WALKUP, MELODIA, KELLY & ECHEVERRIA

FOCUS on torts

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Golden Gate Bridge Claims 34th Life

The most recent fatal collision on the Golden Gate Bridge has again raised the question whether the Bridge District's governing board is doing all that is possible to protect the 120,000 commuters who cross the bridge each day.

San Francisco psychologist, Tamar Kraut, died in a head-on collision on the bridge on June 24, 1996. Her heirs have retained firm members Michael A. Kelly and Cynthia F. Newton to pursue claims against the at-fault driver and the Bridge District. Kraut's death was the 34th fatality on the bridge since 1970. Bridge engineers and directors have been dodging the barrier issue for more than 20 years.

Fifteen years ago our firm represented another victim injured by an errant driver who crossed into the opposing lanes. In that case, the government entities defended on the basis that there was inadequate technical knowledge, and an inadequate accident history, to justify the inconvenience which would result from a reduction in lanes or the placement of a permanent median barrier.

In the wake of the latest accident, the chief engineer for the bridge has again opined that a movable traffic barrier would be a "formidable engineering problem." In response, victims of collisions on the bridge question how it is that we can place men on the moon but are without the technology to protect citizens who commute daily on the span.

The attitude of the bridge's governing board raises questions about how it perceives its role, vis a vis the safety of the motoring public.

In California, public entities are liable only to the extent provided by statute (Government Code §815). In the case of

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BREAST CANCER MISDIAGNOSIS: *A DEVELOPING EPIDEMIC*

With increasing frequency, we are consulted by women who have been the victim of delays in diagnosis, or frank misdiagnosis, of breast cancer. Perhaps this should not be surprising, as failure to diagnose breast cancer is the most frequently litigated medical negligence claim in America. Today, breast cancer remains the most common cause of cancer death among women, and represents 32% of all cancers in women.

For the lawyer reviewing or evaluating a breast cancer case, a fundamental maxim is to learn as much as possible about your client's specific type of cancer. This is a highly technical and specialized field.

It is also necessary to understand how cancer is staged, so as to make an intelligent assessment regarding legal causation. Cancer staging is typically performed utilizing the tumor node metastasis (T.N.M.) classification system.

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BREAST CANCER MISDIAGNOSIS: A DEVELOPING EPIDEMIC

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The most common case involves a small, painless mass that is initially discovered by the patient. If the lesion does not resolve within one menstrual period, a physician must then rule out any possibility of cancer. This includes utilization of diagnostic tests including mammography, needle biopsy or reference to a surgeon for surgical exploration.

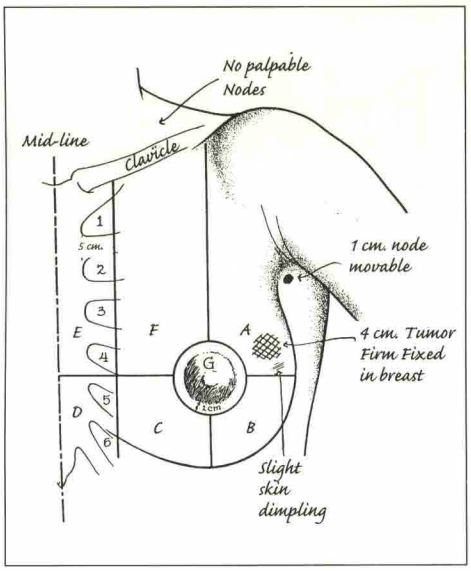
Unfortunately, in all too many cases, the examining doctor is unimpressed with the physical findings and sends the patient home. Several months or years later, cancer is finally diagnosed. By this time, it has invaded lymph nodes or possibly metastasized to other organs.

Risk factors which should immediately put a physician on notice of the possibility of breast cancer include a patient whose age is over 50 with a family history of breast cancer (especially in a mother or sister), a woman with no children, or a history of obesity, high fat diet, birth control pill use, or patients whose menses onset was early.

Skin changes, bulges, or difference in the size of the breasts should also be thoroughly investigated. The physician must also look for nipple irregularities, the presence of discharge, or peculiar skin appearance. In determining whether a viable case exists, all x-rays, mammogram, ultrasounds and bone scans must be obtained and reviewed.

Mammography examinations come in two types: screening and diagnostic. Screening mammography is performed at periodic intervals in the absence of any indication of disease. Diagnostic mammography is performed to confirm or rule out the presence of one or more suspicious findings.

