WALKUP, MELODIA, KELLY, WECHT & SCHOENBERGER

FOCUS on torts

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Record California Water Craft Verdict Highlights Jet Ski Dangers

After almost one month of trial, a Napa County Superior Court jury returned a verdict in the amount of $3,760,000 on behalf of Susan Ford for injuries she received when she fell from the rear of a Polaris Model SLH 700 Personal Water Craft, and suffered serious abdominal injuries. The injury, which occurred at Lake Berryessa in September of 2001, occurred after Susan fell from the back of a jet powered water craft being operated by her sister-in-law. Wearing only a nylon bathing suit, and with nothing to hold other than the operator, Susan was jettisoned from the craft when it struck a wake. Once she fell off the rear of the vessel, its high pressure jet stream caused serious orifice injuries to her lower intestinal tract and abdomen.

Mrs. Ford ultimately underwent emergency abdominal surgery and colostomy. She sustained a neurogenic bladder, damage to her sacral plexus and significant cosmetic scarring over her abdomen. In addition, she is unable to completely empty her bladder and must use a catheter every four hours.

The lawsuit, prosecuted through trial by Walkup name partner Paul Melodia and associate Michon Herrin, sought damages against Polaris alleging that the water craft was defectively designed in two respects: first, it lacked adequate handholds to protect against rear ejection, and, second, the manufacturer failed to adequately warn foreseeable users that riders should wear full wet suits in order to protect against the risk of this very real and serious danger.

At trial, Paul and Michon demonstrated how Polaris had manufactured other water craft during the same model year which were equipped with handhold straps, a feature which this model did not have. Absent a handle or strap to hold on to, Mrs. Ford had no reasonable way to stay on the boat.

In addition, Paul and Michon proved that the label placed on the craft regarding orifice injuries (a tiny decal on the back), was wholly inadequate because it did not focus on this special danger, but instead,

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FIRM WELCOMES NEW ASSOCIATE

We are pleased to welcome Melinda Derish, M.D., J.D., as the newest member of our team. A gifted pediatrician with over fifteen years of experience at a preeminent children's hospital, Melinda joins us having recently graduated from U.C.Berkeley's Boalt Hall School of Law.

Melinda obtained her undergraduate degree at the University of California Berkeley, and thereafter attended medical school at the University of California San Diego. After medical school Melinda completed her internship, residency, and a two year pediatric critical care fellowship at Stanford University. Beginning in 1991, Melinda served as an Assistant Professor of Pediatrics in the Division of Critical Care at Stanford. She held this position until 1999.

In 2000, Melinda began her legal studies at Boalt, graduating in 2003. While there, she was the recipient of numerous honors, including the Prosser Award in advanced legal research, and the Moot Court Advocacy Award.

Melinda is a published author in both of her chosen professions. In the medical area she has co-authored articles in peer reviewed journals including The Journal of Pediatrics, Pediatric Pulmonology, and Intensive Care Medicine.

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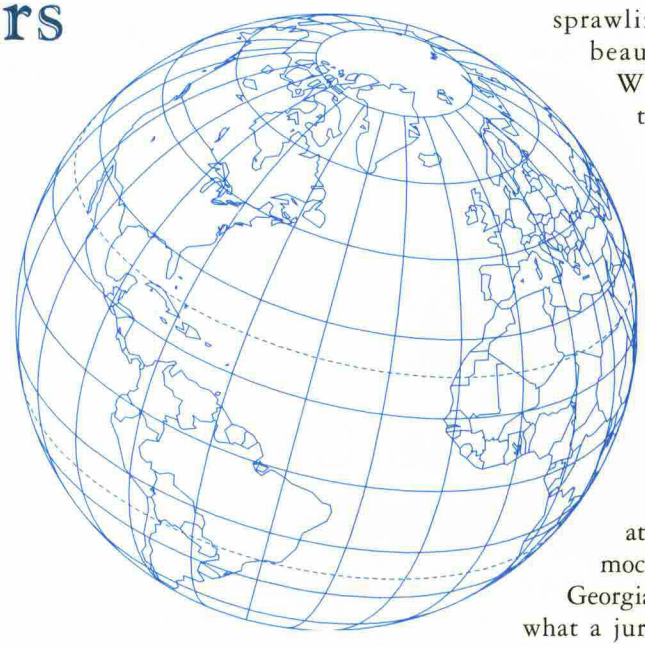
Firm Members Teach Here and Abroad

