WALKUP, MELODIA, KELLY, WECHT & SCHOENBERGER

FOCUS on torts

VOLUME X, NUMBER 1 SUMMER 2003

FIRM NAME CHANGE RECOGNIZES WECHT AND SCHOENBERGER

Recently, in conjunction with John Echeverria's relocation to Reno, the firm's name was officially changed to Walkup, Melodia, Kelly, Wecht & Schoenberger. This change recognizes the contributions of Ronald Wecht and Richard Schoenberger, giving them equivalent status with named partners Paul Melodia and Michael Kelly.

Both Ron and Rich have compiled impressive track records of successful verdicts, settlements and awards in a variety of case types. Recently, Rich obtained his fifth seven-figure verdict, and fourth in the last five years, by securing an award of $1,072,000 in San Joaquin County, in a case where the pre-trial offer was $200,000. For his part, Ron concluded a complex vehicular negligence/medical malpractice case (Kaufman v. Delta) for an amount in excess of $2,500,000.

Ronald Wecht

A graduate of the United States Naval Academy and the University of California Hastings College of Law, Ron joined our firm in 1974 following the completion of his military service. After serving in the infantry in Vietnam, Ron became a Navy pilot flying single seat jet attack aircraft.

Ron's aviation background has suited him well in the litigation of private and commercial airplane crash cases. He has also tried a variety of product liability claims involving industrial and consumer products, as well as cases involving medical negligence. Ron is a member of many prestigious professional organizations, including the American Board of Trial Advocates, the Lawyer-Pilot Bar Association, and he recently completed two years on the executive board of the Robert G. McGrath Inn of Court.

Rich Schoenberger

Rich Schoenberger graduated from Hastings in 1985. Immediately following graduation, he worked as a Deputy District Attorney for the Alameda County District Attorney's Office, prosecuting serious felony cases. He joined our firm in 1987, and became a partner in 1995. With our firm he has tried cases throughout Northern California and was a nominated finalist for the SFTLA Trial Lawyer of the Year award in 2001. He regularly teaches for the Consumer Attorneys of California, the National Institute of Trial Advocacy and the San Francisco Trial Lawyers Association. Last year he was appointed as a faculty member for the judicial studies program of the Judicial Council.

National Media Criticizes Bush Plan to Protect Bad Doctors

The recent death of Jessica Santillan, the 17 year old given a heart and lung from an incompatible donor, has briefly stalled the Bush Administration's plan to restrict the rights of patients. Until the Santillan tragedy, the Administration, parroting the mantra of physician lobbying groups, was pushing hard for a $250,000 limitation on the liability of doctors, physicians, HMO's, nursing homes and even drug manufacturers.

The unfairness of the Bush plan has not been lost on the national media. Writing in the Wall Street Journal, Albert R. Hunt commented, "Malpractice litigation is only part of the cause of the huge increases in insurance premiums. The insurance industry pricing and accounting practices, as this newspaper painstakingly revealed last June, plays a big role. So does the failure of too many state medical boards to discipline serial medical offenders – and the failure to require full disclosure – of such behavior.

"Two favorite whipping boys for the President are frivolous lawsuits and contingency fees, where a trial lawyer takes a case for no fee, but a guaranteed piece of the recovery, usually ranging between 20 to 40

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HILTON VERDICT WITHSTANDS POST TRIAL ATTACK

On April 25, 2003, Washoe County (Nevada) District Court Judge Stephen Elliot denied all post-trial attacks on the $25.2 million punitive damage verdict against the owners and operators of the Reno Hilton Hotel that firm attorneys, in association with local counsel, obtained last year. The jury award was made to approximately 1,000 hotel patrons who became ill during a 1996 outbreak of the Norwalk Virus. Defendants included Park Place Entertainment, a publicly traded, multi-billion dollar gaming company which operates the hotel.

Besides punitive damages which were awarded to the entire class, the jury also awarded five guests $22,000 in compensatory damages. The compensatory damages owed to the remaining 1,000 guests will be determined in future proceedings and could amount to many millions more.

In addition to rejecting the defendants' attack on the judgment Judge Elliot also adopted the plaintiffs' proposal to appoint a special master to oversee the next phase of the trial, which will determine the amount of compensatory and punitive damages due each member of the class. Those proceedings are expected to begin by the end of summer.

