudicating a third party claim unenforceable based on unconscionability.

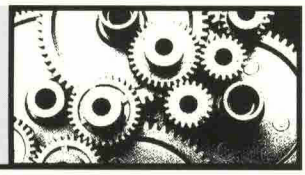
In Zubia v. Farmers Insurance Exchange (1993) 14 Cal.App.4th790, the court affirmed enforceability of the medical expense payment reimbursement provision in the Farmers automobile policy. In Zubia, plaintiffs-appellants argued that the "E-Z-Reader Car Policy" provision was inconspicuous and ambiguous, challenging the provision on legal theories including breach of contract, fraud and bad faith.

The appellate court held that the provision was conspicuous because it appeared on page 5 of a 6-page policy, in the same bold typeface as other headings in the policy. The court disagreed with plaintiffs that Farmers' failure to expressly reference the medical expense payments made it inconspicuous. The court also held that the provision was unambiguous, rejecting plaintiffs' argument that failing to specifically reference medical payments rendered the term "damages" ambiguous. Because the term "damages" itself was defined as "the cost of compensating those who suffer bodily injury or property damage from an accident," the court found no ambiguity.

Given the willingness of appellate courts to honor medical liens in third party cases, determining the source of medical expenses payments in every case is essential. A failure to identify and reimburse valid liens may expose the client and counsel to liability for reimbursement. Moreover, determining lien rights (and discussing their impact on the case with the client) prevents nasty surprises during and after settlement negotiations.

Recent Cases

Industrial Injury



Botello v. Ripon Manufacturing Company

In Botello v. Ripon Manufacturing Company, et al. (Kern Co. Sup. Ct. No. 216726), **Mary E. Elliot** and **John Echeverria** negotiated a structured settlement, including a lump sum cash payment and monthly payments guaranteed for thirty years, on behalf of a 28 year old pistachio plant employee who sustained crushing injuries to his legs when, after crawling inside a disabled conveyor belt assembly, a co-worker turned on the system.

The suit was brought against Ripon Manufacturing Company, the designer/manufacturer of the conveyor belt assembly, and Triple B Electric, the electrical contractor for the conveying equipment, based upon allegations of negligent failure to guard or to install emergency stop buttons, and negligent design of the electrical control panel. Discovery revealed substantial employer negligence and comparative negligence on the part of plaintiff.

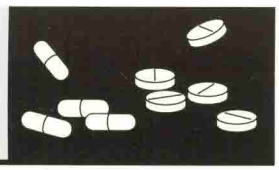
Medical Negligence

Patient v. Doe M.D.

In Patient v. Doe M.D., et al. (Alameda Co. Sup. Ct.) **Mary E. Elliot** and **Michael A. Kelly** obtained a cash settlement of $610,000 on behalf of a 40 year old school teacher and her husband for delay in the diagnosis of breast cancer. Plaintiff underwent routine mammography in 1990 which revealed a small suspicious mass, but was not advised of this result. The cancer was not diagnosed until eighteen months later in an advanced state. The defendants were the radiologist, who claimed that she called the family doctor and advised him of the abnormal mammogram; the radiology center, which claimed that the mammogram report was properly delivered to the family doctor; and the family doctor, who claimed that he never received a call from the radiologist and never received the written report. Mastectomy, radiation therapy and chemotherapy, followed by bone marrow transplant, has put Patient into full remission.

Plaintiffs incurred $120,000 in out-of-pocket medical bills related to her bone marrow transplant, and $15,000 in lost income. The settlement also concluded any future wrongful death case.

Drug Product Liability



Drug Product Liability

Paul v. Melodia and **Cynthia F. Newton** have resolved an additional 8 cases on behalf of clients suffering from eosinophilia myalgia syndrome (EMS) caused by the ingestion of contaminated L-Tryptophan. The L-Tryptophan involved was a synthetically manufactured form of the over-the-counter amino acid recommended for sleep disorders, depression and weight loss. The recently settled cases involved significant injuries including residual scarring (from skin rashes), memory loss, cognitive dysfunction, muscle weakness and spasms, irritability, and fatigue.

The majority of the cases filed against Showa Denko, K.K. and its American subsidiary have now been resolved. Several cases in which the defendants challenge either diagnosis or causation remain. In some instances, these cases will be tried. Mr. Melodia and Ms. Newton continue to be available for consultation with our associate counsel on trial issues in these cases.

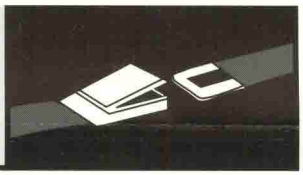
Recreational Injuries

Wersinger v. Cheney

Not all cases arising from recreational sports have been eliminated by the resurrected assumption of the risk doctrine. In Wersinger v. Cheney (Nev.Fed.Dist.Ct. No. CV93-00362), **Ron Wecht** settled a claim on behalf of a woman injured while skiing at Incline Resort. Plaintiff was involved in a collision with another skier, sustaining a torn anterior cruciate ligament. Surgery and physical therapy resulted in a fair recovery, though some limitation of motion in the knee persists at present.

Medical expenses were $38,000. Her loss of earning claim was $21,000. The matter was settled for $125,000 on the eve of trial. Plaintiff claimed that the opposing skier had violated right-of-way rules known as the Skier's Responsibility Code. This "code" is found posted prominently at all ski areas. Liability was highly disputed, and the settlement was discounted to reflect this.

