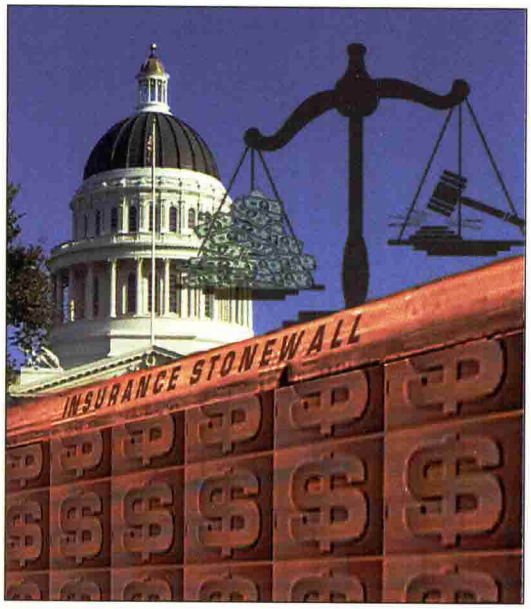
WALKUP, MELODIA, KELLY & ECHEVERRIA

FOCUS on torts

VOLUME XIII, NUMBER 1 Winter 2000

INSURERS SEEK TO REPEAL CONSUMER PROTECTION

Insurers are seeking to repeal consumer protection with Props 30 and 31. Voting YES will protect consumers from delays and denials of insurance claims.



Last year, eleven years after the California State Supreme Court's abolition of third party bad faith in Moradi-Schalal v. Fireman's Fund (1988) 46 Cal.3d 287, the Legislature passed, and the governor signed, Senate Bill 1237, Senator Martha Escutia's bill restoring a limited right of action for third party claimants.

The legislation, signed by the governor in September, was the product of months of negotiation between assembly members, the governor's office and insurers. The approach of the legislation was to encourage alternative dispute resolution for smaller claims, limit the number of cases which might give rise to later "bad faith" claims, and provide insurers with an incentive to engage in prompt claims handling. The bill excludes bad faith claims against liability insurers for health-care providers and public entities. It also excludes from the ambit of its operation, plaintiffs who were convicted of drunk driving in relation to the accident out of which their claim arises.

Several insurance companies opposed the bill because it gave consumers the right to sue them when they did not pay on time. When Governor Davis signed the bill, they placed Proposition 30 on the March ballot to force a vote on the well-conceived law.

According to filings with the Fair Political Practices Commission, out-of-state insurers have now collected in excess of $50 million dollars in their campaign to defeat the restoration of bad faith. The insurers' campaign has become a financial bonanza for political consultants, paid spokespeople, and television stations.

Professional signature gatherers have been paid $1,230,000 to gather the signatures necessary to get the proposition on the ballot. Television stations have so

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LETTER LEADS TO RECORD SETTLEMENT

An Alameda County Good Samaritan's concern for safety, resulting in a letter to the County warning of a dangerous roadway condition, precipitated a record settlement achieved by Paul Melodia and Rich Schoenberger in Loh v. County of Alameda (Ala.Co.Sup.Ct. No. 802293-8).

On May 10, 1998, plaintiff Bill Loh was riding in the rear-most row of a group of ten cyclists traveling two abreast on a two-lane Alameda County roadway. To the cyclists' right, as they climbed uphill were a series of storm drains extending two feet perpendicular-

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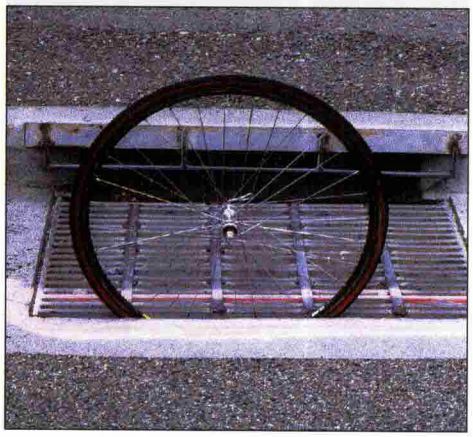

The front tire of Bill Loh's bike lodged in the unprotected gap of this Alameda County storm drain. A citizen had warned of such gaps months before.

RECENT DEVELOPMENTS IN TORTS

As a service to our readers, we periodically report on recent Appellate and Supreme Court decisions which impact California tort law practitioners.

1. Prop 213 (No General Damages for Uninsured Motorists) does not bar an uninsured plaintiff from recovering general damages in a product case, but does bar an uninsured motorist from collecting general damages against a public entity for a dangerous condition of public property. (Hodges v. Superior Court (1999) 21 Cal.4th 109; Day v. City of Fontana (1999) 76 Cal.App.4th 293.)

