WALKUP, MELODIA, KELLY & ECHEVERRIA

FOCUS on torts

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EIGHT MILLION DOLLAR VERDICT SETS RECORD

On February 20, 1998, a Sacramento County Superior Court jury awarded $8,875.000 to Amber Perry, who suffered serious brain injuries in a head-on car accident. Amber, who is now 21 years old, was represented by partners Michael A. Kelly and Richard Schoenberger. The verdict represents the largest judgment ever awarded to an individual represented by our firm.

Amber was hurt on August 27, 1994, when Charles Thomas, a co-defendant, turned left in front of her while she was driving through the intersection of 16th Street and Elkhorn Boulevard in Rio Linda. The high speed collision left Ms. Perry comatose for two weeks. When she awoke, she was partially paralyzed and suffering from multiple fractures. Thomas was driving a car rented from Budget Rent A Car Systems, Inc.

Budget's liability arose from circumstances beginning 12 days before the accident. On August 15, the Budget Sacramento Airport Office rented a Ford Mustang to Estella Johnson, a suspected crack cocaine user. Johnson, who was disabled, designated her caretaker as the vehicle's authorized operator. Johnson was renting the car because her own vehicle

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Blue Ribbon Panel Urges Kaiser Arbitration Changes

In July of 1997, following the California Supreme Court's decision in Engalla v. The Kaiser Foundation Health Plan (1997) 64 Cal.Rptr.2d 843, Kaiser assembled a three-member "Blue Ribbon Panel" to advise it on how to improve its system of medical malpractice arbitration.

Following some five months of investigation and interviews, the Panel issued its final report on January 5, 1998. The thirty-six suggestions included:

1. A recommendation that an independent administrator supervise the entire arbitration system;
2. A recommendation that Kaiser encourage early settlement discussions; and,
3. A recommendation that an ombudsperson program be initiated to assist members in navigating the system of dispute resolution.

Kaiser is the largest HMO in America. It operates in 19 states and the District of Columbia. As of January 1, 1998, it served almost 9 million members. It is also California's single largest user of binding arbitration as a dispute resolution mechanism. The Kaiser arbitration system is used today as the universal form of dispute resolution for Kaiser members.

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EIGHT MILLION DOLLAR VERDICT SETS RECORD

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was being repaired after being sprayed by bullets during a drive-by shooting days before. After the shooting, Johnson's neighbors asked the Sacramento County Sheriff's Department for assistance in bringing the suspected drug activity to a close. As a result, the Sheriff's Office placed her home under surveillance.

On August 23, 1994 (four days before Amber's accident), Deputy Sheriff Anthony Taylor stopped the Mustang. Taylor was one of the officers watching the house. He noted that a houseguest of Johnson's was at the wheel. This person was neither a licensed driver nor authorized by the Budget contract to drive the car. Taylor cited the driver, took the keys, and returned to the Johnson home. He admonished Johnson, returned the keys to the designated driver and left. Later, he called the Budget airport office and advised them that he had stopped the Mustang while it was being operated by an unlicensed and unauthorized driver. It was his hope that the Mustang would be immediately impounded or repossessed to stop the flow of drugs to and from the Johnson household. Budget took no action in response to his phone call.

Two days later, Charles Thomas, another unauthorized, unlicensed driver residing in the Johnson home, took the Mustang without permission. He later turned in front of Ms. Perry's vehicle, causing the accident.

Plaintiff claimed that Budget was negligent for failing to take steps to impound or repossess the vehicle after being notified by Deputy Taylor that it was being operated in violation of Budget's contractual provisions. Budget employees testified that knowledge of unauthorized use of their cars justified immediate repossession. Rather than seeking Deputy Taylor's assistance to impound the vehicle, Budget did nothing, thereby permitting the Mustang to remain under the control of Johnson, who had already demonstrated that she was unwilling or incapable of monitoring the car's whereabouts or limiting its use to authorized persons.

At trial, Budget argued that Deputy Taylor had never called, or if he did call, he called a location outside of Sacramento. Budget also claimed there was no record of the call, and that, in any event, Deputy Taylor failed to provide Budget with sufficient information to respond. If a call had been made, Budget suggested that it was powerless to impound or retrieve the vehicle. In the absence of any written policy or procedure for dealing with such a circumstance, Budget claimed that its employees

would have been limited to sending a registered letter to the authorized renter, Johnson, demanding the car be returned. Allegedly, corporate policy then would have required it to wait five days before reporting the car as stolen to the Sheriff's office. Since the collision happened only four days after Taylor's call, Budget's position was that nothing could have been done to prevent the accident.