Product Liability



Karamcheti v. Dodge

In Karamcheti v. Dodge (Santa Clara Sup. Action No. 712987) **Daniel Dell'Osso** negotiated a $350,000 settlement with Chrysler Corporation on behalf of a 25 year old woman who suffered a fractured back in a single vehicle accident. Plaintiff was a passenger in a 1990 Dodge Ram pick up wearing the lap and shoulder belt provided by the manufacturer. The driver of the vehicle lost control, left the road and struck a tree. Despite the fact that she was wearing her lap and shoulder belt, plaintiff suffered serious low back fractures. Plaintiff's experts described Ms. Karamcheti's injuries as classic "lap belt" induced fractures. It was plaintiff's contention that the injuries occurred because the shoulder portion of the belt failed to lock, allowing her to flex over her lap belt.

Chrysler denied any problems with the seat belt but was nonetheless unable to explain Ms. Karamcheti's injuries given a properly working seat belt. Ms. Karamcheti's total medical bills were $76,113.84. The case settled at a court ordered settlement conference.

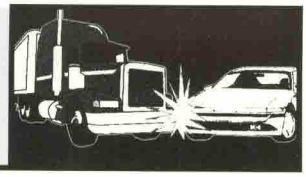
RECENT CASES

Rodriguez v. Ricon

In Rodriguez v. Ricon (Contra Costa Superior Court Case No. C92-01984), **Cynthia F. Newton** obtained a $65,550 arbitration award on behalf of a 45-year-old realtor who fell from his handicapped van wheelchair lift. The accident happened when one of the safety flaps on the front of the lift malfunctioned, allowing his wheelchair to roll forward off the lift. Plaintiff fell to the ground. Defendants, the manufacturer and installer, claimed that plaintiff caused the accident by accidentally engaging the power switch on his electric wheelchair, driving the chair off the lift. Defendants also contended that plaintiff failed to maintain the lift as recommended by the manufacturer.

In the fall plaintiff fractured his left tibia and fibula and sprained his back. His medical bills approached $13,000 and his wage loss was $4,000. Settlement for the amount of the award was reached on the eve of trial.

VEHICULAR NEGLIGENCE



Hamm v. Turner

In Hamm v. Turner (S.F. Sup. Ct. No. 943162), **Rich Schoenberger** and **Kevin Domecus** obtained a $425,000 settlement on behalf of the surviving spouse and parents of a 38 year old advertising executive killed in a rear end collision on Highway 101 in Marin County. The decedent's car had stalled partially in an exit lane at 10:30 p.m. on a clear night in March.

Visibility studies (utilizing exemplars of both vehicles, and simulating existing traffic and driving conditions) established that decedent's car was visible to a reasonably prudent driver. Defendants contended that the decedent was responsible for her own death for allowing her car to run out of gas, failing to activate her flashers, failing to move completely out of the exit lane and finally, for failing to exit her car prior to being hit.

The offer of settlement increased from $75,000 to $425,000 after the defendants were provided with a film of the visibility study. The case settled on the first day of trial.

Cheung v. Green Valley

Cheung v. Green Valley (San Francisco Sup. Ct. No. 954330). This wrongful death action was settled by **Dan Kelly** for $260,000. The deceased, a 73 year old mother of four, was struck and killed by the defendant's right-turning delivery van as she crossed the street at the intersection of Powell and Pacific Avenue. The action was brought by her surviving adult children who ranged in age from 42 to 52 years old. The defendant claimed that the deceased was partially at fault for the happening of the accident and for failing to see the truck commence its turn. Moreover, the defense claimed that the decedent's life expectancy was severely compromised by reason of extensive arteriosclerosis and chronic hypertension. The case was settled shortly after it was set for trial .

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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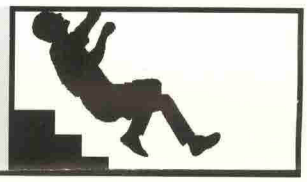
PREMISES LIABILITY



Stein v. Armstrong Garden Center

In Stein v. Armstrong Garden Center, plaintiff, an 80-year-old lady, tripped and fell while shopping at a nursery in Thousand Oaks, California. The flowers in the nursery were set on raised displays with storage beneath them. As plaintiff walked down an aisle, she tripped over a flat of seedlings protruding from beneath a display, fracturing her right hip. She underwent a hip replacement from which she made a good recovery. Following the incident, plaintiff suffered a deterioration of her mental status. Instead of returning to the senior citizens' home where she lived independently, she required placement in a board and care home. Liability, causation and damages were all disputed by defendant's carrier. **Jeffrey Holl** resolved the case for cash and a guaranteed structure with a present value of $150,000.00.

LEGAL MALPRACTICE

Doe Widow v. Black & White Bank and Roe Attorneys

In Doe Widow v. Black & White Bank and Roe Attorneys, **Paul Melodia** and **Jeff Holl** obtained a $300,000 settlement in a complex estate planning, legal malpractice claim. In 1989, the plaintiff and her husband, who was terminally ill, signed wills prepared by attorney Roe. The wills provided for a $1 million "Generation Skipping" Trust benefitting the couple's daughter, and a separate $600,000 Exemption Trust from which income was to go to the widow for life. After her husband died, plaintiff was represented by Roe attorney. The Black and White Bank became the Executor of the Estate. Upon the advice of Roe attorney and analysis by Black & White Bank and its accountants, Widow disclaimed her interest in the Exemption Trust and the interest passed to her daughter. Plaintiff's disclaimer of her interest in the Exemption trust precluded the use of a Qualified Terminable Interest Property (QTIP) election to defer the estate tax on the Exemption Trust. As a result, both the Exemption Trust and the Generation Skipping Trust were fully subject to estate tax.

Had proper planning and post-death elections been made, plaintiff claimed that the total estate tax bill would have been $259,649.00 instead of $768,626,00. The defendants contended that their advice was proper and that plaintiff's estate actually benefited by paying taxes now on the death of the husband instead of deferring them until plaintiff's death. (Under the terms of the settlement the identities of the settling parties are confidential.)