WALKUP, MELODIA, KELLY & ECHEVERRIA

FOCUS on torts

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# Firm Opens New Offices

In 1965, Bruce Walkup, having developed a national reputation for his skill as a trial lawyer, decided it was time to move from his cramped quarters in the old Jack Tar Tower, located at Geary and Franklin. Coincidentally, Hartford Insurance had just completed construction of its west coast headquarters at 650 California Street.

When the Hartford Building opened, Bruce and his staff of nine moved into 4,000 feet of space on the 30th floor. As time passed the office grew, more space was acquired, and Hartford sold the building. By 1987, the firm occupied the entire 30th floor. Until his death, Bruce's corner office commanded a spectacular view of both Alcatraz and the Marin headlands. The offices were spacious, beautifully decorated, functional and impressive to visitors. However, as originally built-out and remodeled over the years, no one anticipated the technological needs of a law office in the 1990's. We were missing a few things: cables, data ports, modems, networking capability, etc.

In November of 1996 a decision was made to secure and build out new space that would afford us (and our clients) the opportunity to utilize state-of-the-art systems for communications, word processing, discovery and legal research.

At about the same time we commenced negotiations with Trammell Crow & Associates (our landlord) to extend our stay at 650 California. Unfortunately, because our plans required complete gutting and build out, and because the interior structure of the 30th floor contained asbestos which had to be abated, it was impossible for us to remain at our address of over 30 years. With the cooperation of our building owners, however, we were able to obtain mirror image space on the 26th floor.

A search was then undertaken for the "right" architect for the job. Aston Pereira & Associates, who had previously designed space for firms including Leboeuf, Lamb, Greene, & McRae, and Townsend, Townsend and Crew, were selected. Working together with the general contractor, Carli Construction, the team has fashioned a state of the art law office which combines the best of

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# M.I.C.R.A. AMENDMENTS INTRODUCED

A bill modifying California's 1975 medical malpractice reform statute has emerged from the Assembly Judiciary Committee. The bill would amend Civil Code §3333.2 to raise the general damage "cap" for non-economic losses in medical negligence cases from $250,000 to $700,000. In addition, it would eliminate the cap in six specified circumstances.[1]

For 22 years, MICRA's damage cap has limited awards against culpable health care providers to $250,000 for intangible losses regardless of the actual damage sustained.

When enacted, the stated purpose of MICRA was to remedy a perceived crisis in health care delivery[2]. Unfortunately, the most significant effect of the legislation has been to arbitrarily undercompensate seriously injured plaintiffs. It can be argued that the MICRA legislation has created a "patients crisis" in place of the alleged "insurance crisis" it sought to remedy.

The limitation on non-economic damage recovery was only one component of the MICRA package. Yet, this single component has engendered more unfairness and inequity than any other part of the statutory scheme.

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# HMOs Achieving Healthy Profits

According to *Business Insurance*, HMOs are achieving healthy profits.

The June 16, 1997 issue of the insurance industry magazine noted that Pacific Care Health Systems (based in Cypress, California) reported 43.5 million dollars in net income (up 36.5%) for the first quarter of 1997. Los Angeles-based Maxicare reported 6.1 million in earnings, up 7%, over the first quarter of 1996. Wellpoint Health Networks, also based in southern California, reported 50.8 million dollars in net income. Foundation Health Systems of Los Angeles (formed by the merger of Foundation Health and Health Systems International) reported 58.5 million dollars in net income.

Judy Greenwald, writing for *BI,* quoted a spokesperson for Blue Cross of California as being bullish about the company's profits for 1997.

In 1996, HMO stocks advanced, on average, 11.68% for the year. This compared to a 6.49% increase for the insurance industry overall, and just a 12.6% hike in the S&P 500.

On the malpractice insurance front, all of California's medical malpractice insurance carriers reported substantial profits and surpluses. Two California carriers, SCPIE and The Doctor's Company, are now looking at expanding nationally — obviously figuring that they can make a profit without California's MICRA damage caps and attorney fee limitations in place.

For the last reporting year, California's largest medical malpractice insurers reported financial results which showed the following: MIEC, net income of $15,354,276; NorCal Mutual, net income of $18,500,257; The Doctors Company, net income of $14,638,618; and, SCPIE, net income of $52,969,992. The average surplus for the four carriers as of the end of fiscal 1996 was in excess of $210,000,000.