Rich Schoenberger Returns from Republic of Georgia



For many years firm members have volunteered their time to teach at law schools, for the State Bar, for local specialty bars, and the for National Institute of Trial Advocacy. Within the last six months, Doris Cheng served as a member of the Executive Committee for the University of San Francisco's Intensive Advocacy Program; Doug Saeltzer completed his second year on the faculty of the University of California Hastings College of the Law and also participated as an instructor at NITA's Western Regional Trial Skills Program; Mike Kelly served as an instructor at the NITA National Session in Louisville, Colorado, and taught in Belfast, Northern Ireland, for NITA UK; and, Rich Schoenberger traveled to the Republic of Georgia, in the former Soviet Union, to conduct an eight day course for 24 hand-selected Georgian attorneys.

The program in which Rich participated was sponsored by the Criminal Law Liaison in the Republic of Georgia, together with the American Bar Association's Central European and Eurasian Law Initiative (CEELI). Georgia, like many of the former republics of the Soviet Union, is in the process of implementing its own criminal procedure code and is working with ABA/CEELI in drafting that new code.

A central tenet of the new system is that courtroom proceedings are to be adversarial in nature. Previously, judges and prosecutors worked hand-in-hand, leading to an almost 100% conviction rate in criminal cases. Prosecutors were given full discretion in the operation of the criminal justice system, and in many instances, defense counsel did not even appear for trial.

Georgia is changing. The planners of the new system envision due process rights which have never existed before. Its gifted young leaders are embracing democracy, and have announced an intention to infuse fairness into the judicial system. For this reason, it is critical to train its next generation of attorneys to be effective advocates within the bounds of the new criminal procedure code.

After being invited to participate in the program, Rich arrived in Tbilisi, a sprawling, old, culturally rich and beautiful city, in late June. Working with two full-time translators, who provided simultaneous translation, the program consisted of "learning by doing" exercises involving opening statement, direct and cross-examination, and closing argument. On the last day of the program, each of the participants conducted a mock trial.

On July 30, 2004, ABA/CEELI, led by four of the attorneys Rich taught, put on a mock trial for high officials of the Georgian government to demonstrate what a jury trial could look like. The officials acted as the jury, convicted t[illegible] "defendant" of a lesser offense and revveled in the process. All major television stations covered the event.

The Georgian attorneys were gracious and excited to receive tutoring in advocacy skills, knowing that with a change in their judicial system, their newly-learned skills would be of use in the courtroom.

"It was an awfully long way to go, but it was one of the most rewarding adventures of my life" commented Schoenberger. "Thi[illegible] was American lawye[illegible]ing at its best. The work of ABA/CEELI to infuse the former Soviet Block countries with an understanding of the rule of law transcends politics. The Georgians made me feel like I was actually making a difference, and were extraordinarily appreciative of the personal rights guaranteed by our system. I would do it again in a heartbeat."

Pro bono teaching, whether at home or abroad, continues to be an important part of our work in giving back to the community and to the legal system. We salute the efforts of our partners and associates who are involved in this important work.

Record California Water Craft Verdict Highlights Jet Ski Dangers

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generically recommended that all riders wear a wet suit bottom, or clothing which provided equivalent protection. Paul and Michon were able to prove that Polaris, like all manufacturers, knew that most riders do not wear wet suits, particularly in warm weather, and that compliance with the tiny decal was highly unlikely.

Interestingly, Polaris required all purchasers to view a special safety video before they were permitted to take possession of their jet skis. However, the safety video which plaintiff's sister-in-law (the operator of the craft at the time of the incident) viewed did not mention any danger of orifice injuries, and contrary to warnings on the craft, depicted models wearing two piece bathing suits (rather than wet suits). Plaintiffs argued that the video undermined the instruction and warnings and essentially rendered them meaningless.