The Norwalk virus is typically transmitted by food, beverages or surfaces contaminated with the fecal matter of an infected person. Plaintiffs proved that the outbreak started among hotel employees and then spread to guests through unsanitary practices, such as cooks not washing their hands after using the restroom. Infected guests suffered from projectile vomiting and uncontrollable diarrhea. Many went to the ER due to extreme dehydration.

The Center for Disease Control and local health authorities conducted an investigation and found that the outbreak spread so quickly because more than half of the hotel's sick employees continued to work while experiencing symptoms. At trial, the hotel's president and department managers testified they were unaware of any employees working while ill. These executives were later impeached with survey forms they filled out for the CDC in which they each personally reported working with sick employees.

The evidence also showed that the hotel's sick leave policy punished employees who called in sick and that hotel supervisors pressured employees to work while ill during the outbreak, in clear violation of state sanitation laws.

Attempting to defend his actions, the hotel president testified that he was greatly concerned about guest safety during the outbreak; that less than 1% of the guests got sick, and that the hotel did everything health authorities told them to do. The jury learned, however, that these same executives disregarded a CDC recommendation to warn new guests about the outbreak and instead publicly stated that there were no problems at the hotel. New guests continued to check in and get sick for more than four weeks.

Supreme Court Invalidates Medi-Cal Balance Billing

In Olszewski v. Scripps Health (2003) 30 Cal.4th 798, the California Supreme Court unanimously invalidated state regulations which sought to permit health care providers to recover the difference between their charges and the amount received from the State of California Medi-Cal program ("balance billing"). Such a procedure had been authorized under California Welfare & Institutions Code section 14124.791, so long as the healthcare provider who had received Medi-Cal payments refunded those to the state and waited until the end of any ongoing litigation to seek reimbursement.

Affirming the Third District Court of Appeal, Justice Janice Rogers Brown, writing for a unanimous Court, held that California's statutory framework for permitting balance billing in the Medi-Cal context was preempted by federal law. Specifically, the Court held that any attempt to apply section 14124.791 was "invalid, unenforceable, and uncollectable."

While federal law requires any state funded Medicaid agency to obtain full reimbursement of Medicaid payments from third-party tortfeasors whenever possible, it strictly limits the ability of medical providers to obtain reimbursement for their services beyond the amount of Medi-Cal funded payments. This is true even though payments from Medi-Cal are typically lower than the amounts normally received by the providers for their services.

Governing federal law requires that any state plan which distributes Medicaid funds (Medi-Cal is such a program) may do so only to providers who accept, as payment in full, the amounts paid by the state agency. (42 C.F.R. §447.15) The California scheme authorized liens to be filed which sought more than the amount to which the providers would be entitled as full payment under the Medi-Cal plan.

Justice Brown noted that in creating Medicaid, congress sought to provide medical assistance to persons whose income and resources were insufficient to meet the costs of necessary care. Recognizing that any amount charged directly to a beneficiary for medical services would "interfere with beneficiary's access to the medical attention he needs," the Secretary of Health and Human Services promulgated 42 C.F.R.§447.15 to force state plans to

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Supreme Court Invalidates Medi-Cal Balance Billing

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require providers to accept Medicaid payments as "payment in full."

The Supreme Court rejected the healthcare providers' claim that where a lien is placed on a judgment, there is technically no "charge" directly imposed on the beneficiary. "In this case, a lien filed under Welfare & Institutions Code section 14124.791 imposes a charge on the *entire* judgment, compromise or settlement obtained by the Medi-Cal beneficiary, and the *entire* award otherwise accruing to the beneficiary may be used to satisfy the lien. Thus, a provider's recovery on the lien may encompass that portion of the judgment, compromise or settlement compensating the beneficiary for, among other things, lost wages and pain and suffering—and not just the portion compensating for medical expenses."

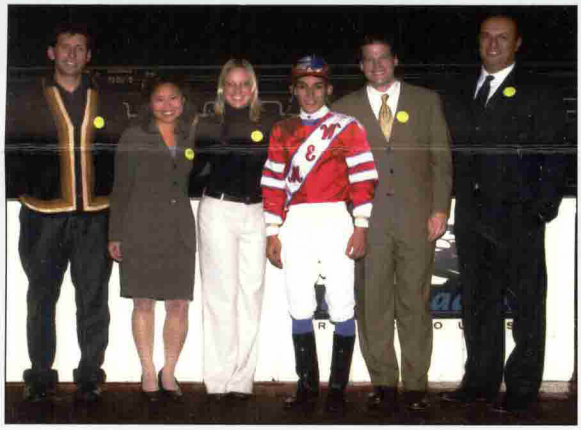
While no earlier California decision has addressed this preemption question, the Supreme Court found support for its position in decisions of other courts. In Public Health Trust v. Dade County (1997) 693 S. 2d 562, the Florida Court of Appeal found the federal law preempted a state regulation analogous to California's scheme. In Evanston Hospital v. Halc (7th Cir. 1993), the Seventh Circuit denied the claim of a healthcare provider who sued a Medicaid beneficiary, and the state agency administering the Medicaid funds, after an injured plaintiff recovered a multi-million dollar verdict.