## M.I.C.R.A. Amendments Introduced

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Particularly penalized have been older persons, young children, homemakers, and others who do not have significant "economic value" as defined by MICRA.

Over ten years ago, in Yates v. Pollack,[3] a patient died as a result of an improperly performed gall bladder operation. The surviving wife and children brought a wrongful death action against the surgeon.

After the jury determined that the death was a result of the surgeon's negligence, in conformance with appropriate California damage instructions,[4] the jury returned a verdict totaling $1,603,560. $103,560 of this sum represented economic losses. $1,500,000 represented compensation for loss of love, companionship, comfort, affection, society, moral support and consortium.

The general damage award was justified by the evidence. The husband and wife were deaf mutes who had been married for 35 years. They had an extremely close and loving relationship enhanced by their shared disabilities.

On appeal the Court of Appeal imposed the $250,000 cap of Civil Code §3333.2 and denied recovery of $1,250,000 awarded by the jury, reducing the total verdict to less than 25% of the jury's award ($353,560).

The $250,000 cap has also become a negotiating tool. Most malpractice insurers will not offer $250,000 in settlement — using the cap offensively. Knowing that their maximum exposure is the MICRA ceiling, insurers refuse to offer this sum knowing the plaintiff will incur discovery costs, expert fees and legal fees in pushing the case towards trial. Using MICRA offensively, malpractice insurers have disproportionate leverage over legitimate claimants — regardless of culpability.

Another piece of proposed legislation, Assembly Bill 1220 introduced by Assembly member Carole Migden, proposes to eliminate the $250,000 cap in cases where the patient can prove that the health care provider refused or delayed evaluation for its own economic benefit, or failed to refer a patient because of HMO constraints.[5]

Both bills have been roundly attacked by the California Medical Association and other physician and hospital lobbying groups. The attacks identify them as attempts to further the interests of "trial lawyers." This is not a trial lawyers' issue — it is a patient rights issue. Neither of the bills seeks to change the MICRA attorneys' fees limitations, lighten the burden for seeking punitive damages, open the way for any type of

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# NHTSA Moves To Make Sport Utility Vehicles Safer

The National Highway Transportation Safety Administration has begun development of a dynamic test to reliably measure resistance to rollover or tipping in sudden maneuvers. At present, no such test exists.

Consumers Union precipitated the recent initiative by filing a petition for rule making to develop consumer information on rollover susceptibility. Consumers Union (in its magazine Consumer Reports) has often criticized certain sport utility vehicles for susceptibility to rollover.

In the petition, Consumers Union alleges that too many occupants die or are injured in rollovers. A reliable dynamic test is "particularly important because SUV's have rapidly replaced the family station wagon for many consumers."

A NHTSA spokesman was quoted as saying that the agency has taken steps in the past to help occupants survive rollover crashes: a rule requiring enhanced padding on upper interiors of cars and light trucks, as well as improved side door latch requirements to help prevent ejection, have both been recently promulgated. Ongoing research is addressing improved crush-resistance, side window strength, and advanced occupant restraint systems.

Sport utility vehicles account for almost 70% of all rollover fatalities. When the present rating system is established and the results are made public, consumers will have substantially more safety information on which to rely in making purchasing decisions.

NHTSA also recently called for auto makers to redesign airbags to reduce injuries to small occupants and children. Although credited with saving over 1,800 lives in the last ten years, at least 30 children and an equal number of small adults have been killed by airbags.

Rear-facing child seats installed in front seats are incompatible with airbags because when the bag deploys it thrusts the child into the vehicle seat at a very high speed. Technological solutions exist to make child seats safe in the front passenger location when an airbag is present. These include a key-operated switch on the dash that disables the airbag and/or weight sensors (BMW) and passive detectors (Mercedes-Benz) which sense whether or not an adult is seated in the passenger seat.

Recently, each of the "Big 3" U.S. auto makers sent letters to car owners enclosing airbag warning labels reminding drivers to always use their safety belts and to place children only in the rear seats.