2. The preferred method for determining the amount of future special damages incurred by an injured plaintiff in a medical malpractice case is to have the jury decide the whole dollar number. Where a present value of future damages is determined, a judge structuring future payments is not bound by the gross dollar amount, but rather, is bound only by the present value finding. A judge may not change or alter the present value finding. (Holt v. Regents (1999) 73 Cal.App.4th 871.)

3. The "delayed discovery rule" which tolls the statute of limitations in certain types of cases, begins to run when a plaintiff believes or suspects anyone (it need not be the actual defendant) is responsible for harm or injury. It makes no difference that information regarding the actual identity of the defendant is not available. (Norgart v. UpJohn (1999) 21 Cal.4th 383.)

4. Where damages are recovered for "lost years" (injured plaintiff whose life expectancy is shortened because of the defendant's wrongful conduct seeks payment now for the value of all wages that would have been earned in the future) California law does not recognize or authorize a deduction for personal consumption. (Overly v. Ingalls (1999) 74 Cal.App.4th 164.)

5. Prop 213 does not prevent the heirs of an uninsured driver from recovering wrongful death damages. Prop 213 is inapplicable in cases of wrongful death. (Horwich v. Superior Court (1999) 21 Cal.4th 272.)

6. A 90 Day Notice sent pursuant to CCP §364 is effective when mailed. There is no requirement that a defendant receive "actual notice." So long as the notice is sent to the correct address, with the proper amount of postage affixed, service consistent with CCP §1013 is effective at the time of mailing. (Silver v. McNamee (1999) 69 Cal.App.4th 269.)

7. There is no action for damages in California for the refusal of a physician or hospital to withdraw life sustaining medical care even where the medical care provider refuses to comply with an instruction from a properly authorized person holding an attorney-in-fact designation. Probate Code §4750 completely immunizes healthcare providers from any civil liability for refusal to withdraw life support. (Duarte v. Chino Community Hospital (1999) 72 Cal.App.4th 849.)

8. There is no equitable lien or equitable obligation on the part of an attorney to reimburse an insurance carrier for med pay payments made to a plaintiff. An attorney does not have an equitable obligation to reimburse any lien holder in the absence of statute (i.e. Medicare) or contract. The previous holding suggesting an equitable lien exists (Kaiser Foundation v. Aguiluz (1996) 47 Cal.App.4th 302) is overruled. (Farmer's Insurance Exchange v. Smith (1999) 71 Cal.App.4th 660.)

LETTER LEADS TO RECORD SETTLEMENT

Continued from front page

ly from the curb. As designed, the drains were to be covered by bicycle-proof grates. However, one of the grates had been manufactured so that an unprotected slot existed on its outside edge.

As Bill headed up the hill the front wheel of his bike fell into the slot (see photo page 1). Traveling roughly 10 miles an hour, he was propelled over the handlebars when his bike came to an abrupt stop. Landing on his head, Bill's neck was badly fractured. The action prosecuted by Rich and Paul against the County of Alameda, premised upon the California Government Code, sought a finding of liability for a dangerous condition of public property.

After the tragedy local cyclists made attempts to warn other riders of the trap.

For years, it has been known that drainage grates which are not bicycle-proofed are hazardous. Indeed, in the mid-1970's, the California Department of Transportation promulgated standards for bicycle-proofing storm grates on state highways. The recommended methodology consisted of replacing existing grates (the preferred method if economically feasible) or, welding thin metal strips across existing grates in a way that was perpendicular to the direction of travel.

The storm grate which injured Bill Loh, however, had been *incompletely* bicycle-proofed. For unknown reasons the welded straps placed across the grate did not extend completely over the drain.

Initially, the County contended that it did not have notice, actual or constructive, that this particular grate (one of hundreds in the County) incorporated this one-inch gap. In discovery, however, the defendant's position changed when a County traffic engineer revealed the existence of a letter from a cyclist who had been injured on the same road (although on a different grate) some miles away.

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After obtaining this letter in discovery and locating and statementizing its author, it became apparent that the County did have the requisite notice required by California Government Code §§835(b) and 835.2.

The letter found in discovery provided in relevant part:

"...I was riding my bicycle on Dublin Canyon Road...approaching one of the storm drains when I was forced to move over. There was a gap of more than an inch between the grate covering the drain and the concrete which surrounds it and the cross bars did not extend all the way to the edge as they should...my rear tire slipped into the gap, I came to a sudden stop and was thrown from my bicycle — luckily not in the path of a vehicle... I called to report the dangerous drain to the maintenance department on September 12th, I hope that the situation can be corrected before someone is seriously hurt...."