At trial, Polaris admitted that it was aware of the risk of orifice injuries to passengers who fell from the rear of the vessel, but suggested that the plaintiff herself had done something "wrong" because of her failure to hold on to the bar located behind her (a jury view demonstrated that the plaintiff could not actually reach the bar). Polaris also attacked the plaintiff for failing to read, understand and act in accord with the decal on the craft. In addition, Polaris argued that Mrs. Ford should have "alerted the driver" that she was in an "insecure position" while the craft was bouncing through wakes – a claim which jurors soundly rejected, since this "position" was exactly the circumstance in which almost all riders find themselves when riding on jet ski type vehicles on any lake where there is wake, wave or turbulence.

The verdict obtained by Paul and Michon is the largest in California history in a jet ski case and one of the largest returned anywhere in the Western United States. Personal water craft makers, including Polaris, have vigorously defended these cases throughout the country hoping to focus blame on riders, rather than themselves. That strategy may work when an operator or rider does something patently unreasonable or is intoxicated or is truly "at fault." Here, however, with a passenger who had no idea or sense that she was doing anything inappropriate or irresponsible, that strategy failed miserably.

WALKUPDATES

Doris Cheng recently returned from Emory University in Atlanta where she served as a faculty member in Emory's nationally acclaimed Kessler-Eidson Trial Techniques Program. Closer to home, Doris served as an assistant program director for the USF Law School's Intensive Advocacy Program. Doris also serves on the Executive Committee for the USF Inn of Court...**Khaldoun Baghdadi** has been appointed Chair of the Minority and Local Business Committee of the San Francisco Human Rights Commission...**Mike Kelly** was appointed by the San Francisco ABOTA chapter as a representative to the National ABOTA Board. Mike was also appointed by Chief Justice Ronald George to the California Jury Instruction (CACI) Committee on Civil Jury Instructions...**Doug Saeltzer** has been reappointed as an Assistant Professor of Law at U.C. Hastings for the 2004-2005 academic year. Doug continues to teach a 2-unit course entitled "Personal Injury Litigation"...**Paul Melodia** was recently inducted as a Fellow in the International Academy of Trial Lawyers. To be admitted to fellowship in the Academy, candidates must be adjudged to possess "superior skill and recognized ability in trial and appellate practice," as well as "excellent character and absolute integrity."...**Rich Schoenberger** was elected to membership in the San Francisco Chapter of the American Board of Trial Advocates (ABOTA). In addition, Rich chaired a recent CLE program sponsored by the San Francisco Trial Lawyers Association entitled "Final Argument: Bring On the Closers."... The Law School at Santa Clara University has named **Dan Kelly** as chairman of its $12 million capital campaign. Dan is also serving his third term as a member of the University's Board of Regents.

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She is also the author of three chapters in Nelson's Textbook of Pediatrics, 16th Ed., published by W.B. Saunders (2000).

Her scholarly publications in the field of law include "Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment" published in the Journal of Law, Medicine, and Ethics.

While Melinda's practice is not limited to medical negligence claims, or cases involving children, her special training, background and expertise in respiratory and pulmonary care make her particularly qualified to assist in the representation of clients afflicted with ARDS, pneumonia, pulmonary hypertension, cystic fibrosis, and other lung disorders.

Melinda Derish

Melinda is available to consult with our associate counsel and referring attorneys in all types of medical negligence, drug and device, elder abuse, and hospital-based negligence claims.

FDA Issues Public Health Advisory for Antidepressants

New York Attorney General Sues Drug Companies

The FDA has issued a public health advisory on the use of antidepressants in children and adults, warning that close observation of patients is needed because of the possibility of worsening depression or the emergence of suicidal thoughts. The drugs included in the warning are Wellbutrin, Celexa, Prozac, Luvox, Remeron, Cerazone, Lexapro and Effexor. (The only drug that has received approval for use in children with major depressive disorders is Prozac.) Luvox is not approved as an antidepressant in the United States.