In June, Ford announced that it had perfected a "second generation" airbag design to provide greater safety benefits to the broadest range of vehicle occupants. Every Ford product in North America will have the new airbag system for the 1998 model year. The bags, which deploy at lower power, reduce the risk to occupants who are not wearing seat belts or who are seated close to the dash.

Additional information regarding passenger restraint safety and airbag failures can be obtained through the new NHTSA website at http://www.nhtsa.dot.gov. Information also remains available through the Auto Safety Hotline at (800) 424-9393.

## M.I.C.R.A. Amendments Introduced

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"windfall recoveries," or otherwise make the burden of proof for plaintiffs any lighter.

Eliminating the cap in circumstances where physician conduct is particularly onerous (e.g. circumstances involving sexual abuse, alcohol abuse, drug abuse) will result in some element of deterrence — deterrence which does not now exist because almost all California physicians are over-insured and therefore rarely, if ever, face any exposure for damages in excess of the MICRA limits.

California's system of health care delivery, like many other social systems in our society, is imperfect. Our system for addressing civil wrongs, while similarly imperfect, is still the world model for fairness.

Our legislature, spurred by poor insurance underwriting practices and a significant increase in claims frequency, enacted MICRA in 1975. At that time, the legislature recognized that some plaintiffs would be undercompensated as a result of the damage cap. Now, some 20 years later, most injured plaintiffs are undercompensated. This result was never intended.

It is time to modify MICRA. Adjustments can certainly be made without disrupting the ability to control malpractice premiums thereby averting another "insurance crisis." Hopefully, this time around, the focus will be on the victims and not the wrongdoers.

[1]These include cases where the victim is under 14; the injury has been caused by a provider under the influence of drugs or alcohol; a history of three prior disciplinary actions, etc.

[2]Fein v. Permanente Medical Group (1985) 38 Cal.3d 137, 211 Cal.Rptr. 368.

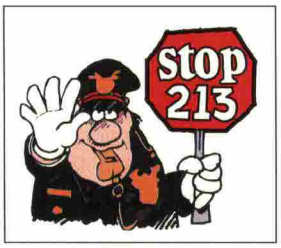
[3]Citation: (1987 2d Dist.) 194 Cal.App.3d 195, 239 Cal.Rptr. 383

[4]BAJI 14.50

[5]The Migden bill purports to remedy problems created by the myopic focus of HMO's on cost containment. In reality, HMO's are not subject to malpractice liability in California because of state statutes and the general preemption produced by E.R.I.S.A.

# ENFORCEMENT OF PROP 213 STAYED

San Francisco Superior Court Judge William Cahill has enjoined enforcement of major portions of the 1996 initiative which precludes uninsured motorists from collecting non-economic (general) damages. Cahill let stand the provision of the initiative which prohibits convicted drunken drivers from recovering pain and suffering damages, and a third provision blocking convicted felons from recovering non-economic damages.




The lawsuit to block Prop 213's enforcement was brought by the California Congress of Seniors. It claimed that the statute, as it related to uninsured motorists, was violative of both the State and Federal constitutions. Cahill agreed, finding that the initiative's provisions treated uninsured drivers more harshly than felons:

"Proposition 213's provisions giving more rights to fleeing felons than to innocent uninsured motorists arbitrarily distinguishes between these two groups of citizens and serves no legitimate state purpose, and is therefore unconstitutional," Cahill wrote.

Cahill found that the denial of pain and suffering recovery to uninsured persons, without regard to fault or the circumstances that brought about their uninsured state, was arbitrary and without rational relationship to any legitimate state purpose. He rejected arguments offered by the California Attorney General's Office that the initiative was intended to combat "skyrocketing insurance costs" in the manner of the Medical Injury Compensation Reform Act of 1975.

In granting a preliminary injunction, Cahill found that the plaintiffs had established a likelihood of success at trial of proving the uninsured motorist provisions of Proposition 213 unconstitutional.

Cahill enjoined the State Insurance Commissioner from spending any state funds or resources for the purpose of implementing Civil Code §§3333.4(a)(2), 3333.4(a)(3) and 3333.4(b). Although without power to enjoin trial courts from implementing the provisions of the Insurance Code, the clear message of the ruling was to invite the First District Court of Appeal to rule on the constitutionality of the measure as quickly as possible.