At deposition, the letter's author confirmed that she had called the County and offered to show them which grate had caused her fall. Tragically, the County did not take her up on this offer.

As the result of the accident, Mr. Loh suffered fractures of the C3 and C4 vertebra. While he has some strength in his lower extremities, he requires assistance in activities of daily living, and is at risk for the multitude of complications which attend paralysis.

The present cash value of his future medical and custodial care was estimated at $5,000,000 by life care experts. Lost earning capacity, wages and benefits were estimated at $2,500,000.

Defendant's experts were prepared to testify that the economic losses were substantially lower.

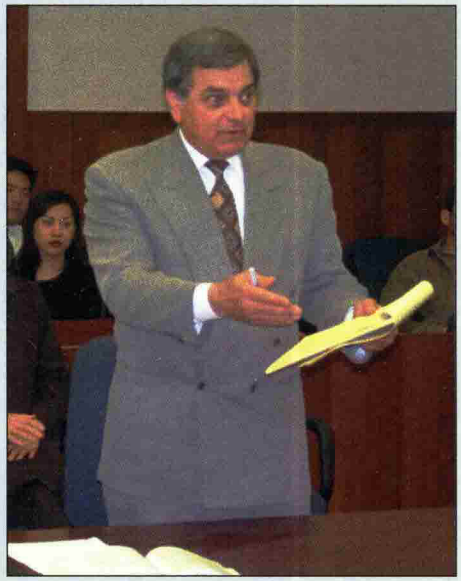
After two weeks of negotiations including two mediations, a cash settlement in the amount of $9,500,000 was obtained on Mr. Loh's behalf. This settlement, the largest in the County's history, was due in no small part to the actions of the concerned citizen who had tried to get the County to remedy this problem. In addition to making payments consistent with the settlement agreement, the County has agreed to step up its bicycle safety program, and to inspect and repair all of the grates presently in place.

WALKUPDATES

Dan Kelly has been elected Secretary-Treasurer of the International Society of Barristers. He will be formally installed at the Barristers' Annual Convention in March. The International Society of Barristers was formed in 1966 and its worldwide membership is limited to 600 trial lawyers. Membership is by invitation only. Our congratulations to Dan for this high honor...Cynthia Newton was a faculty member at the NITA Western Regional Trial Skills Program in Berkeley. She also served as a panelist for the San Francisco Trial Lawyers Association's CLE program entitled "Motions by the Masters" lecturing on motions in limine. Most recently, Cynthia spoke at CEB's day-long San Francisco program "Preparing For, Taking and Using Depositions"...Mike Kelly has been elected to membership in ABOTA, joining Paul Melodia, Dan Kelly, John Echeverria

Cynthia Newton served as a panelist for CEB.

and Ron Wecht, as members of this prestigious society which recognizes trial experience and competence. Mike has also embarked on his 20th year of teaching at U.C. Hastings College of Law...Rich Schoenberger has been selected to chair a Continuing Education program on demonstrative evidence to be presented by the San Francisco Trial Lawyers Association in May. Also in May, Rich will serve as an instructor for the National Institute of Trial Advocacy at its Southwestern Regional at the University of New Mexico. Rich has also been reelected to membership on the Board of Directors of the SFTLA...Ron Wecht served as a presenter for a program produced by the Robert G. McGrath American Inn of Court entitled "Videotaped Depositions: Promised Land or Wasteland?...Khaldoun Baghdadi has been appointed an Adjunct Professor of



John Echeverria has been elected to membership in the A.C.T.L.

Law at the University of California, Hastings College of the Law. He is also serving on the governing board of the Arab American Attorney Association...John Echeverria has been elected a Fellow of the American College of Trial Lawyers. Membership in the College is by invitation only and is limited to no more than one percent of the eligible candidates in any state. Threshold membership requirements include a demonstrated record of excellence over a minimum of 15 years of trial practice. We congratulate John on this noteworthy accomplishment...Doris Cheng served as a participant in a program on character evidence presented by the Edward J. McFetridge Inn of Court at the University of San Francisco. Doris also served as a volunteer for the Bar Association's cooperative restraining order clinic...Mike Recupero has been invited to teach at the NITA Western Regional Program in June 2000.

SUPREME COURT RULES TO PROTECT SENIORS

The number of Americans living in nursing homes or assisted living centers is expected to increase by 1,500,000 every year for the next 20 years. As Americans live longer lives many require a level of residential supervision which falls short of skilled nursing; things like help with dressing, bathing, or taking medications. Others simply need someone to assist with transportation, cooking and managing their bookkeeping affairs. Recognizing that Californians who pay for such assistance are at risk for both physical and financial abuse, the Legislature enacted the California Elder Abuse Act (Welfare & Institutions Code §15657).