The labeling changes requested by the FDA are consistent with recommendations made to it by its Psychopharmacological Drug Advisory Committee. The possibility of suicidal tendencies, associated with the use of antidepressant drug products in the pediatric population, has also been the subject of two previous FDA communications on June 19, 2003, and October 27, 2003.

The FDA warned that healthcare providers should carefully monitor patients receiving these antidepressants for possible worsening of depression or suicidal tendencies, especially at the beginning of therapy or when the dose either increases or decreases. The agency also noted that anxiety, agitation, panic attacks, insomnia, irritability, restlessness and mania have been reported in adult and pediatric patients being treated with these drugs.

Because antidepressants are believed to have the potential for inducing manic episodes in patients with bipolar disorder, there is also concern about using them alone in that patient population. The FDA therefore has recommended that patients be adequately screened to determine if they are at risk for bipolar disorder before antidepressant treatment is initiated, so appropriate monitoring can be carried out during treatment.

Meanwhile, New York state has filed a lawsuit against GlaxoSmithKline ("GSK"), alleging it engaged in persistent fraud by failing to tell doctors that studies revealed its anti-depressant drug, Paxil, did not work in adolescents and might even lead to suicidal thoughts. Paxil has been approved by the United States Food and Drug Administration ("FDA") for the treatment of various adult indications, including major depressive disorder, social anxiety disorder, general anxiety disorder and obsessive-compulsive disorder. In 2002, sales of Paxil generated approximately $55 million for GSK, which had a net income of over $6.9 billion.

Prior to a medication's market release, a drug company must submit all data on the drug from all clinical trials for evaluation by the FDA. After FDA approval, GSK conducted three randomized, placebo-controlled, double-blind clinical studies to test the safety and efficacy of Paxil in children and adolescents suffering from major depressive disorder ("MDD"). Two of the studies revealed that Paxil was no more efficacious in treating child and adolescent MDD than placebo. In one of the studies, the placebo outperformed Paxil in efficacy.

With regard to safety, the results were more alarming. In one study, 6.5% of the participants complained of "emotional lability," including suicidal thoughts and acts, mood swings and crying. This is compared to 1.1% of emotionally labile participants in the placebo group. In another study, 4.4% of the participants experienced emotional lability compared to 1.1% of the placebo group.

The New York lawsuit alleges that despite knowing about the negative outcome studies, GSK promoted Paxil for use in adolescent depression and neglected to disclose possible increased risks of suicidal thinking and acts. The suit also relies on internal company documents to show GSK intended to "manage the dissemination of this data in order to minimize any potential commercial impact."

PT CRUISERS TOP RECENT RECALL LIST

Daimler Chrysler is recalling 438,000 2000-04 PT Cruisers because of problems with defective power steering hoses that can leak fluid into the engine compartment.

There have been reports of multiple fires, but no injuries or deaths, according to a Daimler Chrysler spokesman.

General Motors is recalling 85,000 2004 model Chevrolet Malibus. Analysis of NCAP side impact crash testing revealed that the outboard anchorage of the driver's seat belt could disconnect because of contact between the seat trim and the anchorage connector. Dealers will install retrofit retainers on the belt anchorages.

Hyundai is recalling more than 260,000 Elantras, Sonatas and Tiburons because of a problem with the fuel tank assembly valve. In some vehicles, the valve does not close properly, and in the event of a rollover, could precipitate fuel spillage and a resulting fuel-fed fire.

Subaru of America is recalling 127,000 Imprezas, Legacys and Outbacks because of problems with their cruise control cable. Under certain circumstances, the cruise control cable will come out of its track and lodge on the control lever tab when the accelerator pedal is released. When this occurs, the throttle does not return to the idle position but instead remains open precipitating potential loss of control.

NHTSA ISSUES THIRD WARNING FOR 15-PASSENGER VANS

Acknowledging increased rollover risk, NHTSA has issued yet another warning concerning the safety of 15-passenger vans. The most recent warning comes on the heels of prior admonitions from the agency in 2001 and 2002. Based upon newly released research, the risk of rollover for these vans is said to "increase dramatically as the number of occupants increases to full capacity." Once the vans reach maximum capacity, their rollover rate is five times higher than when the driver is the only occupant.