As for the defendant's claim that the California scheme is not "balance billing," but rather "substitute billing," the Court again disagreed. "We acknowledge that liens filed pursuant to section 14124.791 are not strictly a form of balance billing because the lienholder must refund Medi-Cal benefits before recovering on them. But nothing in the language or history of the federal statutes and regulations restricting provider recovery from Medicaid beneficiaries limits their restrictions to balance billing."

In the end, the Court was firm in its holding that federal regulations prohibit providers from attempting to obtain payment for their services directly from Medi-Cal beneficiaries. Because the lien here constituted such an attempt, it was invalid, unenforceable and uncollectable.

WALKUPDATES

Pictured below are associates Matt Davis, Doris Cheng, Michon Herrin, Erik Atkisson and Khaldoun Baghdadi with winning jockey, Jose L. Rivera, at the recent "Walkup Night At the Races." Rivera rode Boulder Express to a 3-length victory in the feature race of the evening. The resemblance between Rivera, and former Walkup partner, Dan Dell'Osso, is strictly coincidental. As far as we know, Dan is doing well and still practicing law in Arizona...Mike Kelly was recently honored with election to membership in the American College of Trial Lawyers. The organization, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Invitation to membership is limited to 1% of the total lawyer population of any state or province. In addition to this prestigious honor, Mike has also been elected to serve as a member of the Board of Trustees for the National Institute of Trial Advocacy. This follows on Mike's appointment as Director of NITA's California Teacher Training Program...Paul Melodia has been selected to the Boalt Hall Alumni Association Governing Board. Paul also serves as Program Chair for the Edward McFetridge American Inn of Court...Rich Schoenberger led a recent San Francisco Trial Lawyers Association education program focused on demonstrative evidence...Doris Cheng taught at Emory University's Kessler-Eidson Trial Techniques Program in Atlanta, Georgia. Doris also served as Assistant Director of the University of San Francisco Law School's Intensive Advocacy Program, which was recently completed at Kendrick Hall Law School....Ron Wecht was selected to participate as a panelist in a full-day San Francisco's C.E.B. program dedicated to the fundamentals of pretrial civil practice. In addition, Ron serves as Program Chair and member of the Executive Board of the Robert G. McGrath Inn of Court in Contra Costa County....Khaldoun Baghdadi has been appointed by Mayor Willie Brown to the San Francisco Human Rights Commission. Khaldoun has also been invited to participate as an instructor at the Western Regional Trial Skills Program sponsored by the National Institute of Trial Advocacy. The program will be held over a ten day period at the University of San Francisco...Doug Saeltzer has been appointed to the Adjunct Faculty at U.C. Hastings College of Law where he is teaching a two-unit course in personal injury litigation...Daniel J. Kelly has been elected to serve as the President of the International Society of Barristers. Dan will preside over the group's annual convention which takes place in February of 2004 in Naples, Florida. Dan was also presented with the Edwin J. Owens "Lawyer of the Year" award from the University of Santa Clara Law School. The award, named for a former dean, is presented annually to a Santa Clara graduate honored for his high moral character and intellectual ability. Nominees must have made significant contributions both to the community and to the profession. Over the years, Dan has served as a member of the University's Board of Regents, the Law School's Board of Visitors, and the Advisory Board for Santa Clara's Markkula Center for Applied Ethics. Past recipients have included former California Appellate Court Justices Mark Poche and Jerome Smith; former State Supreme Court Justice Edward A. Panelli; retired Santa Clara Law School Dean and criminal law expert, Gerald F. Uelmen, and former White House Chief of Staff Leon J. Panetta.



Daniel J. Kelly

Statutory Amendment and Appellate Decisions Modify Firefighter's Rule

The Firefighter's Rule is a form of assumption of risk which immunizes wrongdoers who negligently start a fire, create a disturbance, or otherwise require the presence of firefighters, peace officers or emergency personnel at the scene of an incident or accident. In California, the rule has been invoked as a complete defense in a variety of situations. (Baker v. Superior Court (1982) 129 Cal.App.3d 710.)