In addition to claiming it was free of fault, Budget's counsel argued that any and all liability for the collision rested with the renter (Estella Johnson) and/or the unauthorized operator (Charles Thomas). Counsel also claimed that since Thomas had essentially "stolen" the car, it had no liability whatsoever.

Plaintiff's injuries included severe brain damage resulting in loss of independence. Deaf since birth, Amber now grapples with short term memory loss and permanent left-sided weakness. She will never be gainfully employed and will always require supervision in activities of daily living.

Prior to trial, plaintiff settled with defendant Johnson for $920,000. Johnson had purchased a $1 million dollar supplemental liability insurance policy at the time of the rental. Budget had filed a CCP Section 998 statutory offer of settlement in the amount of $15,000. Plaintiff herself countered with a statutory demand of $480,000. After a 15 day trial, the jury found all of the defendants negligent and apportioned fault 40% to Budget Rent A Car Systems, Inc.; 30% to Charles Thomas,

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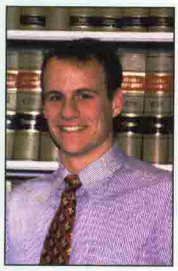
FIRM WELCOMES NEW ASSOCIATE



Douglas S. Saeltzer, a 1994 graduate of University of California Hastings College of the Law, has joined our firm as an associate. Most recently, Doug completed a two year stint with the United States Army Judge Advocate General's Corps in Fayetteville, North Carolina, where he was lead prosecutor for the United States Army serving in the 82nd Airborne Division. In his position, Doug accumulated substantial trial experience, acting as lead prosecutor in over 30 major court martial cases involving serious criminal offenses. Previously, Doug worked as a legal assistance attorney, representing servicemen and women on an administrative level.

While a student at Hastings, Doug interned at three high-profile San Francisco civil litigation firms focusing on tort issues including medical negligence and product liability claims.

An Honors graduate of UCLA, where he was selected for the Academic Dean's List each year of his undergraduate study, Doug was a member of the Hastings Constitutional Law Journal during his law school years.

At the time of his discharge from the army, Doug's commanding officer described him as the best trial counsel in the Division. He was cited as a tenacious litigator and given supervisorial responsibility for all other prosecutors, a position generally reserved for JAG officers with far more seniority. Doug's litigation skills and courtroom experience parallel those of litigators many, many years his senior.

We anticipate our clients and associate counsel will benefit greatly from his trial skills.

PROPOSITION 213 UPHELD

The First and Second District Courts of Appeal have upheld retroactive application of Proposition 213, the 1996 ballot initiative which denies recovery of general damages to uninsured motorists.

Most commentators had expected prospective application of the newly enacted Civil Code sections to be approved. Retroactive application, and the hardship that it produces, was expected to be invalidated.

In Yoshioka v. Superior Court, 58 Cal.App.4th 972, the Second District approved retroactive application. There, the plaintiff was involved in an accident in 1994. A timely complaint was filed in 1995. The case proceeded to judicial arbitration in 1996. The defendant rejected the arbitration award and demanded a trial de novo. As of January 1, 1997, the case had not yet commenced trial — a not unusual circumstance in Los Angeles Superior Courts. When the case was called for trial, the trial court granted defense motions in limine to exclude any evidence of non-economic (general) damages, and further refused to instruct the jury that plaintiff was entitled to an award of pain and suffering damages.

In a 2-1 opinion, Justice Woods found 213 constitutional both in its retroactive and prospective application. In reaching this result, the Court of Appeal decided that voters actually appreciated and understood the difficulty in getting cases to trial, so as to make the brief window of time between the election, and the effective date, reasonable.

In a pointed dissent, Acting Presiding Justice Johnson criticized the majority, stating that retroactive application was fundamentally unfair and violative of constitutionally protected rights; particularly under the circumstances of this case, where plaintiff had timely filed and litigated his case for well over a year, made settlement demands, rejected settlement offers and carried out other litigation decisions in reliance on his entitlement to damages as they existed at the time of his injury. Moreover, the time frame within which to bring a case to trial was so short that it was not feasible, even through the most diligent of efforts, to comply with the artificial effective date of the proposition (1/1/97). As a result, litigants in some counties, through chance or good fortune, or different geography or a kinder judge, were able to commence their trials by December 31, 1996, thereby preserving their substantive right to damages.