Between 1990 and 2002, there were 1,576 passenger vans in fatal crashes, 349 of these being single-vehicle rollovers. NHTSA announced that this third alert is specifically aimed at groups that are planning to use 15-passenger vans this fall for road trips. According to agency administrator Jeffrey W. Runge, M.D., it is "critically important" that users of these types of vans are aware of the risks inherent in their operation. Among other things, the agency warned that passengers, as well as cargo, should be located forward of the rear axle, and no loads should be placed on the van roofs, even if the vans are equipped with roof racks.

Current Federal law prohibits the sale of 15-passenger vans for school-related transport of high school age and younger students. However, there is no ban for the use of these vehicles in the transportation of college students, church groups, senior citizens, or other adults. Tests conducted by NHTSA show that when 10 or more people ride in a 15-passenger van, the risk of rollover crash is greatly increased. The risk increases because the passenger weight raises the vehicle's center of gravity. As a result, the vehicle has less resistance to rollover

and handles differently, making it more difficult to control in an emergency situation. Placing load on the roof similarly raises the center of gravity and increases the likelihood of a rollover.

A copy of the NHTSA analysis of the rollover characteristics of 15-passenger vans can be found at http://www.nhtsa.dot.gov.

Bush Campaign Distorts Facts Regarding Medical Malpractice

Continuing to echo a theme which pervaded his 2000 election campaign, President Bush continues to distort the impact of consumer lawsuits on the nation's economy and its healthcare system. Recently, the President's statements were so distorted that Joan Claybrook (president of the national non-profit public interest organization "Public Citizen") issued a fact sheet setting the record straight.

Claybrook noted that in Pennsylvania, the President announced that lawsuits were driving Pennsylvania doctors out of business and out of the state. Yet shortly before that comment, the Allentown *Morning Call* reported the number of doctors in Pennsylvania had actually increased during the alleged malpractice "crisis."

In Greensboro, North Carolina, the President proclaimed that "all these junk lawsuits are running up the cost of medicine." Yet the Department of Health and Human Services' most recent report on the growth in healthcare expenditures found that expenditures on malpractice insurance premiums (reported to the National Association of Insurance Commissioners) was less than three-quarters of one percent of all national healthcare expenditures.

In Kansas City, the President claimed that "industry estimates show that litigation is a $200 billion dollar a year burden on the U.S. economy." But the Congressional Budget Office repudiated this claim, and admitted the number was "highly misleading" having been calculated by adding up the total cost of liability insurance purchased in the United States, and adding to that, insurance company administrative costs.

The President and his supporters understand neither the importance nor social purpose of the American civil legal system. Tort law does not simply compensate – it also deters wrongful conduct. It prevents injury by removing dangerous products and practices from the market place. It spurs safety and health innovations in all industries. It forces public disclosure of information about dangers which consumers face. The tort system serves as an early warning of the need for government action to prevent harm, and in a final analysis, it protects responsible individuals, businesses and corporations by holding accountable those who are irresponsible.

Though the President often says the tort system is "like a giant lottery" (these very words were used in a Washington, DC speech earlier this year) the truth of the matter is that the median jury award in personal injury cases has fallen thirty percent since 2000. Tort filings have decreased every year since 1992.

In the end, the Bush campaign hopes to garner votes by weakening the legal system with the false promise that this will strengthen the economy. But the President's understanding of economics is faulty, and the factual assertions which his campaign have made are simply wrong. It is no surprise then that more than $14 million dollars to date have been contributed to the President's campaign by the finance and banking industry; more than $2 million dollars from insurance interests; and over $7 million dollars from real estate interests. These special interests are looking for the President to protect them against consumers – and to immunize and/or protect them from the responsibility to act fairly and reasonably in the market place.