The California Supreme Court has now held that providers of services to the elderly who recklessly violate the act are subject to the heightened penalties of W&I Code §15657 regardless of whether the perpetrators are healthcare providers otherwise subject to the protections of California's MICRA statutes (Civil Code §§3333.1 and 3333.2). Such penalties include awards of attorneys' fees and in the event of wrongful death, compensation for a decedent's pre-death pain and suffering.

In Delaney v. Baker (1999) 20 Cal. 4th 23, an elderly woman who sustained an ankle fracture was admitted to a skilled nursing facility which qualified as a "healthcare provider" subject to the protections of MICRA. (Healthcare providers are defined as those persons or entities licensed under Business & Professions Code §500 and Health & Safety Code §1200.) After the woman died of complications from bedsores, her heirs brought an action which sought damages for medical negligence as well as violations of the Elder Abuse Act.

At trial, the jury found by clear and convincing evidence that the defendants acted recklessly in failing to care for the decedent and awarded the surviving children $150,000 for the decedent's pain and suffering. The court thereafter added plaintiff's attorneys' fees in the amount of $185,000, and costs in the amount of $32,000. The defendant appealed, contending that the conduct complained of was "professional negligence" and that neither the attorney's fees nor the decedent's pain and suffering were proper elements of damages under MICRA.

Writing for a unanimous California Supreme Court, Justice Stanley Mosk affirmed the decision, finding that healthcare providers are subject to the enhanced remedies of §15657 when the conduct includes culpability greater than mere negligence. (Delaney at 32).

The Court found that the failure to provide personal hygiene, food, clothing, shelter, medical care and protection from safety hazards constituted "abuse" under the Act and not mere "professional negligence" subject to the protections of MICRA. It ruled that bringing all conduct related to the rendition of medical services under the umbrella of MICRA (as the defendant urged), was inconsistent with the intent of the Act.

This decision is welcome news for those clients we represent against nursing homes, assisted living centers, residential care facilities and retirement homes. The Elder Abuse Act, in conjunction with the federal False Claims Act (31 U.S.C 3729) provide potent statutory protections to a vulnerable segment of our society.

This Supreme Court opinion is especially timely as many companies previously unaffiliated with personal care (including some hotel chains) are holding themselves out as providers of assisted living in an attempt to profit in this growing industry. Too often they are doing so while ignoring the rules that regulate the industry.

Many providers operate outside the bounds of traditional nursing home licensure with minimal government supervision. Notwithstanding state and federal guidelines (such as those issued by the Healthcare Financing Administration in 1995), many facilities do not know or adhere to the applicable regulatory restrictions and are ill-equipped to handle the medical needs of their "clients." Prohibitions regarding accepting patients with certain medical conditions (e.g. catheterized patients, hospice care patients, oxygen dependent patients), medical waiver requirements, staff-client ratios and staff training are all areas which are often ignored. Indeed, a 1998 U.S. General Accounting Office survey cited almost one third of California's nursing homes for serious health hazard violations. Many such facilities advertise the fact that they are *not* medical providers, presumably believing that this insulates them from claims of substandard care. Nothing could be further from the truth. As the Supreme Court pointed out in Delaney, supra, the law makes no distinction between medical licensees and non-licensees: each is equally liable for injuries flowing from reckless neglect.

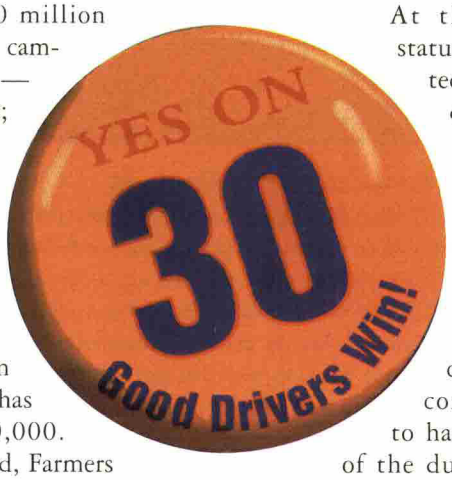
Establishing negligence in such cases can be difficult as the victims are often incapacitated and dependent upon their caregivers to report abuse and preserve evidence. Prompt and thorough investigation is key. This includes investigation both of the claim of abuse (whether physical, financial or otherwise) and a detailed administrative inquiry which may include state and federal licensure applications, Department of Social Services evaluations, court filings, fire department visits and OSHA reviews. Industry generated standards and requirements are also often helpful to establish whether or not abuse has occurred. Many providers have sought and received accreditation by professional organizations who have promulgated standards. These include the American Association of Homes and Services for the Aging (AAHSA), the Continuing Care Accreditation Commission (CCAC), the Retirement Housing Professionals of America (RHP).