Within weeks after the Yoshioka opinion, the First District issued a unanimous opinion reversing an injunction issued by the San Francisco Superior Court prohibiting implementation of Prop 213. In California Congress of Seniors v. Quackenbush (1998) 60 Cal.App. 4th 454, the First District Court of Appeal held that notwithstanding Proposition 213's disparate treatment of different classes of motorists, the "rational basis" test required for constitutionality was met. In so holding, Justice Phelan wrote that the classification scheme of 213 reasonably accomplished its objectives and did not unconstitutionally infringe upon the rights of uninsured motorists. Rather than honestly analyze 213's unequal treatment of uninsured owners (who

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WALKUPDATES

Paul Melodia recently was invited to speak to the Consumer Attorneys of California on the topic of handling MICRA issues in the trial of medical negligence cases...John Echeverria was a featured speaker at an all-day seminar in San Francisco entitled "Defining Economic Damages in Personal Injury Cases" sponsored by Vocational Economics, Inc. John spoke on evaluating and organizing life care plans in cases of catastrophic injury...Mike Kelly was featured as moderator at a National Business Institute seminar on "Trying the Wrongful Death Case" given in Oakland. Mike has also been invited to teach at Emory University's intensive Trial Skills Program in May, and will return to the National Institute of Trial Advocacy's Boulder, Colorado, National Trial Skills program in July. Mike was also honored by appointment to the BASF Judiciary Committee...Dan Dell'Osso recently completed a presentation before the Western Trial Lawyer's Winter Convention. Dan spoke on engineering issues related to automobile passenger restraint designs intended to protect small occupants. As vice-chair of the ATLA Product Liability section, Dan will address the national convention in Washington, D.C. this July. His presentation will focus on techniques of final argument in product liability cases....Rich Schoenberger and his wife, Monica, welcomed their third child, Madeline. Rich has accepted an invitation to serve as an instructor this summer at the NITA Western Regional Trial Skills Program held at Boalt Hall...Dan Kelly served as a panelist on a two day program jointly sponsored by The Rutter Group and the California Judges Association on expert testimony and expert witnesses. The program, given in Orange County, was highly acclaimed. As we go to press, Dan is in Orlando, Florida, attending the annual meeting of the International Society of Barristers...Kevin Domecus has broken out the bats and gloves as the Mighty Mouthpiece Softball Team attempts to defend its Lawyers League softball championship. Pictured above are members of the 1997 Champions. Mighty Mouthpiece team membership includes district attorneys, insurance defense counsel, plaintiffs counsel, house counsel and a lonely member of the Attorney General's Office. Kneeling from left to right are Erik Brunkal, Bob Ford, Jim Treppa, Kevin Domecus, Mike Recupero and Mark Zanobini. Standing, from left to right, are Steve Roberts, Dan Dell'Osso, Kevin Murphy, Rich Schoenberger, Steve DalPorto, Pete Lagasse, Jim Taggart and Rich Diestel.

Blue Ribbon Panel Urges Kaiser Arbitration Changes

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The standard Kaiser contract mandates arbitration for any "alleged violation of any duty incident to or arising out of or relating to the [health plan] agreement. . . ." When first adopted by Kaiser, it was advertised as faster, less expensive, more flexible, and a fairer way to protect the rights of individuals to adequate compensation. As applied, many Kaiser members came to learn that these suggested benefits were illusory.

Once the process begins, both sides gear up with attorneys, expert witnesses, medical personnel and arbitrators. Panel members spoke to many individuals who fill these roles. Once formal arbitration begins, the original goals of arbitration seem to fade into the background "to be replaced with the values of a legal system that prizes procedural formalism and winning over other virtues." Overall, the committee determined that the arbitration system does not provide a system which is speedy, low cost and just. Instead, the present system is essentially "unmanaged" and an independent administrator (not affiliated with any firm which provides neutral arbitrators or mediators) should be hired to run the system. The independent administrator would ensure a fair, timely, low cost process which protects the privacy interests of all parties. The Panel also recommended establishing program benchmarks, similar to the state court "fast track" targets, in order to ensure swift resolution of claims.

Selection of neutral arbitrators has been a constant source of delays, disagreement and dispute. Only after a neutral arbitrator is selected can an arbitration date be set. As a result, many arbitrations drag on and on. The Panel recommended that the independent administrator develop "the largest possible list of qualified neutral arbitrators." The neutral arbitrator should be selected within thirty days of the independent administrator's receipt of an arbitration demand. If no neutral is selected within that period, the independent administrator could select the neutral by providing a list of names to the parties and giving them ten days to strike some number of those on the list.