Prior to Cahill's decision, Judge Stuart Pollak of the San Francisco Superior Court had issued a ruling finding that retroactive application of the act, banning the recovery of non-economic damages by motorists who were uninsured, and whose cases were not tried within the specified time period after passage of the measure (Civil Code §3333.4) was also unconstitutional.

# PROP 51 INAPPLICABLE IN PRODUCT LIABILITY CASES

Since the abolition of joint and several liability in negligence cases accomplished by Proposition 51 (Civil Code §1431 et seq.), manufacturers in product defect claims have sought to avoid liability by shunting fault onto others in the marketing chain.

This has manifested itself in attempts to blame retailers, component suppliers, assemblers and others. Plaintiffs have found themselves vexed. Although traditional strict liability principles historically permitted consumers to recover 100% of their losses from any entity in the commercial stream, uncertainty about how Proposition 51 apportionment principles might be applied resulted in many claimants feeling that it was mandatory to sue each and every entity in the distribution chain.

Finally, two California Appellate Courts have confirmed what most commentators believed all along: joint and several liability remains unaffected in the strict liability context by the adoption of Proposition 51.

Since Greenman v. Yuba Power (1963) 59 Cal.2d 57, a manufacturer has been strictly liable in tort when an article it places on the market, knowing it is to be used without inspection for defects, proves to have a defect which causes injury.

Later cases expanded the zone of responsibility beyond manufacturers. The rule ultimately developed that any entity in the chain of production and marketing, from original manufacturer, down through distributor and wholesaler, to the retailer, is jointly and severally liable. (Kaminiski v. Western MacArthur Company (1985) 175 Cal.App.3d 445)

In Moreno v. Kress & Company (1997) 54 Cal.App.4th 782, the Third District was faced with a situation where a 3-year-old boy was badly injured when defective caps exploded in his pocket. The caps had been purchased from the defendant retailer. The foreign manufacturer of the product could not be identified, and the distributor was bankrupt.

Claiming that it was faultless in the design or manufacture, the retailer claimed it should be permitted to escape liability under Civil Code §1431.2.

The trial court disagreed. The Appellate Court affirmed. "Proposition 51 requires an apportionment of non-economic damages based on each tortfeasors **comparative fault.**"

Citing respondeat superior and nondelegable duty cases where "fault" is not an issue (Miller v. Stouffer (1992) 9 Cal.App.4th 70; Rashtian v. Brac, Inc.

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(1992) 9 Cal.App.4th 1847), the Third District held that "strict product liability evolved from the same public policy interests as respondeat superior, nondelegable duties and permissive user statutes. In each case, liability is derivative. As a matter of law, and not as a matter of fault, one who benefits from the injury producing activity is held financially accountable to the victim." (54 Cal.App.4th at 792)

On different facts, the Fourth District reached the same conclusion in Wimberly v. Derby Cycle.

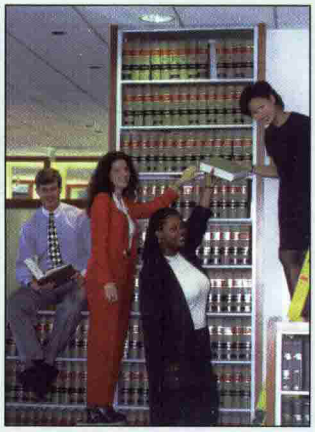
In Wimberly, the plaintiff was severely injured when the mountain bike he was riding crashed after the front forks failed.

Derby had subcontracted the manufacture of the forks to a foreign company. It sought to have fault apportioned to this company which had welded the forks in a manner inconsistent with the plans.

A unanimous Third District panel held that reducing or eliminating a defendant's responsibility for non-economic damages would thwart the public policy of insuring that the cost of injuries caused by defective products is borne by those putting them on the market. If parties in the chain of distribution could escape liability for non-economic damages, they would avoid natural risks incident to their business. The court held that Proposition 51 had no application in a strict product liability case where, as here, plaintiffs' injuries are caused solely by a defective product. "A strictly liable defendant cannot reduce or eliminate its responsibility to plaintiff for injuries caused by a defective product by shifting blame to other parties in the products chain of distribution who are ostensibly more at fault."