Recent Cases

Premises Liability

Heirs v. Helmsley Properties

In Heirs v. Helmsley Properties (S.F. Sup.Ct.), Richard Schoenberger and Matt Davis obtained a $2,700,000 settlement on behalf of the husband and two adult daughters of a 54-year-old decedent who was killed when a Monterey pine tree fell on her car as she drove on Brotherhood Way in San Francisco. Plaintiffs claimed that Park Merced, the owner of the adjacent property from which the tree fell, knew that such an incident was potentially likely given the diseased state of the trees along the roadway. Discovery identified a former manager of the apartment complex who testified that her request for funds to have the dangerous trees cut down was rejected by the corporate owners of the complex. Defendants argued that the tree-fall tragedy was a "freak accident" and that even assuming liability, the case had only modest value because the decedent was not a high wage earner.

Plaintiffs demonstrated that the decedent was a caring and loving wife, mother and devoted daughter, who contributed to the support of her elderly parents. Prior to trial, Rich and Matt "tried" the case to a focus group. The findings at that time suggested that a jury would likely award the family substantial damages notwithstanding the decedent's relatively low income producing history. The case was settled one week prior to trial during mediation with JAMS neutral, Jerry Spolter.

Product Liability

Roberta Roe v. National Medical Device Maker

Roberta Roe v. National Medical Device Maker (confidential settlement), Michael A. Kelly and Khaldoun Baghdadi obtained a combination cash and annuity settlement, having a present cash value of $5,125,000, on behalf of a 54-year-old university housing manager, who suffered major complications after undergoing treatment for esophageal reflux disease. The plaintiff submitted to minimally invasive surgery using a newly designed surgical instrument manufactured by the defendant device maker. Shortly after surgery, she developed symptoms indicative of esophageal perforation. She returned to the defendant hospital and was seen in the emergency room, but sent home. Within 72 hours she became overwhelmingly septic. She suffered major organ failure, coma, and while immobilized, developed heterotopic ossification, a condition involving excessive bone growth. As a result of the HO, she lost normal movement and function in her ankles, knees, hips, shoulders and elbows. She was rendered a functional paraplegic and confined to a wheelchair. The claim was settled after two sessions of mediation, and following denial of the manufacturing defendant's motion for summary judgment, in which it alleged that it was in full compliance will all FDA regulations, and was immune from design defect liability by reason of the fact that the device was an "implanted medical device" per the rationale of Brown v. Superior Court (1988) 44 Cal.3d 1049, and Artiglio v. Superior Court (1994) 22 Cal.App.4th 1388. The liability of the defendant hospital was limited by the provisions of MICRA (Civil Code §3333.1 et seq.).

Correctional Officer v. Federal Weapons, Inc.

In Correctional Officer v. Federal Weapons, Inc. (USDC N.D. Ca. No. C012284), Ronald Wecht and Khaldoun Baghdadi achieved a $1,150,000 settlement on behalf of a 40-year-old Pelican Bay Prison correctional officer who sustained bilateral hand injuries when a grenade launcher discharged after being dropped. The injury occurred when plaintiff was summoned to a disturbance and accidentally dropped his weapon. It discharged, firing rubber projectiles into both hands. He sustained acute injuries which resulted in chronic pain and sensitivity, forcing early retirement. Plaintiff contended that the firing mechanism of the grenade launcher was defective in design and that the weapon should have included an external safety. The defendant manufacturer alleged that in 40 years of producing the weapon it had no prior notice of similar accidental discharges, and that the cause of the malfunction was the negligence of plaintiff's co-workers in the Pelican Bay armory who had improperly maintained the weapon. Prosecution of the claim was hampered by the fact after the accident, Pelican Bay employees disassembled the firing mechanism to use the weapon at trial in an unrelated case. After re-assembly, it was impossible to duplicate the circumstances existing at the time of injury.

Government Liability

Carmen M. v. State of California / City & County of San Francisco

In Carmen M. v. State of California/City & County of San Francisco (S.F. Sup.Ct.), Michael A. Kelly and Khaldoun Baghdadi negotiated a cash and annuity settlement having a present cash value of $2,000,000 on behalf of a 16-year-old girl who was struck by a MUNI LRV near Stonestown, on 19th Avenue, suffering amputation of her left lower leg below the knee. The child was crossing the street with the green light at the same time a southbound LRV "M-Line" train was passing through the intersection.