In a public statement following issuance of the report, Kaiser CEO David Lawrence, M.D. announced that Kaiser would move swiftly to implement the Panel's recommendations. However, to date, no formal implementation has been undertaken.

Copies of the report, entitled "The Kaiser-Permanente Arbitration System: A Review and Recommendations for Improvement" can be obtained by contacting our office.

PROPOSITION 213 UPHELD

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may recover general damages) and uninsured drivers (who may not), the court suggested "improvement of Proposition 213 is a legislative task, not one to be performed by the judiciary." In the end, the court ruled that the Superior Court's reasons for enjoining implementation of Proposition 213 were incorrect.

In light of the holdings in Yoshioka and Quackenbush, few questions are left regarding 213's constitutionality. However, many questions remain regarding its scope.

FIRM MOURNS PASSING OF KEN FACTER

Our firm, our clients and our community were shocked in December when Ken Facter, M.D., J.D., passed away of a sudden heart attack. Ken joined our firm after graduating from Boalt Hall, following a highly successful career as an emergency room doctor. Because radiation therapy for treatment of Hodgkin's disease had damaged his immune system, it became impossible for Ken to continue work as an emergency room physician.

A zealous advocate for patients' rights (Ken actually taught seminars across the country urging diabetics to take control of their treatment), Ken turned to the law as a tool for protecting the public and insuring high quality medicine. During his short tenure with our firm, Ken impressed clients and opposing counsel alike with his breadth of knowledge, gentle manner and wonderful wit.

Ironically, prior to his death, Ken had been selected for the University of California Davis "Distinguished Alumnus Award." The award is made annually to an alumnus of the U.C.D. School of Medicine. The selection committee, comprised of members of the medical school's alumni association, made the award based upon Ken's scholarly excellence and outstanding work in the area of patient education.

While his passing leaves a void, all of us who had the opportunity to know and work with Ken are better persons for having had that experience.

EIGHT MILLION DOLLAR VERDICT SETS RECORD

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25% to Estella Johnson, and 5% to plaintiff. The jury awarded the plaintiff $4,275,000 in economic damage and $4,500,000 in non-economic damages. After reduction for comparative fault, and credit for the prior settlement calculated in accord with Greathouse v. Amcord (1995) 35 Cal.App.4th 831, the net verdict against Budget was $5,413,210. Given that the verdict exceeded the CCP Section 998 statutory demand, an additional $540,000 in prejudgment interest was added.

Our firm was associated to try the case two months before trial. Gary Livaich of the law firm of Desmond, Miller & Desmond, and Joan Medeiros of the Law Office of Joan M. Medeiros, had thoroughly worked the case up over the three years preceding our association. Their excellent and professional work allowed us to prepare the case for trial on short notice.

APPELLATE COURTS REFINE PRIVETTE WHILE SUPREME COURT CONSIDERS TOLAND

Since the California Supreme Court's decision in Privette v. Superior Court (1993) 5 Cal.4th 689, a host of appellate court decisions have been rendered dealing with when (and whether) an owner or general contractor may be held liable for its own acts or omissions resulting in injury to the employees' contractors on site. The Supreme Court has granted review in five different cases where the courts of appeal have reached various results. In one of those, Toland v. SunLand Housing, oral arguments are now complete.

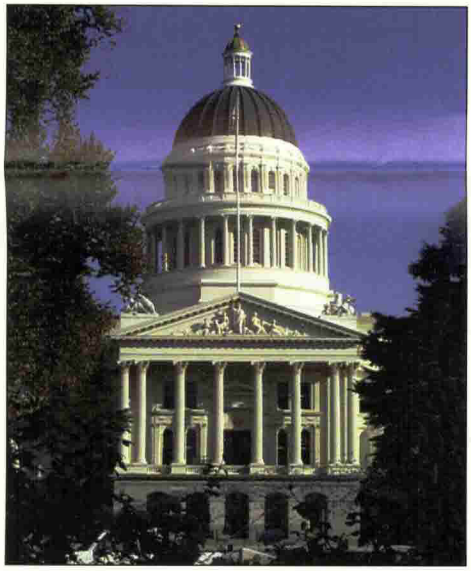
Following Privette, defendants in industrial accident/construction site injury cases brought summary judgment motions attempting to eliminate third party liability where the injured employee had worker's compensation coverage. Such motions reasoned that the holding of Privette was that third party liability was not an available remedy for any injured employee covered by worker's compensation.