Recently, however, an amendment to Civil Code §1714.9 (the statute which codifies the Firefighter's Rule) was signed into law, expanding the rights of public employees. The amendment was the result of lobbying by the mother of a Stockton firefighter who was killed in a 1997 fire when the floor of a burning building he entered collapsed. The floor had been built without required permits. Following her son's death, Judy Booher began to lobby for a change in the state's law so that public safety workers would have the same rights as other victims when they suffered injury. The amendment now provides that police officers, firefighters, and other public safety workers may sue when the cause of their injury "violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event which precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel."

A second historic exception to the Firefighter's Rule involves situations where an act of negligence, independent of the conduct which necessitated the response, produces the injury. That principle was recently upheld by the Third District Court of Appeal in Terry v. Garcia (2003) D.A.R. 5715. In Terry, a CHP officer responding to a domestic violence incident was driving in Code 3 mode when he was involved in an accident when an agricultural truck pulled in front of him.

When Officer Terry brought suit against the truck driver, the Firefighter's Rule was raised as a defense. The court of appeal refused to immunize the truck driver, rejecting the defendant's claim that the risk of a collision is necessarily part of a police officer's job: "We disagree that in determining whether the firefighter's rule applies a court is free to decide what risks are inherent in police work. The inherent risks as to which defendants owe public safety officers no duty of care are defined by the Firefighter's Rule based on the policy considerations which justify the rule. These risks are confined to those which caused the officer to respond: in other words, defendants owe public safety officers no duty of care as to the negligence that makes the public safety officers' employment necessary."

The court of appeal went on to find that the negligence of the truck driver was independent of the misconduct which summoned Officer Terry to a high speed response. As such, the court felt the case fell within the "independent cause exception" and no public policy existed to support the rule in this instance.

While such an interpretation is consistent with California law, an appeal to the Supreme Court is undoubtedly in the works. Since the Supreme Court decided the 1992 cases which reinstated assumption of risk (Knight v. Jewett and Ford v. Gouin) appellate courts have shown no restraint in applying the doctrine. The Third District's unanimous opinion in Terry marks a departure from such judicial activism. Only time will tell whether the exception carved out here is one that will be applied statewide.

Recent Product Recalls

General Motors has recalled over 110,000 1995 Chevrolet Luminas, Buick Regals and Pontiac Grand Prixs because the center rear seat belt anchor cracks and fails. In the event of a collision, the seat belt system can fracture, increasing the risk of injury to rear seat occupants. (NHTSA recall 98V306.)

Mazda of North America has recalled over 200,0000 models 626 and MX6 for the years 1995-1997 because of problems with inadvertent airbag deployment in minor impacts. Unexpected airbag deployment can result in personal injury. (NHTSA recall 98V249.)

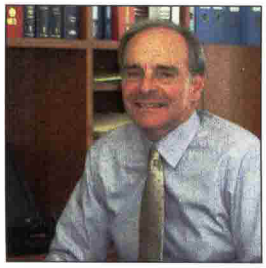
Subaru has also recalled approximately 100,000 Impreza and Legacys because of inadvertent airbag deployment. Unexpected and injurious deployment has happened after undercarriage contact of the tow hooks with curbs, dips, speed bumps, potholes and other typical road conditions. (NHTSA recall 98V315.)

Over 40,000 Galaxy 2000 child seats have been recalled by Basic Comfort, Inc. because of their failure to comply with the chest acceleration requirements of Federal Motor Vehicle Safety Standard No. 213. Improper placement of the shoulder belt portion of the vehicle's built-in safety harness across a child's torso can result in excessive forces on the booster seat occupant, increasing the risk of serious personal injury. In addition to the recall, Basic Comfort is also distributing a revised instructional booklet. (NHTSA recall 98E036.)

Over 3.4 million Evenflo Joyride car seats/infant carriers have also been recalled. The seats have handles which unexpectedly unlatched when used as an infant carrier. Hundreds of reports of unlatching, resulting in injuries such as skull fractures, concussions, extremity fractures and bruises have all been reported. The recall involves model numbers beginning with 203, 205, 210, 435 and 493.

Finally, Goodyear Tire and Rubber Company has agreed to replace approximately 200,000 16-inch load range E tires in use on fifteen-passenger vans and ambulances. According to NHTSA, the tires have been linked to 18 fatalities, 158 injuries and 86 crashes. The tire manufacturer has been named in at least 35 lawsuits to date for claims related to the tires.