Many cases result from radiologists' failures to properly read and interpret mammogram. When reading a mammogram, the radiologist has an obligation to obtain all prior mammograms. The American College of Radiologists (A.C.R.) publishes standards for radiologists performing mammogram. Also, federal rules for mammography have been promulgated in the Mammography Quality Standards Act (21 C.F.R. §900.1).



Often, defendants admit negligence in failing to timely diagnose and treat lesions. Causation, however, is where the battle is most typically fought. Defendants routinely argue that cancerous lesions big enough to be palpated or seen on mammography have metastasized before they could ever have been diagnosed by known methods. Physicians argue that such delays, therefore, result in no compensable harm. California's abolition of the "lost chance" theory of recovery thus favors defendants.[1] A qualified and convincing oncologist is always required to explain to the jury why significant delays of time do make a difference.[2]

Medical literature generally supports the view that early diagnosis results in improved prognosis. Further, early diagnosis often spares the patient from painful and expensive treatment. One study found that 86% of patients who had a tumor one centimeter in diameter (or smaller) survived 20 years.[3]

Failure to diagnose breast cancer is an area where medical negligence is increasing at a great rate. Clinicians must be made aware that early and aggressive treatment is possible, and makes a significant difference in the length and quality of patients' lives.

Firm members with experience in these cases include Paul Melodia, Cynthia Newton, Kevin Domecus and Wesley Sokolosky. We know the subtleties and nuances of effective case preparation and presentation. We encourage counsel confronted with such cases to consult or associate with us.

[1]In this respect, see Dumas v. Cooney 235 Cal.App.3d 1593; Bromme v. Pavett (1992) 5 Cal.App.4th 1487. Compare, however, Duarte v. Zachariah (1994) 22 Cal.App.4th 1652.

[2]Doubling times for breast cancer range from a few days to more than a year. Ninety to ninety-five percent of all breast cancers grow with an average doubling time of 30 days or slower. Plaintiff's expert must be prepared to identify the specific type of cancer which afflicts your client.

[3]Rosen, Groshen, et al., "A Long Term Follow-up Study of Survival in Stage I and Stage II Breast Carcinoma," Journal of Clinical Oncology (March 1989) 7(3):355-66.

EIGHT YEARS LATER — SUZUKI SUES CONSUMER REPORTS

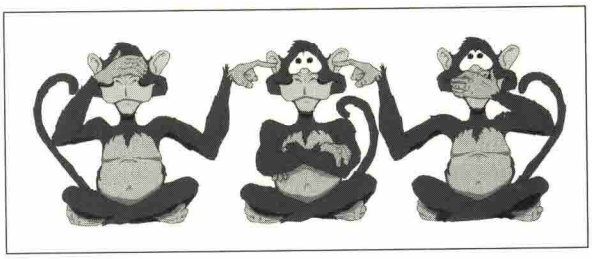
Suzuki Motor Corporation of America has recently filed suit against Consumer Reports Magazine, alleging libel and product disparagement, based on an article that Consumer Reports published in 1988. In that article, Consumer Reports described a test which purportedly showed that the Samurai would roll over in an accident avoidance maneuver that any driver might be expected to perform. In 1988, Suzuki sold 77,000 Samurais. The following model year, after the Consumer Reports article, sales dropped to 1,400 vehicles sold.

George Ball, Suzuki's general counsel, has stated that the company believes Consumer Reports is engaged in a "continuing campaign" against Suzuki. The company, through Ball, claims Consumer Union's tests were flawed and did not have a scientific basis.

David Berliner, Consumer Union's assistant director, has stated that the eight year delay prior to taking legal action is "a telling acknowledgment by Suzuki of the overwhelming truth and accuracy" of C.U.'s findings.

The 1988 report was re-published by Consumer Reports in its January 1996 issue, its CD-ROM Car Buyer's Guide as well as various on-line computer services.

LEGISLATORS DEAF TO VOICE OF ELECTORATE



Although California voters spoke unequivocally on March 26, 1996, rejecting limitations on access to civil justice and restrictions on their ability to contract for legal services, the California Assembly apparently did not receive this message. Within weeks after the election results, the Assembly passed more than 20 so-called "tort reform" proposals, including AB 3364 (Knowles), that imposes the same Proposition 202 attorneys' fee limits rejected by the voters. Notwithstanding the defeat of Prop 201, AB 2385 (Brulte) was passed denying victims full compensation for errors and omissions by accountants and other professionals responsible for providing prospectus information. The Senate now faces these bills as well as others, including AB 607 (Brulte), which would enact pure no-fault auto insurance, a concept rejected overwhelmingly by voters in the last election. Another Assembly Bill, AB 1752 (Knowles), would bar civil actions for bodily injury for at least two years against at-fault drivers unless a Court finds the injuries are "serious," or unless the at-fault driver was driving under the influence of alcohol, driving a stolen vehicle, or committing a felony.