Promulgation of the Elder Abuse Act has provided a meaningful tool for dependent adults (and their heirs) to combat neglect, and a significant incentive for dependent care facilities to adhere to rules in caring for those who cannot care for themselves. Our experience in these cases indicates that this statutory framework provides an effective system to eliminate wrongdoing and protect seniors.

INSURERS SEEK TO REPEAL CONSUMER PROTECTION MEASURES WITH PROPS 30 AND 31

Continued from front page

far received over $20 million dollars from the "No" campaign; radio stations — over $3 million dollars; and newspapers — over $600,000 for advertising space. Over $20 million funneled into the state from out-of-state carriers remains to be spent. State Farm Insurance of Illinois, has contributed $16,700,000. During the same period, Farmers (now headquartered in Zurich, Switzerland) contributed over $15,700,000 to undo the legislation, while Allstate contributed almost $4 million dollars. Two European carriers, Alianz A.G. and Zurich Financial Services, have contributed a total of $17 million dollars to defeat the legislation.



Given that both houses of the legislature and Governor Davis believed the legislation was appropriate and warranted, one wonders whether these insurers truly believe they can mislead the voting public by spending tens of millions of dollars of shareholders' money. Why would any straight thinking person vote to permit insurers to delay and deny legitimate claims?

Culpable conduct only results where an insurer fails to make an honest, intelligent and knowledgeable evaluation of a claim. Thus, where the denial of a claim is the result of an "honest mistake in judgment" no breach of the duty of good faith occurs. Before a bad faith claim can be brought, there must be a judgment reached in the underlying personal injury action. So-called "settle and sue" bad faith is not restored. The judgment cannot be a stipulated judgment. It must flow from a trial, default or arbitration award. Finally, prior to judgment being entered, there must have been a demand to settle the underlying personal injury claim in writing, sent by certified mail, within the applicable policy limits, which was not responded to. Any final judgment obtained thereafter must exceed the amount of the final written demand.

At the same time, the statute provides broad protections to insurers who do the right thing. An insurer cannot be sued for bad faith if it stipulates to binding arbitration in claims with values of less than $50,000. In such cases the insurer is conclusively presumed to have complied with all of the duties and obligations imposed by Insurance Code §790.03.

Not surprisingly, the list of those endorsing Proposition 30 is impressive and includes: Governor Gray Davis; Ralph Nader, Candace Lightner (founder of MADD); San Jose Mercury News; Los Angeles Times; Sacramento Bee; American Association of Retired Persons; Consumers Federation of California; California Nurses Association; Citizens for Reliable & Safe Highways; AFL-CIO; California Association of Nursing Home Advocates; and, the California Teachers Association.

Perhaps the San Francisco Examiner said it best in its Sunday, February 6, 2000 editorial endorsing a 'yes' vote on the Propositions:

"At present, Californians victimized by stonewalling insurance companies have no recourse, under present court rules, but to complain to the state Department of Insurance, which is notoriously reluctant to act on such complaints. (Faced with 40,000 consumer complaints a month, the department took enforcement action 54 times in eight years, levying trifling fines of less than $25,000 in most cases.)

Out-of-state insurance companies are spending $50 million trying to defeat Props. 30 and 31. Their front organizations say a 'no' would save Californians from higher auto insurance premiums. That is misleading drivel. 'Yes' on the twin measures provides vital protection against craven insurers."

NHTSA and CPSC Announce Recalls

The National Highway and Transportation Safety Administration, together with Kolcraft Enterprises of Illinois are recalling over 750,000 infant car seats/infant carriers.

There have been more than 3,000 reports of handle-related problems with the seats. When used as a carrier, the handle can unexpectedly move and cause the seat to suddenly rotate, allowing an infant to fall out and suffer serious injuries.

More than 40 injuries have been reported. Some involved children who were restrained in the carrier, and others were not. Reported injuries have ranged from skull fracture, to concussions, to scrapes and bruises.

A free repair kit has been offered by the manufacturer. The risk of injury is not related to how the seat performs while in a vehicle, and therefore, parents can feel confident continuing to use the carriers as car seats. Seats manufactured after July 1, 1999, have a newly designed handle mechanism which prevents the problem. These seats are not part of the recall. A total of 50 model and style numbers are affected.

The CPSC has announced a record civil penalty of $575,000 assessed against Black & Decker for problems associated with the company's Spacemaker T1000 under-cabinet toasters. The CPSC charged that the toaster contained defects which Black & Decker failed to report in a timely manner as required by law. In addition, the CPSC alleged that Black & Decker withheld consumer complaint information. While Black & Decker agreed to the penalty, it continued to deny charges that it violated the law.