PAUL MELODIA PROFILED AMONG TOP 25 LAWYERS IN BAY AREA



On May 4, 2003, the San Francisco Chronicle honored twenty-five attorneys selected by their peers, judges and legal observers as the best in their specialty areas. Along with the attorney who had defended the American Taliban and the prosecutor who convicted Oliver North in the Iran-Contra Scandal, was our own Paul Melodia. The only personal injury attorney singled out for recognition, Paul was profiled thusly:

"To a layman, a personal injury lawyer is the guy you hire when you fall on somebody's sidewalk or when someone plows into you in a car. And that's true. But at perhaps the preeminent personal injury firm in the Bay Area – Walkup, Melodia, Kelly, Wecht & Schoenberger, widely referred to as the Walkup Firm – the field of personal injury law includes consumer protection, product liability, medical malpractice, wrongful death, vehicle and aviation accidents, workplace injuries and insurance company disputes.

"As head of the firm, Paul Melodia, 63, has had a hand in hundreds of trials and arbitrations. A plaintiff's attorney, his specialty is medical litigation, from malpractice to drug and product liability. Since joining the firm in 1967, he has successfully brought lawsuits against the makers of the Ortho-Novum pill, Dalkon Shield IUDs, swine flu vaccine and L-Tryptophan. Although the cases were brought on behalf of individuals rather than class action suits, revelations about the products' dangers have affected thousands of consumers. 'I like the cases that have social significance,' Melodia says."

We are pleased that the greater legal community has recognized what we already know: Paul is a special lawyer. Many honorary societies have already confirmed this. Recently, Paul was inducted as a Fellow in the International Academy of Trial Lawyers. Previously, he had been selected for membership in the American College of Trial Lawyers and the American Board of Trial Advocates. Paul has been listed among "The Best Lawyers in America" for more than a decade. A founding member of Northern California's first American Inn of Court, Paul is currently serving his second term as president of Walkup, Melodia, Kelly, Wecht & Schoenberger.

National Media Criticizes Bush Plan to Protect Bad Doctors

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percent of a final judgment. Yet contingency fees not only enable those without means to get legal representation, but actually discourages frivolous lawsuits: 'Why sue frivolously if you only get paid if you win?'"

The St. Louis Post Dispatch reminded, "It is important to remember why malpractice laws exist in the first place: to help compensate people who are injured seriously by the negligence of a doctor or hospital. Improvements to that law should not come at patients' expense."

While the national news media has begun to recognize that the solution to increasing malpractice insurance rates is not to cap pain and suffering awards or limit victims' access to the courts, the Bush Administration and the healthcare lobby, don't seem to "get it."

Here in California, the victims of medical malpractice know all too well how unfair our 1975 "reforms" have turned out. Particularly victimized are those who have no economic loss; the brain-damaged infant who the healthcare industry now argues should be cared for by the state; and those whose harm is non-economic: the scarred, disfigured and/or maimed, who require no additional treatment, or can still do their jobs.

As pointed out in the Charleston Gazette, "If the house of representatives and the United States senate approve the Bush proposals, the legislature will have committed malpractice of its own."

Ten years after California passed M.I.C.R.A., malpractice insurance rates still increased by 30 percent. Insurance rates during that period of time still exceeded the national average.

If the California "model" is to be emulated by the rest of the country, doctors in the other 49 states should not start spending their saved insurance premiums. According to the Foundation for Taxpayer and Consumer Rights, M.I.C.R.A. did nothing to substantially reduce doctors' insurance premiums. Reductions in premiums did not occur until the passage of Proposition 103 in 1988, an insurance reform initiative that brought radical changes to everything but life insurance and worker's compensation. Politicians who point to the California model as a solution to the "malpractice crisis" are urging the wrong model: there is no benefit in copying a flawed system.

Tom Baker, writing in the Hartford Courant, got it right:

"Tort reform is a blame-the-victim strategy that hurts doctors as much as patients by distracting them from attacking the causes of medical error. Doctors are compassionate professionals who want to help their patients, not hurt them. But, reducing medical errors requires more than compassion. Injured patients and their lawyers are the messengers here, not the cause of the medical malpractice problem. Don't shoot the messenger."