Many other bills now in the State Senate passed in the Assembly over the objections of almost all consumer organizations. These include AB 1862 (Morrow), which limits punitive damages to three times the amount of compensatory damages; AB 2129 (Goldsmith), which requires punitive damages be proved "beyond a reasonable doubt;" and, AB 3412 (Ackerman), which creates a disincentive to bring public interest lawsuits by placing fixed caps on attorneys' fees that can be awarded to a prevailing party against a public entity or a public official.

Representative democracy requires that elected leaders listen to their constituency. Representative democracy permits the people to set public policy. The membership of the Assembly has its own agenda which appears opposed to that of the electorate. In November, voters will have an opportunity to decide whether they, or a group of assembly members who they think "know best," should be setting policy. The results of the next California election will be more telling than those of the last.

Golden Gate Bridge Claims 34th Life

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alleged dangerous conditions of public property, liability is governed by a series of statutory provisions (including defenses and immunities) beginning at Government Code §830. Among other things, the injured plaintiff must prove that the condition was dangerous even if used with due care, that the type of injury which occurred was reasonably foreseeable, and, that sufficient time, technology and funds existed to permit remedial action or warning. Finally, the injured plaintiff must overcome a number of defenses or immunities.

Historically, the Bridge District has defended the absence of a median barrier on the basis that a barrier is not technologically feasible. In addition, the District has alleged that any injuries or deaths which occur are exclusively the product of the negligence of the driver crossing over into oncoming traffic.

California case law recognizes that the public property may be in a dangerous condition even though negligent or criminal conduct by others causes or contributes to the accident. Specifically, the absence of a median barrier on a freeway, coupled with the concurrent negligence of a driver whose car crosses the median, has been held to give rise to government liability. (Ducey v. Argo Sales (1979) 25 Cal.3d 707.)

The District has also sought design immunity as provided by Government Code §830.6. This immunity, a complete affirmative defense, prevents the imposition of liability where the dangerous condition results from discretionary approval of a plan or design prior to construction or improvement of a public structure. Fortunately, the plan or design immunity of G.C. §830.6 is not perpetual. It is lost if subsequent history shows the design is unreasonable for any reason after the public entity has notice of the dangerous condition and a significant time within which to remedy it.

San Francisco Supervisor Angela Alioto, one of the City's representatives on the Bridge District Board, has requested immediate temporary measures to improve safety, including the utilization of a buffer zone by taking one of the six available lanes out of service depending upon the direction of peak travel.

Residents of Marin County have complained that little action has taken place because its citizens are under-represented on the bridge board — raising the question of whether Golden Gate Bridge Transit District members are more concerned about the safety of the public, or their own political futures.

NINTH CIRCUIT RESTRICTS AIR PASSENGERS' RIGHTS

The Airline Deregulation Act of 1978 prohibited states from enacting or enforcing "a law...related to a price, route, or service of an air carrier ...." 49 U.S.C. §41713(b)(1) (1996). The stated reason for the enactment was "to improve air service" by preempting state laws interfering with the deregulation of the airline industry. (House Report No. 95-1211, P.L. 95-504.)

Unfortunately, as recently interpreted by the Ninth Circuit, the Act does nothing to improve air service. Indeed, the Act has now been given a construction that threatens to eliminate all liability of airlines for common law tort claims.

In Harris v. American Airlines, Inc. (C.D. Cal. 1995) 55 F.3d 1472 the Ninth Circuit held the Deregulation Act preempted state law personal injury claims against an airline for negligence if the claim relates to the provision of a "service." In Harris, the plaintiff alleged the defendant's in-flight conduct in providing alcoholic drinks to an obviously intoxicated male passenger, and in failing to protect her from his verbal assaults, caused her injury. The court found that providing alcohol, and controlling passengers, were "services" within the meaning of the Act. Such claims, the court held, were preempted and the district court's order dismissing her claims was affirmed.[1]

More troubling is the case of Costa v. American Airlines, Inc. (C.D. Cal. 1995) 892 F.Supp. 237. In Costa, a woman sued American Airlines for injuries she suffered when an unidentified passenger opened an overhead bin, causing luggage to fall onto her. The plaintiff alleged American Airlines violated its duty as a common carrier by failing to stop or identify the unknown passenger or to preserve the passenger manifests. In granting defendant's motion for summary judgment (and finding that the claims were preempted) the district court cited Harris:

"It seems unlikely either Congress or the Supreme Court would have intended this broad result or the impact it may have on bodily injury claims arising from other kinds of airline services . . . . However, all of the acts and omissions complained of in this case fall within the broad Harris definition." Id. at 239.