The toasters in question were sold between 1994 and 1996. The CPSC stated that the design of the door opening mechanism (in light of the fact the toasters were mounted under wooden cabinets) had resulted in over 800 reports of fires and multiple reports of burn injuries.

Further information regarding the recall can be obtained at the Consumer Product Safety Commission web site, info@cpsc.gov.

Recent Cases

Government Liability

Motorist v. Conco Cement

In Motorist v. Conco Cement, State of California, et al. (Ala.Co.Sup.Ct. No. 773929-9) John Echeverria and Richard Schoenberger negotiated a settlement having a present cash value of $2,500,000 on behalf of a 20 year old U.C. Berkeley graduate student who was injured when flooding on State Highway 13 caused a following vehicle to strike her. Standing water on roadways is recognized as a principal cause of hydroplaning because horizontal drag forces are imposed on the vehicle causing directional instability. As little as 1/16th of an inch of water can cause dangerous hydroplaning. Plaintiff contended that the design of the highway, in conjunction with temporary barriers placed in connection with ongoing shoulder construction prevented proper drainage. The construction, done as part of Bay Area earthquake retrofitting, was carried out by Conco. Defendants claimed that the investigating California Highway Patrol officers noted an absence of running water on the highway surface at the time of the accident, and alleged that the accident was caused solely and exclusively by the negligence and inattention of the plaintiff and the driver who struck her. Plaintiff suffered a closed head injury resulting in brain damage. Past special damages totaled approximately $400,000. The case was settled on the first day of trial prior to the impanelment of a jury.

Recreational Injuries

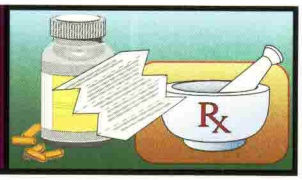
Student v. Waterworld

In Student v. Waterworld (Co.Co.Co. Sup.Ct. No. C98-00396), Paul Melodia and Cynthia Newton recovered $425,000 on behalf of a high school student injured in the June 2, 1997, collapse of the Bonsai water slide at Waterworld's Concord, California facility. Plaintiff was attending the senior class picnic at the facility when the slide broke.

Plaintiff contended that Premier Parks, manager of Waterworld was negligent in understaffing the park. One teenage assistant was present to monitor the slide's platform. Plaintiff alleged the staff was ill-trained and ill-equipped to handle the large student group. Park executives testified that they had no knowledge that multiple riding or "clogging" of the slide occurred despite the fact that employees testified that such activities regularly occurred even at company picnics. Plaintiff also contended that the School District and the high school were negligent in their failure to supervise the students while at the park, and that the manufacturer of the slide failed to appropriately design it to accommodate foreseeable weight.

Plaintiff, an accomplished amateur tennis player, sustained permanent injury to her shoulder in the fall. Her medical expenses totalled $50,000. No wage loss claim was made. The case was resolved at mediation prior to expert discovery.

Dangerous Pharmaceuticals



Consumer v. Drug Company

In Consumer v. Drug Company (confidential settlement), Michael A. Kelly negotiated a seven-figure settlement on behalf of a 52-year-old woman who suffered organ failure after taking a prescription drug marketed by the defendant. Plaintiff claimed that the drug was marketed without adequate testing and that the defendant understated the risks of the drug in its filings with the FDA, and that the package insert was misleading. Plaintiff further claimed that after the drug had been on the market for a period of time the defendant, with knowledge of complications, again failed to timely warn of signs and symptoms of organ failure. Lastly, plaintiff claimed that because the drug had been direct-marketed to consumers in the popul press, magazines and television, the defendant should be precluded from relying on the "learned intermediary" defense. (Fogo v. Cutter Laboratories (1977) 68 Cal.3d 744; Brown v. Superior Court (1988) 44 Cal.3d 1049.)

Defendant countered that plaintiff's reaction was idiosyncratic and unpredictable, and that all proper procedures had been observed and followed during testing of the product. The defendant further alleged that plaintiff's underlying disease process was sufficiently severe that many of her residual complaints would have developed anyway, notwithstanding her ingestion of the drug.

Settlement included all claims for injury, loss of consortium, and any prospective claim for wrongful death.

Medical Negligence

Minor Child v. Kaiser Foundation Health Plan

In Minor Child v. Kaiser Foundation Health Plan (binding arbitration), Kevin Domecus obtained a $4,100,000 arbitration award on behalf of a young boy afflicted with cerebral palsy following negligent delivery at the Kaiser Hospital in Redwood City. Plaintiffs claimed that the child endured a severe hypoxic injury when his mother's uterus ruptured during labor because the attending nurse midwife negligently managed the mother's labor and failed to reduce or stop the administration of Pitocin (a labor enhancing drug). Plaintiffs also claimed that nurses left the mother unattended prior to the rupture which resulted in a failure to note ominous signs of fetal distress. Defendants alleged that the mother's management was entirely within the standard of care and that the Pitocin dose was minimal. Kaiser also claimed that the fetal heart monitor failed to show signs of fetal distress at a time when caesarian section would have made a difference in the infant's outcome.