These two rulings protect consumers and prevent retailers of goods made overseas (including third world countries where quality control standards are non-existent) from escaping liability for selling dangerous products. Many, many products on the market today have been made offshore by laborers with little or no training. To permit retailers or others involved in the marketing chain to reap significant profits, and avoid accountability for "fault" in design or manufacture, would have been inconsistent with the principles enunciated by the California Supreme Court more than 30 years ago.

# WALKUPDATES



Cynthia Newton, and her husband Mark, welcomed twins to their family on July 21, 1997. We are pleased to report that mother and infants George and Carol are healthy, happy and doing fine...Dan Kelly participated in the International Society of Barristers Board of Governors Meeting held in Sun Valley, Idaho. In May, Dan was a principal presenter for The Rutter Group's "Medical Evidence in Personal Injury Cases" day-long seminars in Costa Mesa, Los Angeles, San Diego and San Francisco... Dr. Kenneth Facter spoke on managed care issues to patients attending seminars in San Francisco and Seattle. The programs were sponsored by the non-profit corporation "Taking Control of Your Diabetes." Ken also served as a visiting professor of medicine at the University of California San Diego...In May, Mike Kelly served as a faculty member at the National Institute of Trial Advocacy's Southwest Regional Program held in Albuquerque, New Mexico. In June, Mike participated as a panel member at a day-long Association of Defense Counsel Seminar. Mike spoke on the plaintiff's perspective in litigating dangerous condition of public property cases... The Mighty Mouthpiece softball team, now in its third decade of existence, emerged victorious over more than 30 other teams in the San Francisco Lawyers League's Spring Season. Skippered by Kevin Domecus, the Mouthpiece emerged victorious in the title game over the Ninth Circuit...Dan Dell'Osso attended the recent ATLA Convention in San Diego in his role as first vice president of ATLA's Product Liability Section...Rich Schoenberger served as a faculty member at the N.I.T.A. Western Regional Trial Skills Program held at Boalt Hall in June. In April, Rich spoke at an S.F.T.L.A. seminar on utilizing demonstrative evidence in automobile liability cases... Jeff Holl was elected chairperson of Archbishop Riordan High School's fiftieth anniversary capital campaign committee... Pictured above are our four summer associates: from left to right Andrew Hothem (University of Alabama), Nicole Vance (U.C. Hastings), Najuma Henderson (Georgetown University) and Doris Cheng (University of San Francisco).

## Firm Opens New Offices

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new technology while retaining an impressive and professional law office "feel."

Utilizing Microsoft's NT network, word processing efficiency has been increased. Library space has been reduced by placing 80% of our library materials on CD-rom, accessible through the network.

Conference room space which had been at a premium on the 30th floor has been doubled. Our new reception area (pictured above right) has been designed to take advantage of the spectacular bay views (perhaps the best of any office building in the financial district).

Utilizing custom made cabinetry, built-in desks and work stations, the space is a model of efficiency. Though we are

presently handling more cases than we ever have, a state of the art high density filing system has permitted us to actually reduce the size of our filing room and central supply area.

And of course, our website is in development. Come see us on the internet. Our domain name is walkuplawoffice.com. Better yet, come see us at 650 California Street, 26th Floor.

# Recent Cases

## Recreational Injuries

### Passenger v. Boat Owner

In Passenger v. Boat Owner (S.F.Sup.Ct. No. 973864), Michael A. Kelly negotiated a cash and annuity settlement having a present value of $2,505,000 on behalf of a 25-year-old woman who suffered major neurologic injury in a boat collision on the waters of Lake Tahoe. The plaintiff was riding in a boat owned and operated by her boyfriend. The vessel was without running lights when it struck another boat broadside. Closing speed of the two vessels was in the range of 40 miles per hour.

Significant dispute existed regarding proportionate fault of the two vessel owners. Both had been drinking prior to the collision, however, neither was legally intoxicated.

Prior to the accident the plaintiff had been an excellent athlete, engaging in competitive snow skiing, softball and other sports. Following the collision she was comatose for over three weeks. Thereafter, plaintiff could not walk, talk, or perform activities of daily living. She underwent months and months of inpatient and outpatient rehabilitation.