The breadth of the Harris court's definition of "services" has been rejected by other circuits. See Hodges v. Delta Airlines, Inc. (5th Cir. 1995) 44 F.3d 344. One court within the 9th Circuit has criticized the Harris ruling, suggesting its interpretation is in error. See Stone v. Continental Airlines, Inc. (D. Hi. 1995) 905 F.Supp. 823, 825.

The logical extension of Harris is that any possible claim against an airline for negligence can be "related to a service;" from the maintenance of an unobstructed aisleway to engine repairs, from the flight attendants "service" of beverages to the pilots "service" of flying the plane. Harris unreasonably eliminates the rights of consumers to sue a common carrier that owes consumers the highest duty of care.

[1]Because the preemptive scope of the ADA does not reach to private contract terms, the allegation of a breach of contract claim, either implied or express, may withstand a motion for summary judgment. See American Airlines, Inc. v. Wolens (1995) 115 S.Ct. 817, but see, Stone v. Continental Airlines, Inc. 905 F.Supp. 823,826.

WALKUPDATES

Dan Kelly has been requested to serve as a faculty member by The Rutter Group for its upcoming program teaching medical terminology to attorneys. The program will be held in Los Angeles, San Diego, Santa Ana and San Francisco. In September, Dan will travel to New Hampshire for the quarterly Board of Governors meeting for the International Society of Barristers. In addition to serving as a board member, Dan was also recently named to the Editorial Advisory Panel for the Barrister's quarterly publication...In addition to occupying himself as president of the San Francisco Trial Lawyers Association, Mike Kelly had been busy on the C.L.E. circuit. In May Mike served as a panelist at a Kaiser Risk Management Seminar entitled "Managing an Unexpected Patient Care Outcome." In June he served as a faculty member for the National Institute of Trial Advocacy's Western Regional Program. In July, Mike was asked to teach at NITA's National Session in Boulder, as well as its Pacific Regional in San Diego....In June, Dan Dell'Osso was asked to address the Aerospace Industry Association on federal attempts to change aviation tort liability. Dan's audience included corporate counsel and management representatives from major aerospace companies including Aerojet, Allied Signal, Boeing, Lockheed-Martin and McDonnell-Douglas....In July, Dan spoke to the A.T.L.A. 50th National Convention on the topic of discovery abuse...Cynthia Newton was recently appointed to the San Francisco Trial Lawyers Association's Community Involvement Committee, charged with the responsibility of programming S.F.T.L.A.'s outreach programs and community service needs...Pictured to the left are our summer associates. The happy group includes, from left to right, Angela Burdine (McGeorge School of Law), John Donald (Duke University School of Law), Lindsay Sturges (U.C. Hastings College of Law), Arash Moussavian (U.C. Hastings College of Law), and Andrew MacKay (Boalt Hall School of Law)

Resurrected Assumption of Risk Doctrine Confounds Courts of Appeal

In 1992 the California Supreme Court handed down two opinions resurrecting the defense of primary assumption of risk. In Knight v. Jewett (1992) 3 Cal.4th 296 and Ford v. Gouin (1992) 3 Cal.4th 339, the court characterized the defense as a situation where no duty is owed to protect the plaintiff from the particular risk that caused the injury. Primary assumption of risk acts as an absolute bar to recovery.

This articulation of the defense introduced the potential danger of result-oriented manipulation of the concept by lower courts. In Volume VII, no. II of "Focus on Torts" (Fall 1993), we discussed Knight and Ford and predicted "[u]ntil the [Supreme] Court further clarifies this issue, the rest of the judiciary must fitfully struggle with the doctrine and its application." Fulfillment of this prediction can be found in the First District Court of Appeal's recent opinions which serve as pluperfect examples of how appellate courts have been implementing the directive of the Supreme Court — with conflicting results.