Pursuant to the Kaiser contractual arbitration agreement, the matter was arbitrated for ten days. Liability and damages were bifurcated.

RECENT CASES

In the damage phase of the arbitration Kaiser claimed that there were no future medical damages since the child is Medi-Cal eligible and CCP §3333.2 entitles it to a credit for future collateral source payments including government benefits. Kaiser also argued that the child's parents should be forced to place any award in a special needs trust to maintain government benefit eligibility. The arbitrators awarded the child the MICRA limit of $250,000 in general damages, $670,000 in future lost earnings, $331,000 in past medical specials, and reimbursement for in-home nursing and attendant care at the rate of $15,500 per month, increasing at 3% per annum, for life. The arbitrators also awarded the mother $250,000 for emotional distress, and $84,000 for household modification expenses.

Heirs v. HMO

In Heirs v. HMO (Confidential Settlement), Michael A. Kelly and Cynthia F. Newton negotiated a six-figure settlement on behalf of the surviving parents of a 38-year-old healthcare executive who was killed as the result of an automobile accident. The accident occurred when an adverse driver suffered an epileptic seizure, lost control of his vehicle and struck plaintiffs' decedent who was without fault in the accident. Investigation disclosed that the offending driver had a history of epilepsy, and had reported varying degrees of seizure activity to his primary treating neurologist, who was an employee of the HMO. Plaintiffs claimed that the neurologist and HMO were negligent in making a recommendation to the California Department of Motor Vehicles that the adverse driver's license be reinstated when they knew that he had ongoing seizure activity. Plaintiffs claimed that in light of the fact that the medical defendants knew the adverse driver had been involved in at least one prior automobile crash which was seizure-related, it was negligent for the neurologist to advise the Department of Motor Vehicles that the driver would probably be seizure-free in the future. The HMO defended the case on the basis that it had no responsibility to notify the DMV, and further claimed the adverse driver had not accurately disclosed the severity of his ongoing seizure disorder, purposely minimizing his symptoms in an attempt to conceal his disease from his doctors. Under the terms of the settlement, the identity of the HMO and specific amount of money paid was to be kept confidential.

Rowe v. Doe Hospital

In Rowe v. Doe Hospital, John Echeverria represented a successful real estate broker in a medical malpractice action stemming from a failure to diagnose an infection. As a result of the failed diagnosis and a consequent failure to prescribe antibiotics, the broker went on to develop overwhelming septic shock which eventually resulted in bilateral below the knee amputations and amputation of his fingertips.

The plaintiff contended that the emergency room physicians and hospital staff breached the standard of care in failing to admit plaintiff to the hospital and failing to administer antibiotics.

Though the plaintiff has been fitted for artificial legs and become proficient in their use, his life was catastrophically altered by the hospital and doctors' negligence. He is able to wear his prosthetic devices for only six hours before pain and swelling preclude their use.

The defendants vigorously denied any liability and additionally claimed that any negligence was not a substantial factor in causing the plaintiffís severe injuries. The case eventually settled for $3,100,000

Lieu v. Engle

In Lieu v. Engle (contractual arbitration) Cynthia Newton obtained a $410,000 judgment on behalf of the family of a 38-year-old mother of four who died following cosmetic surgery at an outpatient surgical center. The surgery (abdominoplasty) was performed under conscious sedation anesthesia without the assistance of a certified nurse anesthetist or anesthesiologist. Rather, a registered nurse administered the anesthesia under the doctor's orders and was responsible for monitoring the patient's vital signs and respirations during the procedure. The surgeon, bankrupt and uninsured, was not a party to the proceeding. The arbitration resolved the plaintiffs' claims against the nurse.

Plaintiffs alleged that the defendant nurse failed to properly monitor and assess the decedent and to appreciate and timely respond to changes in her vital signs, including blood pressure, respiration rate, and oxygen saturation level. As a result decedent suffered prolonged oxygen deprivation and hypoxia causing irreversible brain damage. Defendant nurse contended that her monitoring and response to changes was entirely appropriate and that any responsibility for the decedent's death lay with the surgeon as "captain of the ship."

The arbitrators apportioned 80% fault to the absent surgeon. The award against the nurse included $330,000 in economic damages and $50,000 in non-economic damages. Defendant made no pre-hearing settlement offer.