The recovery represented 89% of the available insurance policy limits of the involved drivers, negotiated at a global mediation participated in by all five persons injured in the collision.

Under the terms of the settlement plaintiff received a seven figure lump sum payment and a 20 year annuity to provide for ongoing attendant care and rehabilitative needs.

## Vehicular Negligence


### Frank v. DeSoto Cab

In Frank v. DeSoto Cab (S.F.Sup.Ct. 971154), Daniel J. Kelly achieved a $735,000 recovery on behalf of a 42-year-old woman struck by defendant's cab while crossing The Embarcadero in a marked crosswalk on the evening of August 5, 1994.

Plaintiff's accident reconstruction expert opined that the cab was exceeding 50 miles per hour when it struck the plaintiff. Discovery into the cab company's practices regarding dispatch indicated that the vehicle was on its way to pick up a fare, and may have been in a "race" to the fare with one or more other cabs.

The defendant cab operator alleged that a phantom car ahead of it actually struck the plaintiff first, thereafter knocking her into the cab. The driver also claimed that the plaintiff was crossing against a red light.

Ms. Frank sustained significant orthopedic injuries including a comminuted tibia fracture which required rodding. Plastic surgical reconstruction of plaintiff's calf muscle was also required. Medical bills exceeded $150,000. The matter was resolved after two days of mediation.

### Heirs v. Delivery Company

In Heirs v. Delivery Company, Kevin L. Domecus concluded a wrongful death claim on behalf of the wife and four adult daughters of a 74-year-old man killed in a traffic accident.

The decedent was struck and killed by a bobtail truck while walking across the street in downtown Oakland. Plaintiffs contended that he was walking in the crosswalk and that the defendant driver, making a left turn with the green light, failed to yield the right of way as required by the Vehicle Code.

Defendant claimed that its driver was acting appropriately, that the decedent was jaywalking, and that its vehicle had already entered the crosswalk before the deceased left the safety of the sidewalk.

The point of impact was placed at the middle of the truck. The investigating police officers exonerated the truck driver from any wrongdoing.

The case was settled just prior to trial for $537,500.

### Washington v. Button Transportation

In Washington v. Button Transportation, Inc. (Alameda Sup.Ct. No. 749836-9), John Echeverria and Michael Recupero negotiated a $500,000 settlement on behalf of a family injured while driving through the I-80/I-580 Interchange. Defendant's driver lost control of his tractor-trailer and collided with a freeway support column at approximately 75 miles per hour.

The defendant's tanker was transporting 9,000 gallons of liquid petroleum gas. The fuel ignited, killing the driver, melting the roadway, and entrapping the Washington family in flames on the overpass above. Depositions of current and former employees of the defendant revealed the driver had a history of speeding. Discovery also disclosed that the defendant had received over 100 citations for violations of the Federal Motor Carrier Safety Regulations and California Motor Carrier Regulations.

The case resolved after plaintiffs' motion to amend the complaint to seek punitive damages was granted. Plaintiff's' medical specials were approximately $4,000.

### Whisnant v. Krakowsky

In Whisnant v. Krakowsky (Co.Co.Sup.Ct. No. C95-05345) Richard H. Schoenberger and Erik R. Brunkal obtained a jury verdict in the amount of $244,000 (after a policy limit demand for the defendants' $15,000 policy had been rejected by Allstate Insurance) on behalf of a 42-year-old East Bay airline mechanic who, while riding his motorcycle, was struck by a left turning vehicle at the intersection of Ygnacio Valley Road and Oak Grove Road in Walnut Creek.

Following the accident, defendant claimed that plaintiff had run a red light. The plaintiff testified that his light was green and that the defendant had turned prior to illumination of his left-turn arrow.

Plaintiff's injuries included a ruptured anterior cruciate ligament (which was surgically repaired) as well as multiple fractures. Medical bills exceeded $35,000. Notwithstanding special damages (including wage loss) three times the available policy limits, Allstate Insurance refused to make any offer of settlement until a few weeks before trial when it finally tendered the $15,000 policy. However, since the policy limit demand had expired, plaintiff refused to accept the offer and proceeded to trial.