Staten v. Superior Court (1996) 45 Cal.App.4th 1628 demonstrates the difficulty of analyzing primary assumption of risk as a question of law. In Staten, Division Five held that an injured skater had no cause of action against another skater, or the ice rink where they were practicing, and mandated a summary judgment for the defendant. This was despite expert testimony that the activity causing the injury was not an inherent risk of the sport. The court found such expert testimony to be inadmissible because the question of duty is one of law. In so holding, the court called out for help from above. "The Supreme Court would do well to provide further guidance by clarifying the rule book. Trial courts deciding these questions on summary judgment should not be faced with determining the inherent risks of an unfamiliar sport while bereft of the helpful factual input of experts. We suppose that a trial judge could receive expert evidence on the factual nature of an unknown or esoteric sports activity, but not expert evidence on the ultimate legal question of inherent risk and duty. This, however, is not our call; it is for the Supreme Court, in baseball parlance, to declare this suggestion fair or foul." (Staten at 1636.)

In Bushnell v. Japanese-American Religious & Cultural Center (1996) 43 Cal.App.4th 525, a judo student was injured while practicing a maneuver with his instructor. In a split decision, Division One of the First District affirmed summary judgment for the defendant, stating that this sort of accident is an inherent risk in the sport of judo. Following Knight, the court reasoned that unless there is reckless behavior on the part of the defendant or other risk-increasing conduct, there is no breach of the duty of care, and the doctrine of primary assumption of risk applies. Because the Supreme Court mingled the concepts of duty and recklessness in Knight, the Bushnell court (in result-oriented fashion) decided the questions of breach and duty at the same time.

Justice Dossee's dissent focused on the role of the defendant, a factor mentioned in Knight as being relevant to the question of duty. Turning to the common law, he found a duty of care owed by coaches to students, and would have returned the case to the lower court to determine if there was a breach of this duty.

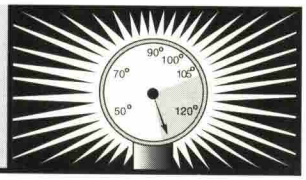
A final First District case, Regents of University of California v. Superior Court (Roettgen) (1996) 41 Cal.App.4th 1040, involved the death of a student in a rock climbing class. Because of the inherent risk in that activity, the Division One panel found no duty of ordinary care owed by the instructor to the student. The Roettgen court treated the defense of primary assumption of risk as an exception to the general rule of liability. Disregarding the traditional duty analysis of foreseeability, the court applied its own guideline, distilled from Knight, examining the relationship of the parties to the activity and to each other. The justices also looked to the rationale behind excusing participants from liability in sports cases, and weighed the chilling of participation and harm to the "fundamental nature" of the sport against a finding of liability.

The decisions in the area of primary assumption of risk in a sports context are hardly uniform, and the decisions of the First District are in direct contradiction to cases in other districts. The most conspicuous schisms pertain to the admissibility of expert testimony on the inherent risks in a given activity, the relevance of a student-teacher relationship, and the result-oriented analysis of duty and breach.

Prior to Knight and Ford, California courts defined assumption of risk as the voluntary acceptance of a risk that may have been caused by another. As Justice Kennard noted in her Knight dissent, since the 1975 decision in Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, a long line of California cases established that implied assumption of risk survived as an affirmative defense, notwithstanding Li's adoption of comparative fault. The Knight court disregarded the harmony of the lower courts, and changed a question of consent into one of duty, completely abolishing a time-tested defense. Worse, the court tangled the notions of duty and breach, allowing lower courts to decide questions historically and better left to a jury.

RECENT CASES

PRODUCT LIABILITY



McDaniel v. Cal Spa (Ala.Sup.Ct. No. 754032-1)

Daniel Dell'Osso and Daniel Kelly mediated resolution of this tragic wrongful death case in the amount of $2,500,000. Plaintiffs in the action were the surviving parents of a 4-year-old girl who was burned over 80% of her body when she jumped in the family hot tub. The surviving parents (who were physical therapists) had purchased the hot tub from defendant Cal Spa for use by the family, and, in their practice. Alleged to be a top-of-the-line model, the device was touted as completely automatic.

On the day of the incident, Ms. McDaniel opened the lid on the tub and her 4-year-old daughter hopped in. Unknown to either mother or daughter, the temperature control device on the tub had malfunctioned and the internal water temperature had reached nearly 150°. The child was scalded before her mother's eyes. She survived for 61 days following the incident, incurring pre-death medical bills in excess of $600,000.