The unfairness (and indeed, the absurdity) of this rationale has been most recently illustrated by the opinion of the First District Court of Appeal in Grahn v. Tosco (1997) 58 Cal.App.4th 1373. In Grahn, the plaintiff was a 51-year-old brick mason employed by an independent contractor specializing in the installation and repair of high temperature furnaces and boilers. He worked at a number of refineries, including Tosco's, for a 26 year period.

After he was diagnosed with asbestos-related lung disease, he brought an action against asbestos manufacturers and the Tosco Refinery. He claimed that Tosco was negligent in selecting and supervising his employer, in retaining control over the details of the work performed by his employer, and in failing to properly maintain and inspect the worksite. .

The evidence at trial demonstrated that Tosco had retained control over the details of the work and had never warned Grahn or his fellow employees of the hazards associated with asbestos. At verdict, the jury allocated 3% of fault to Tosco, 60% to Grahn's employer, and 37% to other persons.

On appeal, Tosco sought to have the appellate court adopt a rule that any work-related injuries suffered by the employee of an independent contractor while working at another's premises were solely compensable through worker's compensation, and that the hirer of the independent contractor should be



absolutely immune regardless of independent fault. The court of appeal rejected this argument, holding that Privette contemplated no such bright line rule. The Grahn court pointed out that Privette eliminated only vicarious liability based upon the so-called "peculiar risk" doctrine. Other theories of negligence based upon the hirer's active conduct were neither raised nor addressed in Privette.

Quoting from Prosser, the opinion states "there is nothing at all 'vicarious' about the liability that attaches to a hirer who itself is negligent; in the first place, quite apart from any question of vicarious responsibility, the employer may be liable for any negligence of his own in connection with the work to be done. When there is a foreseeable risk of harm to others unless precautions are taken, it is [the hirer's] duty to exercise reasonable care to select a competent contractor, and to provide, in the contract or otherwise, for such precautions." (58 Cal.App.4th 1373 at 1385)

The court went on to hold that a hirer is not immune from the provisions of Civil Code Section 1714, and that California law continues to require that everyone is responsible for their own negligent acts.

Justice Ruvolo wrote that the worker's compensation system clearly recognizes and accommodates the availability of civil remedies for the injured worker as against negligent third parties. Indeed, Labor Code Section 3852 establishes the procedures for an injured employee to pursue a third party civil suit for the same injury for which the worker has collected compensation benefits. "The judicial abolition of all hirer liability, based on Privette, would leave the injured party's employer, who has paid worker's compensation benefits, without recourse against the hirer whose negligence might have caused or contributed to the worker's injuries, thereby rendering Labor Code Sections 3852 and 3856 ineffectual." (Id. at 1387.)

The court concluded that Privette was not intended to supplant independent bases of liability which pre-existed under California tort law. "Its reach is limited to the instances where the injured employee seeks to hold the hirer answerable in tort damages for the fault of the independent contractor, and where the employee has received compensation benefits on account of that fault."

As we go to press, the Supreme Court has just heard arguments in the first of the cases, post-Privette, holding that third party liability does not exist where worker's compensation is available. In Toland, the Supreme Court will have to decide whether, as many defendants suggest, Privette wiped out direct liability for negligent land owners and general contractors—circumstance which will neuter Labor Code endorsed recovery of worker's compensation benefits, and (in the words of Justice Baxter at oral argument) encourage landowners to take the lowest bid, even if it comes from a subcontractor with a bad safety record. As noted by Justice Baxter, public policy should encourage landowners and contractors to hire experts to do risky work. A rule which immunizes owners and general contractors will not have this salient effect.

Recent Cases

Government Liability

M.O., a minor, v. County of Kern

In M.O. v. County of Kern (Kern Co. Sup. Ct. No. 231813) Michael A. Kelly, in association with Ralph Wyatt of Wyatt & Baker of Bakersfield, negotiated a cash and annuity settlement having a present cash value of $4,500,000. Plaintiff was a 14-year-old youth riding as a rear-seat passenger in a car traveling westbound on Buena Vista Avenue in Bakersfield. As the car approached the intersection of Buena Vista and the East Side canal, its driver (plaintiff's aunt) encountered flooding. No warning signs had been erected. Although it had been raining earlier, it was not raining at the time of the collision. The investigating Highway Patrol officer ultimately testified that water was four to six inches deep at the crown of the road at the time of the accident.