# Recent Cases

Through the testimony of city engineers regarding the light-timing sequence, and expert opinion testimony on accident reconstruction, plaintiff was successful in proving that the defendant had violated his right of way and turned before he had the green arrow.

Because Allstate refused to timely tender the policy, plaintiff argued that it was fully responsible for the entirety of the damage award. The case settled for near the full verdict amount just prior to the hearing on defendant's new trial motion.

## Premises Liability

### Wu v. Fujii Melons

In Wu v. Fujii Melons (Alameda Sup.Ct. No. 7604J-1), Michael Recupero obtained a $132,500 settlement on behalf of an 84 year-old woman struck by a runaway dumpster at the corner of Second and Franklin in Oakland, California. Plaintiff contended the dumpster had been negligently pushed into her by defendant's forklift driver. Defendant claimed the dumpster had been sitting in the street long before plaintiff ever reached the site of her injury, and that plaintiff had simply fallen down.

Plaintiff claimed that defendant's practice of transporting produce by forklift in the Farmer's Market area (an area where pedestrians were anticipated) constituted a dangerous practice. Discovery also revealed an inadequate safety and injury prevention program.

Plaintiff, a native of mainland China, suffered wrist and femur fractures requiring surgery. After a six month period of rehabilitation she was unable to comfortably walk without a cane.

### Doleman v. Lyons

In Doleman v. Lyons (Co. Co. Sup. Ct. No. C96-02039), Daniel Dell'Osso negotiated a $122,000 settlement on behalf of a 36-year-old court reporter injured at the defendant's restaurant when she was seated in a booth containing a broken bench. As plaintiff slid along the seat it canted forward, spilling her onto the floor. She developed chronic back pain ultimately diagnosed as a herniated disc at L4-5. The herniation was treated with a microdiscectomy.

After the incident occurred, the defendant claimed that no accident had occurred (the night manager made no report) and that the bench was not broken.

After extensive investigation, plaintiff was able to identify a former employee who confirmed that the bench had been broken for an extended period of time.

Defendant also claimed that plaintiff's injury could not have occurred as alleged. Medical bills exceeded $12,000. Wage loss was highly disputed. Defendant alleged that plaintiff's court reporting income was subject to fluctuation, and that her earnings in the year before the accident were highly inflated because of her extended work on a complicated multi-party case.

## Government Liability

### Arnold v. City and County of San Francisco

In Arnold v. City and County of San Francisco (USDC No. C96-03754 MMC), Michael A. Kelly negotiated a $1,500,000 settlement on behalf of the wife and two adult daughters of a bank executive mistakenly arrested for being drunk in public by S.F.P.D. officers when, in fact, he was suffering from a subdural hematoma. Under then-existing S.F.P.D. policy, "drunks" were placed in district holding cells until they sobered up.

When the decedent could not be roused after five hours in a district station holding cell, an ambulance was summoned. By the time he was medically evaluated he had sustained global brain damage.

Plaintiffs claimed that the failure to immediately seek medical attention was a violation of accepted police practices, and that the district station officers had failed to monitor Mr. Arnold's condition as required.

As a result of this incident, the S.F.P.D. enacted new guidelines and safety standards for the handling of detainees. These require that any person exhibiting signs potentially suggestive of head injury be medically evaluated and not detained in a holding cell.

Pre-death medical and attendant care expenses exceeded $300,000. At the time of his injury, the deceased was employed as an area vice-president for a national financial institution.

The City claimed that the officers had good cause to believe Mr. Arnold was intoxicated because of the presence of an elevated blood alcohol and subjective signs of intoxication. The City also alleged that persons and entities other than itself (including the facility which called the police reporting Mr. Arnold as drunk) should be apportioned fault pursuant to Proposition 51.

The matter was settled after extended mediation with retired San Francisco Superior Court Judge Edward Stern.

## Aviation Injuries

### In Re: Air Crash Near LaMoille, Nevada

In In Re: Air Crash Near LaMoille, Nevada (Case No. CV-N95-00190), John Echeverria negotiated a $3,131,500 settlement on behalf of the heirs of a 41-year-old helicopter ski guide killed when the helicopter in which he and three clients were riding crashed in April of 1994 in the Ruby Mountains near Elko, Nevada. In addition to being a helicopter ski guide, the decedent was also a registered nurse employed by Tahoe Forest Hospital and a paramedic/fire fighter employed by the Tahoe City Fire Department. The present value of his past and future economic losses was computed to be approximately $1,200,000.