In addition to alleging that the thermostat failed to function properly, plaintiffs were also able to demonstrate that the wiring for the automatic safety shut-down did not conform to manufacturing specifications.

The entire settlement was paid by the defendant manufacturer who reserved its right to proceed against component manufacturers. The settlement was paid in satisfaction of the parents' wrongful death claim, the estate's claim for pre-death special damages, and the mother's emotional distress claim.

Anonymous Minor Patient v. Doe Compounding and Roe Hospital

In Anonymous Minor Patient v. Doe Compounding and Roe Hospital (confidential settlement), Paul Melodia and Kenneth Facter obtained a $600,000 settlement on behalf of an 8-year-old child who sustained coma and neurologic damage as a result of taking improperly mixed parenteral nutrition solution. Defendants in the action were the manufacturer of the compounding machine, as well as the entity employing the pharmacist responsible for the mixture.

The minor plaintiff had been disabled since birth as a result of short bowel syndrome. All nutrition was delivered parenterally. Shortly after the child's third birthday he sustained an episode of hyperglycemia. Subsequent investigation indicated that the nutrition solution contained excessive dextrose.

Defendants contended that the child's multiple pre-existing disabilities caused or contributed to most of his claimed injuries, and that even without severe hyperglycemia, long term TPN ingestion results in liver damage.

Plaintiff proceeded on a Summers v. Tice theory, alleging that the only explanations for the improper mixture were a failure of the compounding machine or an error by the pharmacist.

Past and future special damages were highly disputed, as were issues of medical causation. The settlement was apportioned $500,000 to the child with the balance being apportioned to repayment of medical liens and payment to the parents for the reasonable value of nursing services.

MEDICAL NEGLIGENCE

Goering v. V.M.C.

In Goering v. V.M.C. (Fresno Co.Sup.Ct. No. 543567), Richard H. Schoenberger concluded a medical negligence action on behalf of a 28-year-old man who sustained brain damage when, it was alleged, that physicians in the employment of the defendant failed to timely recognize and treat an aneurysm. Under the terms of the settlement, an initial lump sum payment of $250,000 was made, an outstanding Medi-Cal lien was satisfied, and an annuity was established making payments at $2,000 per month, increasing 3% per annum. Because the plaintiff is incompetent, the settlement funds were placed into a special needs trust to allow the plaintiff to maintain his Medi-Cal eligibility. The present cash value of the settlement was estimated at $782,000.

The underlying liability involved plaintiff's claim that the defendant facility mistook an aneurysm for a benign cyst. Defendants did not dispute the misdiagnosis but claimed that there is no causal link between any delay in diagnosis and rupture of the aneurysm.

Survivors v. Anonymous Physician

In Survivors v. Anonymous Physician (Confidential Settlement), Ron Wecht obtained an all-cash settlement in the amount of $900,000 for the wrongful death of a 29-year-old wife and mother survived by her husband and infant son.

The defendant obstetrician, plaintiffs alleged, failed to appreciate elevated blood pressure and proteinuria during the course of the mother's pregnancy. Plaintiffs allege that these signs of pre-eclampsia (pregnancy-induced hypertension) demanded closer and more frequent monitoring of the mother.

The defendant physician claimed that the mother's blood pressure elevation was within acceptable norms and was not diagnostic of pre-eclampsia. Further, he alleged that additional monitoring would have done no good as the pre-eclampsia developed rapidly between normal prenatal visits. Several weeks before the decedent's estimated due date she developed headaches and seizures. She was rushed to the nearest hospital where her infant son was delivered on an emergent basis. Tragically, the elevated blood pressure had caused a brain stem hemorrhage which caused the mother's death two days after her son's birth.

The settlement included compensation in the maximum amount ($250,000) for non-economic damages under MICRA, as well as an amount equal to the present value of the mother's future earnings.

Patient v. Regional Medical Center

In Patient v. Regional Medical Center (Central California/ Confidential Settlement), Michael A. Kelly and Cynthia F. Newton recovered $487,500 on behalf of a 58-year-old medical office receptionist whose doctors failed to timely diagnose and treat non-oat cell lung cancer.

Three years prior to her diagnosis, plaintiff underwent an annual physical exam which included a screening chest x-ray. Though the chest x-ray

revealed a suspicious lesion, and the diagnostic radiologist commented on its existence, no one ever advised the plaintiff that repeat studies were necessary. The plaintiff's primary care physician, the radiologist, the medical center and the physician who bought the primary care doctor's practice all failed, during the succeeding three years, to communicate the abnormal results to plaintiff.