The flooding caused the vehicle to hydroplane and rotate. It crossed over into the oncoming lane and collided head on with a northbound vehicle. Both drivers were killed. All of the surviving occupants of plaintiff's vehicle were injured. The minor plaintiff sustained a massive head injury, coma, fractures of the left femur, right tibia and fibula, a ruptured spleen, and a diffuse axonal injury with hemorrhages into the right frontal lobe, the right parietal lobe, and the right occipital lobe.

In spite of heroic efforts on the part of outpatient therapists and the minor's family, he sustained permanent and irreversible brain damage. He is able to talk, walk and is minimally independent in activities of daily living. His psychological and emotional state prevent him from living independently. Because of impaired judgment, unpredictable violent and assaultive behavior and absence of short-term memory, the minor plaintiff is in need of lifetime attendant care and supervision. His earning capacity has been destroyed.

Past medical bills exceeded $540,000. Wage loss, discounted to present cash value, was estimated at $881,000.

Plaintiff claimed that the defendants County, Water District and adjoining property owners had all acted so as to prevent surface waters from properly draining off the highway. The County, it was alleged, had improperly built up the grade of the road so that water pooled in the center. The Water District, owners and operators of the irrigation canal, had configured and maintained an intersecting levy access road in such a way that it acted as a dike, keeping surface water on the highway. The owners and farmers of land immediately adjacent to the flooded roadway had tilled their fields so as to encroach upon the shoulder, reducing shoulder so that water which should have drained off the highway were kept on the highway surface.

Defendants claimed the sole and exclusive cause of the accident was excessive speed on the part of the driver of plaintiff's car and further that plaintiff's injuries were exacerbated by his failure to wear an available seat belt.

The governmental entity defendants also claimed immunity pursuant to the provisions of California Government Code Section 831 (weather immunity).

Under the terms of the settlement, the defendants contributed cash in excess of $1,800,000 to pay past medical expenses, outstanding liens, and to establish a contingency fund for emergency expenses. In addition, an annuity paying $10,000 per month, increasing at 3% per annum, guaranteed for 30 years, was purchased for the minor. Through the establishment of a special needs trust, the minor's eligibility for benefit under state and federal law was maintained. The present cash value of the settlement is $4,500,000.

Kemsey v. CCSF

In Kemsey v. CCSF (S.F. Sup.Ct. Action No. 975619) Jeffrey P. Holl negotiated a $450,000 settlement against the City and County of San Francisco arising out of the death of a Muni patron who was struck and killed by a J Church LRV on August 31, 1995. The decedent was survived by her husband, who alleged that her death resulted from the concurrent negligence of the operator and a defective light timing sequence at the intersection of Church and Market Streets in San Francisco. Plaintiff was struck by the LRV as she stepped off the curb of a passenger loading platform just after the traffic light for her direction of travel on Market had turned green. Witnesses testified that although the light was green, the decedent stepped into the path of the streetcar before it had an opportunity to clear the intersection. Other pedestrians (on the corners and on the loading platform) testified that they had heard the oncoming LRV and hesitated.

Uninsured Motorist

Carter v Commerce & Industry

In Carter v Commerce & Industry Insurance (USDC No. C-952609), Daniel Dell'Osso negotiated a $500,000 uninsured motorist settlement on behalf of a 56-year-old sales representative injured in a hit and run accident when he was struck while a pedestrian in 1991. He reported the matter to his employer's worker's compensation carrier, but did not make an uninsured motorist claim. Over the course of the next two years, worker's compensation paid for his bills. When his symptoms persisted, he was diagnosed with multiple herniated discs and underwent a five level cervical laminectomy. Postoperatively, his motorized hospital bed malfunctioned and closed on him without warning, causing additional injury.

After discharge from the hospital, the plaintiff contacted an attorney for the first time. The uninsured motorist carrier was then notified, three years post-accident, and defended on the basis that plaintiff's claim for benefits was untimely. The carrier was cited to the provisions of Insurance Code Section 11580.2(k) which required it to give a warning regarding the statute of limitations, something it did not do. It accepted the loss, but later reversed itself denying coverage. A declaratory relief action was thereafter filed. Following denial of the carrier's summary judgement motion, the matter was settled. Under the terms of the settlement, the worker's compensation carrier, which had advanced over $150,000 in benefits, agreed to continue paying benefits without taking any credit.

Recent Cases

Vehicular Negligence

Miranda v. Hirai Farms

In Miranda v. Hirai Farms (Placer Co. Sup. Ct. #SCV-6330), Paul Melodia negotiated a cash settlement in the amount of $2 million on behalf of the 38-year-old widow and two surviving minor children of a 42-year-old quality control inspector who died as a result of a head-on collision on State Route 65 outside of Lincoln, California. The defendant driver also died in the accident.