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# RECENT CASES

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The settlement was contributed to by the helicopter manufacturer and the helicopter charter company.

Plaintiffs claimed that the crash was triggered by a flameout in the copter's jet engine secondary to defective design of its air inlets. Plaintiffs also contended that the charter company was negligent in its maintenance procedures and in its failure to install engine inlet covers when the craft was grounded in snowy conditions.

Plaintiffs were surviving spouse and two-year-old son of the decedent. In discovery, plaintiffs learned that the engine manufacturer had perfected an auto-reignition kit which would have been of benefit in the weather conditions existing at the time of the crash. However, the manufacturer did not make the kit a component on its commercial helicopters.

The defendants denied any problem or defect with the copter and alleged that the crash was due exclusively to pilot error.

## MEDICAL NEGLIGENCE

### Heirs v. Urban Medical Center

In Heirs v. Urban Medical Center (Confidential Settlement), Paul Melodia successfully represented the surviving wife and adult child of a 48-year-old junior high principal who died of complications from multiple pelvic fractures after falling from the rooftop of his garage. Plaintiffs claimed that excessive protection against the possibility of pulmonary embolus (a complication of pelvic fractures) caused the deceased to develop a retroperitoneal hematoma. The treatment of choice, anticoagulation with heparin, resulted in uncontrolled bleeding into the retroperitoneum. The persistent loss of blood ultimately produced a cardiopulmonary arrest resulting in death eleven days following the fall. Plaintiffs alleged that the nurses on duty failed to properly appreciate the changes in the patient's vital signs and to adequately advise the treating physicians.

Defendants alleged that the acute injuries were sufficient in and of themselves to produce death; and further, that a failure to identify and correct retroperitoneal hemorrhage was not negligent. The treating physicians defended their conduct on the basis that they had been given inadequate information by hospital personnel. The settlement was in the amount of $500,000 representing the $250,000 MICRA "cap" and an amount equal to the present cash value of lost future support.

### Survivors vs. Physician

In Survivors vs. Physician (Confidential Settlement), Kevin Domecus concluded a wrongful death claim on behalf of the widow and two teenage children of a 44-year-old technician who died after suffering a cardiac arrest during back surgery.

The decedent had been hospitalized for an anterior and posterior fusion. Towards the end of the seven hour surgery, the anesthesiologist administered a blood transfusion using a cell saver, a device that collects the patient's blood from the surgical site and "washes" it for re-infusion intraoperatively. To accelerate the transfusion, the anesthesiologist placed a pressure generating device over the infusion bag.

The manufacturer of the cell saver warned against the use of such devices because of the risk of producing an unwanted air embolism. As the transfusion concluded, the patient suffered a massive arrest. He died from the sequelae of the arrest ten days later.

Plaintiffs claimed that the cause of death was air embolus introduced by the misuse of the cell saver. Plaintiffs claimed an annual loss of support in the amount of $40,000. The defendant doctor alleged that the back problems for which the decedent was undergoing surgery would have substantially curtailed his earning capacity even if surgery was successful. Settlement in the amount of $830,000 was achieved on the eve of trial.

### Family v Radiologist, M.D.

In Family v Radiologist, M.D. (S.F. Sup. Ct. #978656), Jeffrey P. Holl and Cynthia Newton negotiated a $217,500 settlement on behalf of the surviving wife and 4 adult sons of a 73 year old man who died of undiagnosed colon cancer.

The decedent presented to his internist in April, 1993, with diarrhea. The internist referred decedent to a colorectal surgeon for sigmoidoscopy. That test was negative. A barium enema was performed by defendant radiologist. The radiologist noticed abnormality in the area of the splenic flexure of the colon. He concluded that the defect was benign. He reported the barium enema as normal.

In August, 1994, repeat barium enema and abdominal CT Scan showed not only the colon tumor in the area of the splenic flexure but also multiple liver metastases. Comparison of the 1993 barium enema films with the 1994 film showed that what had earlier been identified as fecal matter was in fact a polypoid mass.

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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