Almost three years to the day following the abnormal film, plaintiff reported to her physician that she was suffering from shortness of breath. At that time, repeat films identified the lesion. Comparison with the earlier films verified that it was visible in 1992.

Defendants claimed that although a breakdown in communication had occurred, plaintiff's disease had already progressed to a stage, in 1992, where her prognosis was likely terminal, and that she could not meet her burden of proof on causation.

Prior to trial, settlement was achieved with the medical center and one subsequent treating physician. Settlement with the radiologist and initial primary care physician occurred after one week of trial.

Thompson v. Robinette

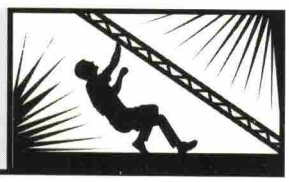
In Thompson v. Robinette (Santa Barbara Sup. Ct. No. SM94073), Cynthia F. Newton negotiated a $175,000 settlement on behalf of a 62-year-old male who suffered an 18 month delay in the diagnosis of prostate cancer. As a veteran, plaintiff sought routine medical care at the Vandenberg Air Force Base Clinic where a PSA test was ordered as part of an annual exam. The results were either lost or misplaced, and plaintiff was not advised of the results of the PSA test for over a year and a half. The second PSA blood sample indicated a value three times greater than that present previously.

Plaintiff claimed the delay caused his condition to worsen from treatable to terminal. Defendents alleged that the failure to follow up on the original PSA test was not a sustantial factor in causing his worsened prognosis under Dumas v. Cooney (1991) 234 Cal.App.3d 1593.

In addition, the defendant claimed that any delay in diagnosis was of no consequence because the Gleason grade of plaintiff's tumor was high, suggesting an ominous prognosis regardless of the date of discovery.

The case was settled three days prior to trial.

WORKPLACE INJURIES



Hicks v. Webcor

In Hicks v. Webcor (San Mateo Sup.Ct. No. 387906), Michael A. Kelly and Michael J. Recupero obtained a settlement on the eve of trial having a net value of $1,105,000 on behalf of a 39-year-old pile butt operator injured while assembling sections of crane boom at a job site south of San Francisco.

Plaintiff, an employee of the pile driving subcontractor on an office building construction job, had been instructed to assist in disassembly of crane boom sections. This was ordinarily not his job.

Plaintiff alleged that the manner in which the job was being undertaken was unsafe, and that this fact was known to both the owner and general contractor. In addition, plaintiff alleged that the general contractor was behind schedule on the project, and that its desire for expediency resulted in a total breakdown of job site safety supervision. The defendant alleged the accident was exclusively the product of plaintiff's negligence, and that of his employer, who had undertaken a contractual responsibility to provide safety supervision.

Plaintiff sustained traumatic crush injuries to both feet and ankles when a 500 lb. section of the boom collapsed on him. Residual limitations included deformity of the right foot, chronic pain and an inability to walk normally. Medical bills incurred to the time of trial totalled $318,000. Under the terms of the settlement, arrived at four days before trial, the general contractor contributed $600,000. Additionally, the worker's compensation carrier waived a lien of $390,000 and paid an additional $115,000 towards settlement.

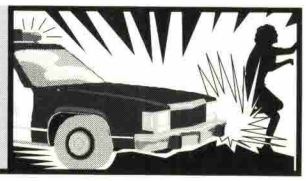
Boltman-Tyler v. Home Depot

In Boltman-Tyler v. Home Depot (U.S.D.C No. C-94 4026), John Echeverria and Michael J. Recupero recovered $280,000 on behalf of a 33-year-old manufacturer's representative injured when a Home Depot forklift operator pushed plumbing supply boxes off of a storage rack above her. The boxes landed on plaintiff's right, major hand, causing tenosynovitis and tendon sheath scarring. She was unable to work for over a year. She claimed past wage loss of approximately $40,000 and in impairment in her future wage earning capacity.

Home Depot claimed that plaintiff's complaints were wholly subjective without objective evidence of injury and disputed the nature and extent of her claimed disability.

Although Home Depot initially denied knowledge of any prior similar incidents, through discovery plaintiff was able to demonstrate frequent similar accidents resulting from the defendant's attempt to transform commercial warehouses into retail stores. The settlement was reached shortly after plaintiff's motion for leave to amend to seek punitive damages was granted.