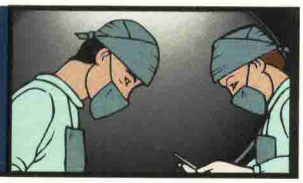
A postmortem examination revealed the decedent was driving under the influence of amphetamines. The decedent was driving a truck owned by the agricultural conglomerate that employed him.

At the time of his death, the decedent was earning $12.50 per hour. Plaintiffs claimed a future loss of support in the amount of $576,000.

Defendants did not dispute liability, but disputed life expectancy on the basis of autopsy findings suggesting underlying coronary artery disease which would have shortened the decedent's life expectancy.

The matter was settled in mediation prior to the institution of discovery.

Medical Negligence



Reiss v. Physicians Surgery Center

In Reiss v. Physicians Surgery Center (San Mateo Co.Sup.Ct. No. 397082), Richard H. Schoenberger and Paul V. Melodia concluded a medical negligence/wrongful death action on behalf of the surviving husband and children of Jo Ellen Reiss. Mrs. Reiss, a 30-year-old software company manager, died from acute water intoxication after routine laparoscopic surgery on the morning of March 21, 1996. Less than 24 hours following the procedure, a series of medical errors sent Jo Ellen into irreversible respiratory arrest. Plaintiff claimed that nurses administered IV fluids too low in sodium, resulting in hyponatremia. Moreover, when symptoms developed, the nurses increased the use of such fluids in direct contradiction to doctor's orders, which resulted in further lowering the decedent's sodium level. Finally, plaintiff alleged that the defendants were negligent in failing to recognize the signs and symptoms of hyponatremia or to monitor Jo Ellen in an appropriate fashion.

Under the terms of the settlement, $1,500,000 was paid to the family, with $1,250,000 of that sum reflecting the present cash value of the family's future economic losses. The general damage cap of MICRA limited the family's recovery for the loss of care, comfort, society and guidance to $250,000.

Hallissy v. Kaiser Foundation Health Plan

In Hallissy v. Kaiser Foundation Health Plan (Co.Co.County Sup.Ct. No. C96-03897). Ronald H. Wecht obtained a binding Kaiser arbitration award in the amount of $946,616 on behalf of the surviving heirs of Daniel Hallissy, who suffered a fatal heart attack at age 48. Mr. Hallissy, a long time public servant in Contra Costa County, was running for assessor at the time of his death. Five weeks prior, he had undergone a 24 hour Holter monitor evaluation (the equivalent of a 24 hour EKG) because of irregularities noted during a routine blood pressure check. The Holter study indicated signs of ischemia (insufficient blood supply) to the heart. Plaintiffs contended that Kaiser physicians should have followed up on the Holter monitor results immediately and that a proper workup, including a thallium treadmill examination, would have resulted in diagnosis of Mr. Hallissy's severe coronary artery disease and permitted timely bypass surgery.

Kaiser disputed liability, claiming that the findings reflected on the Holter monitor tracings were not diagnostic and were, in fact, insignificant. Kaiser also claimed that bypass surgery would not have prevented the fatal heart attack. The case was arbitrated for five days before a panel of three arbitrators. The award of damages included past economic loss of $128,000 and an award of $598,500 reflecting the present cash value of future economic losses. General damages for the wrongful death of this husband and father were limited by MICRA to $250,000.

Parents v. Medical Center

In Parents v. Medical Center (confidential settlement), Kevin L. Domecus resolved the wrongful death and personal injury claims of parents whose two day old infant died after the mother's uterus ruptured during labor. The mother was admitted to the hospital with contractions, but was sent home several hours later because the nurses felt that she was not progressing. While she was home, the mother began experiencing severe abdominal pain. Her husband rushed her back to the hospital, where the defendant obstetrician determined that the baby was outside the uterus in the abdominal cavity. The doctor then performed an emergency cesarean section with only a limited local anesthetic. The baby was severely compromised, and died two days later.

The plaintiffs contended that the mother should never have been sent home from the hospital, and that if she had been monitored properly, staff would have detected her impending uterine rupture and performed a cesarean section. The defense contended that sending the mother home was an appropriate exercise of clinical judgment, and that the rupture was sudden and catastrophic. The plaintiffs' claim sought damages for the wrongful death of their daughter, and the mother's personal injury and emotional distress claims. The case settled at mediation for $400,000.