Recent Cases

Government Liability

Pedestrian v. City & County of San Francisco

In Pedestrian v. City & County of San Francisco (S.F.Sup.Ct. No. 316096), Richard Schoenberger and Doris Cheng obtained a $567,000 verdict on behalf of a 30-year-old man who sustained multiple pelvis fractures, a transected urethra, and orthopedic injuries when he was crushed between a moving light rail vehicle (LRV) and a handicap ramp at the intersection of 9th and Judah Streets in San Francisco. Plaintiff alleged that the MUNI operator pulled away from the stop without confirming that the area between the ramp and the LRV was clear, with the result that the rear corner of the vehicle swung into plaintiff, pinning him against the ramp. Plaintiff also claimed that the LRV boarding platform at the location of the injury constituted a dangerous condition of public property. The City contended that the LRV operator could not have seen nor heard the plaintiff because plaintiff was outside the designated boarding area, and further, that the defense of design immunity (Government Code §830.6) insulated it from fault.

The pretrial settlement offer was $10,000. The jury apportioned negligence 78% to the City and 22% to the plaintiff. Special damages were approximately $100,000.

Student v. San Joaquin School District

In Student v. San Joaquin School District (confidential settlement), Michael A. Kelly and Richard H. Schoenberger obtained a cash and annuity settlement having a present cash value of $4.5 million on behalf of a high school sophomore who suffered permanent paralysis as a result of unsupervised horseplay when the plaintiff and fellow members of his sophomore football team were left unsupervised prior to practice. In the course of rough-housing, one member of the team jumped on the plaintiff, severing his spine. The school district claimed that the fault for the incident rested with the minor plaintiff and his schoolmates. Plaintiff acknowledged that while some fault could be apportioned to him and other members of his team, special (economic) damages exceeded $4,000,000 pursuant Civil Code section 1431.2. In addition, while the school district might try to apportion fault to other tortfeasors, it had a non-delegable duty to supervise its students at all times while they were on campus for school-related activities. The defendant school district argued that coaches were not responsible for supervision of the team off of the field and that no coach or other school district employee unlocked the door to the room where the tragedy took place. Under the terms of the settlement, $2,750,000 was paid in cash, and the balance was directed to multiple annuities to provide for increased levels of support throughout the child's life as his needs increase.

Heirs of D. v. State of California

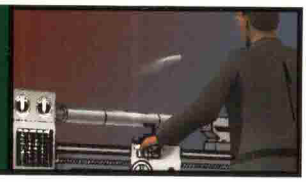
In Heirs of D. v. State of California (San Mateo Co. Sup.Ct. No. 415924), Matt Davis negotiated an $800,000 settlement after three days of trial in a dangerous condition of public property case against the State of California. The claim was brought on behalf of the surviving wife and two children of a 59-year-old man who crashed into a fallen tree on State Route 1 late at night. Plaintiffs claimed that the tree fell because it was infected with pine pitch chancre, a disease well known to CalTrans maintenance personnel in southern San Mateo County. The tree fell such that the root ball remained elevated on a hillside, with the tree suspended above the roadway surface like a clothesline. The decedent, driving a van, was transporting commercial goods to Watsonville, and never saw the tree before impact.

Plaintiffs argued that the fallen tree constituted a dangerous condition of public property (Government Code §835) and that the State knew or should have known of the problem because it had previously cut down a number of Monterey Pines showing the very same symptoms.

Defendant State alleged that the decedent was comparatively at fault for not seeing the tree, and further, that the provisions of the weather immunity of Government Code §831 (the State argued that rain the evening before loosened the tree roots and caused the fall) and the immunity for natural conditions of unimproved public property (Government Code §831.2) both prevented recovery.

The case settled after a trial court ruled on motions in limine dealing with expert opinion testimony and the applicability of the various immunities.

Product Liability



M.C., an Incompetent v. Foreign Tool Maker

In M.C., an Incompetent v. Foreign Tool Maker (confidential settlement), Michael A. Kelly and Richard Schoenberger negotiated a cash and annuity settlement having a present cash value of $4,000,000 on behalf of a 47-year-old metal worker. The plaintiff suffered a catastrophic brain injury, and remains in a semi-vegetative state, after a 50 pound piece of metal ejected from a metal forming lathe manufactured by the defendants. Plaintiff claimed that the defendant manufactured the lathe without analyzing all possible failure modes.