GOVERNMENT LIABILITY



Parents v. Municipal Police Agency

In Parents v. Municipal Police Agency (confidential settlement), Kevin Domecus obtained a $700,000 cash settlement for the parents of a 17-year-old female high school student who was struck and killed by a police car.

The accident occurred at approximately 2:45 p.m., on a clear and sunny day, on a four lane street adjacent to the decedent's school. There were no traffic control devices at the crosswalk, although it was marked by signs as a school crossing.

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RECENT CASES

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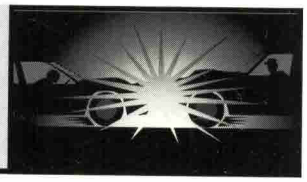
The deceased was struck shortly after she entered the crosswalk. The police officer, who was responding to a non-emergency call, without lights or siren, told investigating California Highway Patrol officers that he never saw the pedestrian until after the impact. The officer's speed was calculated at 32 m.p.h. Witnesses testified that the child never looked to her left as she entered the crosswalk. The Highway Patrol investigators cited her as the primary cause of the accident for walking directly in front of the oncoming car.

The plaintiffs contended that the officer was speeding and inattentive, and that he knew from experience that the area was heavily populated by students in the late afternoon. The defendant municipality argued that the plaintiffs' daughter simply failed to look for oncoming traffic and that the officer had no chance to avoid the collision.

The plaintiffs emigrated to the United States from Afghanistan in 1979. They have one other daughter who is just starting high school. In addition to the monetary settlement, the defendant agreed to fund a memorial to the decedent at her former high school.

VEHICULAR NEGLIGENCE



Burns v. Unigard

In Burns v. Unigard (Uninsured Motorist Arbitration) Jeffrey Holl recovered $300,000 on behalf of a 23-year-old Sonoma County woman injured in a head-on collision. The settlement, constituting the total available uninsured motorist policy limits, was in compensation of an anterior cruciate ligament rupture and medial meniscus tear of the right knee. The injuries required four surgeries to repair. Plaintiff's rehabilitation was compromised by the fact that the injured knee had undergone numerous prior injuries.

Defendant contended that the pathology in plaintiff's right knee preexisted the subject accident given her history of symptoms and prior orthopedic examinations.

Plaintiff claimed medical bills of $85,000 and lost wages of $16,000. Defendant vigorously disputed the special damage claims. Residual complaints included pain, stiffness and some limitation of motion in the right knee.

Guan v. Reichell Engineering

In Guan v. Reichell Engineering (S.F.Sup.Ct. 972187), Richard H. Schoenberger and John Echeverria negotiated a $1,250,000 settlement on behalf of the surviving husband and four adult children of a 63-year-ol pedestrian killed on June 7, 1995. The accident occurred at the corner of 10th and Mission Streets in San Francisco. While the surviving husband looked on, the deceased crossed Mission Street and was struck by the defendant's plumbing truck.

Plaintiffs alleged that the operator of the plumbing truck was inattentive and preoccupied with attempting to catch up with a driver whom he alleged had cut him off moments earlier. It was claimed that this phantom vehicle was responsible for diverting the driver's attention from the road.

The settlement included compensation for the survivors' wrongful death damages and the Dillon v. Legg emotional distress claim of the husband, who sustained extreme and lasting emotional distress after witnessing his wife's tragic death.

PREMISES LIABILITY

Custodian v. Pacific Stock Exchange

In Custodian v. Pacific Stock Exchange (S.F. Sup. Ct. No. 965007), Erik Brunkal obtained a $66,000 sttlement on behalf of a female janitor who tripped and fell as a result of a raised section of floor stripping. The stripping was in the process of being replaced by an ouside contractor who had covered the floor with mats during the day, but removed them at the end of each trading day. The incident occurred roughly one and one-half hours after a security guard had noted the hazard, but taken no steps to remedy or warn of the condition. The Exchange claimed that the defect was the responsibility of the contractor, or in the alternative, should have been warned of or remedied by the security company.

The settlement was achieved two weeks before trial. The Exchange, the contractor, and the security service all contributed to the settlement. Also as part of the settlement, the worker's compensation carrier agreed to accept $13,000 in full and final satisfaction of a $72,000 lien.

We are available for association and/or referral in all types of personal injury matters. Fees are shared with referring counsel in accord with Rule of Professional Conduct 2-200. 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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