Doe Minors v. Roe Physicians, Laboratories and Hospital

In Doe Minors v. Roe Physicians, Laboratories and Hospital (confidential settlement), Dan Kelly and Wesley Sokolosky, M.D., J.D. concluded a case on behalf of the two minor daughters of a 35-year-old woman who died of cervical cancer. Liability was shared by the woman's primary care physician and the lab, who had failed to take steps recommended by a pathologist who reported abnormalities on a pap smear. Plaintiffs' expert pathologists were prepared to testify the pap smear had been underreported, and that the laboratories should have independently asked the primary care physician for follow-up information as California law requires.

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RECENT CASES

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Defendants contended that all pap smears were properly read and reported and that the decedent failed to return for routine annual care.

The settlement consisted of a combination of a cash payment and future installments to cover the plaintiffs' educational and other maintenance expenses through age 23. The total settlement had a present cash value of $450,000.

Male Patient v. Anonymous Hospital

In Male Patient v. Anonymous Hospital, Paul Melodia negotiated a settlement having a present cash value of $2,835,000 on behalf of a 44-year-old grocery store manager who suffered catastrophic brain damage following anterior cervical fusion. Nine hours after surgery had concluded, plaintiff sustained a massive cardiopulmonary arrest and was discovered in a vegetative state. The operating surgeon and attending anesthesiologist were initially included as defendants, however, the entirety of the settlement was paid by the defendant hospital for the failure of its nurses to timely observe and report signs and symptoms consistent with a post-operative hematoma. Plaintiff alleged that the nurses assigned to his care were inexperienced, and that as his vital signs deteriorated, they failed to bring these changes to the attention of the attending physicians. Under the terms of the settlement, a guaranteed daily care rate was agreed upon with a private provider equal to annuity payments having a present cash value of $1,385,000. In addition to the annuity, $1,400,000 in cash was paid, out of which various liens (including an ERISA benefit plan claim) and a MediCal lien were reimbursed.

Menezes v. Chan

In Menezes v. Chan, et al. (Merced Co. Sup. Ct. No. 120220), Dan Kelly negotiated settlement of claims on behalf of an infant in a wrongful birth action. The child's mother consulted defendants for prenatal care. Defendants performed a series of routine obstetrical sonograms in the office, including three studies before the end of the second trimester of pregnancy. Though the last of these sonograms was reported by defendants to show unusual shortening of at least one of the fetal limbs, defendants did not take any steps to evaluate the fetus further or to refer the mother for high resolution ultrasound scanning. The child was born with virtual absence of his right leg, arm stumps and a significantly shortened left leg. Defendants contended that they complied with the standard of care for office based ultrasound exams by community obstetricians. As a wrongful birth action, damages in the case were limited to extraordinary expenses required for the child's medical care over his lifetime. The settlement should pay over $2.5 million during the course of the plaintiff's lifetime.

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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INDUSTRIAL ACCIDENTS

Clarke v. Kirkpatrick's

In Clarke v. Kirkpatrick's Logging, Dan Dell'Osso negotiated a cash and annuity settlement in the amount of $235,000. Settlement was achieved on behalf of a 36-year-old unemployed father of three who was injured in an accident involving a logging truck. The accident occurred outside of Saint Helens, Oregon, on a narrow, winding mountain pass. Mr. Clarke, who was driving an International pick-up truck, was heading up the mountain as the defendant was descending pulling a trailer loaded with logs. The log truck was descending out of the pass at a speed which exceeded the stability limits of his trailer. As the two vehicles passed on a tight curve in the road, the logging trailer lifted onto two wheels, dumping its load onto the plaintiff. He sustained facial lacerations and fractures of the lower extremities. A femoral fracture required open reduction and internal fixation resulting in some slight shortening of the plaintiff's left leg. Plaintiff made no wage loss clair Defendant did not dispute liability, but disputed plaintiff's damage claims.

RECREATIONAL INJURIES

Pfaff v. Laytonville Unified School District

In Pfaff v. Laytonville Unified School District, Jeffrey P. Holl obtained an $80,000 settlement on behalf of a 17-year-old high school student injured following a school football game as she descended from the press box of the school's football field. As she came down the ladder leading out of the press box, another fan, also descending the ladder, fell on the plaintiff from above, striking her head and causing it to come in contact with the rungs of the metal ladder. Plaintiff was knocked unconscious and fell to the ground, suffering severe lacerations of her face and lip, damaging three teeth and requiring extensive dental work. She was ultimately diagnosed with TMJ disc displacement for which she underwent a course of splinting. Medical bills were $11,500. Recovery was premised upon theories of negligent supervision and maintenance.