Plaintiffs' experts testified that the particular lathe as designed was incapable of retaining work pieces or chuck components which might foreseeably come loose and become projectiles. Discovery indicated that the defendant was aware of at least two similar lathe accidents. Defendant contended that the accident occurred solely as a result of the plaintiff's employer's negligence, because the employer had modified the machine, after purchase, with parts not produced by the defendant. Under the terms of the settlement, approximately $3,000,000 was paid in cash and $1,000,000 was dedicated to the purchase of multiple annuities to pay for ongoing medical costs. Under the terms of the settlement, a 7-figure worker's compensation lien was compromised and waived.

Plaintiff v. Domestic Automaker

In Plaintiff v. Domestic Automaker (confidential settlement), firm attorneys recovered a $2,000,000 settlement on behalf of a 15-year-old girl who was ejected from an SUV after her mother fell asleep at the wheel and

Recent Cases

caused the vehicle to roll. The child was ejected although she was properly seat belted at the time of the accident. Plaintiff claimed that the vehicle was defective in design because the seat belt system failed to perform as safely as an ordinary consumer would expect. The defendant Automaker claimed that the plaintiff was not belted at the time of the accident. The case settled after expert discovery.

General Negligence

Passenger v. San Francisco Limousine Company

In Passenger v. San Francisco Limousine Company, Khaldoun A. Baghdadi negotiated a settlement with a value in excess of $1 million on behalf of a 26-year-old San Francisco banker who fell from a motorized cable car during a work-related party in San Francisco. The defendant limousine company owned and operated the trolley, built to resemble a San Francisco cable car. Plaintiff fell from the vehicle when it navigated a sharp curve on a city street late in the evening. The driver, unaware of the fact that his erratic operation had caused the injury, continued driving until other passengers brought the injury to his attention. Plaintiff claimed that erratic vehicle operation caused him to lose his balance and fall from the vehicle's doorway. The defendant claimed that the plaintiff, as well as other passengers on board, had consumed substantial amounts of alcohol with the result that their recall could not be trusted and that the likely cause of the fall was plaintiff's intoxication. Plaintiff countered that intoxication was a known, expected and encouraged condition of the passengers given that defendants advertised its service as a safe way to travel when celebrants expected to be consuming alcohol. Plaintiff's injuries included a fractured skull and subarachnoid bleeding.

Vehicular Negligence

Commuter v. Defendant Driver

In Commuter v. Defendant Driver, et al., (S.F. Sup.Ct. No. 316334), Douglas Saeltzer obtained a $550,000 settlement on behalf of a 34-year-old man injured in a multiple car pile up on the Golden Gate Bridge. The plaintiff's vehicle was stopped when the 18-year-old defendant, driving with a suspended license, rear-ended a third vehicle, which in turn was pushed into the plaintiff's motorcycle. Plaintiff's left leg was trapped between the suspension of the bike and the oncoming vehicle. Bystanders attempted, but failed, to lift the vehicle off of plaintiff. He sustained a compound fracture of the left tibia and fibula, with involvement of the knee joint. Medical bills exceeded $60,000. Plaintiff claimed future wage loss in the amount of $45,000.

Rachel C. v. Victoria Bass

In Rachel C. v. Victoria Bass (Glenn Co. No. 02CV00731), Matt Davis negotiated a settlement in the amount of $380,000 on behalf of a 27-year-old woman who was driving to work in Butte County on State Route 45 when struck by a car that had turned illegally in front of plaintiff from County Road 39. As a result of the collision, plaintiff sustained a comminuted and displaced fracture of the right radius and ulna, resulting in significant residual deformity. Because of bone loss at the fracture site, an external fixation device and bone grafting were required. Post-operatively the plaintiff developed significant keloid scarring at the incision and pin-insertion sites. Defendant acknowledged liability, but disputed the nature and extent of residual disability. Plaintiff claimed that restricted flexion and extension in the injured right (major) arm compromised her ability to work in her chosen profession and/or to engage in recreational activities including water sports, snow skiing, tennis and basketball.

Medical bills, past and future, were approximately $100,000. The case settled at court ordered mediation.

Aviation Liability

Family of B. v. Teledyne, et al.

In Family of B. v. Teledyne, et al. (Los Angeles Sup.Ct. No. VP008604), Ronald H. Wecht obtained a $3,000,000 settlement on behalf of the widow and two surviving children of a 45-year-old missionary, who died in a plane crash. The decedent had dedicated his life to missionary work in Mexico. While on such a mission, a cam shaft gear broke in the plane he was piloting. A wrongful death claim was brought against the defendants who produced and sold the engine. The decedent attempted an emergency landing but was unable to find a suitable landing area. The plane struck a forested area before it reached the ground. The matter was settled at mediation.