CHILD ABUSE

Child v. Children's Discovery Center

In Child v. Children's Discovery Center (U.S.D C. No.Dist. No. 98-03035) Doug Saeltzer obtained a cash and annuity settlement on behalf of a 9-year-old boy having a total present cash value of $250,000. The plaintiff was physically and verbally abused by his day-care teacher over a six month period. The mistreatment culminated in the teacher throwing the child across a room into a wall. Shortly thereafter the teacher was terminated. Defendants included the day care facility and the teacher. Discovery revealed that the defendant facility had received numerous complaints from other parents regarding the teacher mistreating their children during the same period the minor plaintiff alleged he was abused. Complaints from staff members were also lodged during this time. Plaintiff sustained emotional and psychological injuries requiring extensive counseling with residual emotional difficulties. The defendant day care facility disputed the severity of the abuse, attempted to avoid responsibility by characterizing the actions of the teacher as not within the course and scope of her employment, and disputed the nature and extent of the child's residual emotional complaints.

Recent Cases

Premises Liability

Child v. Yardbird's Home Center

In Child v. Yardbird's Home Center (Co.Co.Co. Sup. Ct. No. P9901582) Michael J. Recupero negotiated a settlement having a present cash value of $235,000, including both cash and annuity, on behalf of a 3-year-old child who was seriously injured when a display fell on her at the defendant's premises. The child was shopping at the Yardbird Home Center in Richmond, supervised by her grandmother, when the accident occurred. Defendant claimed that the accident was exclusively the fault of the child, or her grandmother, for not supervising her. Plaintiff countered that in California a child under the age of 5 is incapable of contributory negligence. The display which fell incorporated a door jamb and was advertising the availability of replacement home entrance doors. Investigation revealed that the child's actions had not in any way increased or caused the problem, but rather, the design of the display made it equally likely it could fall on an adult patron who brushed against it. The child's injuries included severe lacerations which resulted in residual scarring requiring revision surgery and a series of steroid injections to reduce hypertrophic swelling. Medical bills exceeded $6,000. The annuity portion of the settlement was structured to provide funds for the cost of a college education.

Invasion of Privacy

Husband and Wife v. Doe Broadcasting

Husband and Wife v. Doe Broadcasting (confidential settlement). John Echeverria and Doris Cheng have successfully concluded a defamation/invasion of privacy case on behalf of a husband and wife against a radio station and individual radio personalities. The individual defendants, while on the air, called the female plaintiff's home and left a message which falsely suggested that she was having an extramarital affair with one of the hosts of the show. The action filed on behalf of both the wife and her husband claimed that the telephone call and the content of the message were outrageous, defamatory and constituted an invasion of privacy because they intruded upon plaintiffs' marital life, their personal lives and their home. It was also claimed that the conduct of the defendants constituted a misappropriation of plaintiff's identity for commercial benefit. Initially, defendants denied that the phone call had been made, that the message was left while they were on the air, and that the statements were defamatory. Defendants also claimed that if the call had been placed and if the statements were made, it was part of the show's "blue humor" and not offensive. Investigation and discovery confirmed that defendants indeed called plaintiffs' home and made sexual references about the female plaintiff on more than one occasion while on the air. The matter was concluded during the discovery phase of the lawsuit. Under the terms of the release, the settlement terms and the identity of the defendants are to be kept confidential.

Worksite Injury

Adam K. v Gonsalves & Santucci

In Adam K. v Gonsalves & Santucci (S.F. Co. Sup. Ct. No. 998123), Doug Saeltzer resolved a work site back injury claim on behalf of a 29-year-old scaffold erector. The accident occurred during construction of a multiple screen movie theatre at 1000 Van Ness Avenue, while the building was in its shell stage. The plaintiff was on the fifth floor lowering a cable adjacent to an empty elevator shaft. Unbeknownst to him, two of defendant's employees were using the elevator shaft to pass rebar down from the roof to the eighth floor. As the worker on the roof slid the rebar underneath a tarp, the employee below him leaned out over the shaft to grab the end of the steel rod. The transfer was unsuccessful and the rebar fell into the elevator shaft striking the plaintiff in the back. Injuries included an anterior disc bulge of the thoracic spine. This injury, according to plaintiffs treating physicians, prevented him from returning to work as a scaffold erector. By the time of settlement the plaintiff was being retrained as a building inspector. Defendant contended that other entities, including the plaintiff's employer and the general contractor, were responsible for the accident. Defendant also disputed the nature and extent of plaintiff's injuries. The settlement package totaled $250,000 and included resolution of an outstanding workers compensation lien in the amount of $65,000. The workers compensation carrier agreed to accept $35,000 and waive future credit rights.

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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