Family of M v. Alaska Airlines

In Family of M v. Alaska Airlines, Richard H. Schoenberger recovered a settlement in excess of $2 million on behalf of the grandparents of a 7-year-old child who died on Alaska Airlines Flight No. 261 when the plane crashed enroute from Puerto Vallarta to San Francisco. Plaintiffs alleged that the carrier did not take all necessary measures to avoid the incident, overlooked obvious maintenance needs, and therefore (by the modified terms of the Warsaw Convention) assumed liability for the deaths of those aboard Flight 261. Plaintiffs also claimed that the defendants failed to immediately seek permission to land when its crew first noted difficulty in operation of the aircraft, failed to remove or repair the jack screw assembly of the aircraft in a timely manner, and failed to provide necessary and appropriate training to the flight crew.

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Recent Cases

Medical Liability

Infant v. Local Hospital

In Infant v. Local Hospital (confidential settlement), Doris Cheng and Michael A. Kelly negotiated a settlement having a present cash value of $2,900,000 on behalf of a 9-year-old boy whose hyperbilirubinemia went undiagnosed during the first week of life. As a result, the child developed kernicterus, brain damage and spasticity, and requires daily attendant care. Defendants included the hospital where the child was born and the child's attending pediatrician. Plaintiffs claimed that the child was discharged prematurely from the hospital with knowledge that the child and mother had an AB-O blood incompatibility. The parents claimed that daily calls to the pediatrician complaining of jaundice were ignored.

The defendants denied that any such calls had occurred, and claimed that all care had been within the then prevailing standard. Past medical expenses, and future medical expenses, were subject to the collateral source provisions of MICRA. General damages were limited to $250,000 per Civil Code §3333.2(b). A portion of the funds were dedicated to annuities to offset the cost of ongoing medical care for the child.

Minor Child v. Local Gynecology Group

In Minor Child v. Local Gynecology Group (confidential settlement), Paul V. Melodia negotiated a $1 million settlement on behalf of a newborn born with significant birth defects as a result of claimed obstetrical malpractice. Plaintiff claimed that the attending physicians failed to properly monitor and appreciate the child's short-term beat-to-beat variability. Further, plaintiff alleged that hospital personnel observed the presence of meconium in the mother's urine, but thereafter neglected to employ an intrauterine pressure catheter or to perform amnioinfusion. Defendants alleged that there was nothing to suggest fetal distress in the fetal monitoring tapes and that no basis existed for emergent intervention by any of the defendant physicians. Defendants further claimed that any meconium that might have been present was not a reason to alter the patient's management.

Cynthia M. v. Orthopedic Clinic

In Cynthia M. v. Orthopedic Clinic (binding arbitration award), Michael A. Kelly and Doris Cheng obtained a binding arbitration award with a present cash value of $785,000 on behalf of a 41-year-old advertising and marketing executive who developed arthrofibrosis of her left knee following premature reconstructive surgery for an ACL rupture. Plaintiff alleged that the defendant orthopedist's decision to operate on her knee, while it was still inflamed, and before normal motion had returned, was below the standard of care and precipitated the development of excessive scar tissue formation, resulting in arthrofibrosis, four subsequent surgeries and ultimate amputation of the affected leg. Defendant vigorously disputed liability, made no settlement offer prior to arbitration, and claimed that if there was any failure to comport with the standard of care, it was on the part of subsequent treating physicians. The orthopedist had required plaintiff to sign a binding arbitration agreement before she began treatment. The single neutral arbitrator determined, following a one-week arbitration, that a breach of the standard of care had occurred.

Heirs v. Plastic Surgeon

In Heirs v. Plastic Surgeon (confidential settlement), Paul V. Melodia negotiated a wrongful death settlement in the amount of $625,000 on behalf of the husband and two adult children of a 51-year-old woman who died following cosmetic surgery. The decedent developed seizures following the administration of anesthetic. Plaintiffs claimed that the defendant plastic surgeon was ill equipped to administer in-office anesthesia, and failed to utilized available emergency equipment in a timely and proper manner. As a result, there was a delay of 25 minutes until effective resuscitation occurred, by which time the patient had sustained irreversible brain damage. General damages for loss of love, care, society, etc. were limited by the $250,000 damage cap of Civil Code §3333.2. In addition to general damages, plaintiffs claimed future loss of earning capacity and future loss of household services, both of which were highly disputed by the defendants.

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. Visit us on the web at www.walkuplawoffice.com.

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