Plaintiff contended that the crosswalk constituted a dangerous condition of public property by virtue of the timing sequence of the various signal lights governing LRV traffic, automobile traffic, and pedestrian traffic. (Plaintiff claimed that she had the green light at the same time the LRV had the green light.) Plaintiff alleged that the LRV operator was negligent in failing to see her, failing to react, and failing to stop his transit vehicle in sufficient time to avoid striking her. The defense claimed that regardless of the color of the LRV light, the pedestrian advisory for the minor plaintiff was red. The defendants also claimed that the minor plaintiff was comparatively at fault for failing to appreciate and avoid the oncoming train, as her companion (who was crossing the street with her) was able to do. The matter

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was resolved after two sessions of mediation with retired First District Court of Appeal Justice Robert Dossee.

High School Student v. East Bay Regional High School

In High School Student v. East Bay Regional High School (confidential settlement), Douglas Saeltzer negotiated a settlement having a present cash value of $1,000,000 on behalf of a high school student who was rendered a quadriplegic in a tackling drill on the first day of high school varsity football practice. Plaintiff claimed that the coaching staff at the high school provided no training or instruction to him despite the fact that this was the first time he had ever participated in this particular drill. He also alleged that the risk to him of injury had been improperly increased by matching him against the best and most experienced player on the team. Such conduct was claimed to be "totally outside the range of ordinary activity" as articulated in the Supreme Court's holding in Kahn v. Eastside Union High School District (2003) 31 Cal.4th, 990, and therefore the primary assumption of risk doctrine was inapplicable. The defendant School District alleged that the plaintiff had years of experience in contact football beginning at the Pop Warner level, and had adequate instruction on the day of the incident. The defense further alleged that the minor had assumed the risk of this inherently dangerous activity. The matter was resolved while the defendant's motion for summary judgment was pending.

Motorist v. Rural County Road Authority

In Motorist v. Rural County Road Authority (confidential settlement), Ron Wecht and Michon Herrin obtained a settlement, in the form of both cash and annuity payments, having a present cash value of $3,000,000, on behalf of the heirs of a 42-year-old man who was fatally injured when his truck struck a guardrail at a rural bridge crossing. The decedent was survived by his wife and two children. On the morning of his death, the decedent was driving home. Enroute, his pickup truck drifted to the left, across the center lane of a two lane road. After correcting back into his own lane, he struck and slid along a metal guardrail. As he approached the subject bridge, there was a gap between the guardrail and the bridge rail; at that gap the front end of the decedent's truck struck the bridge rail, which impaled the truck. Discovery and investigation revealed that the guardrail and bridge rail were not built in accordance with original plans or specifications. By design the two should have been one continuous structure. Plaintiffs claimed that the appropriate construction standards required highway barriers to be continuous structures because of the risk of an accident precisely such as this. Further, plaintiffs claimed that the end of the barrier should have been protected by an energy-absorbing section so that it did not become a "spear" pointing at oncoming traffic.

Clara T. v. City & County of San Francisco

In Clara T. v. City & County of San Francisco, Khaldoun Baghdadi resolved a civil rights claim against the City and County on behalf of the two surviving children of a murder victim. The defendant agreed to pay $500,000 in civil damages to the children of Clara Joyce Tempongko, a domestic violence victim who was fatally stabbed by her abuser. Plaintiffs alleged that the City & County's law enforcement agencies denied equal protection to victims of domestic violence. The decedent had made at least five separate calls for help to the San Francisco Police Department, and/or other law enforcement personnel, before the date of her death. In addition, the abuser had been arrested and held in custody on at least three prior occasions, but because of a severe communication failure between the various City law enforcement agencies charged with administering local domestic violence laws, the abuser was released from prison just prior to the death. He fatally attacked the decedent following his release. The settlement was reached after a preliminary round of dispositive motions filed by both parties. The amount recovered has been structured to fund the educations of the decedent's surviving children.

Smock v. State of California

In Smock v. State of California (Ala. Sup.Ct. No. 2002-065217), Douglas Saeltzer and John Echeverria obtained a jury verdict in the amount of $288,000 in a combined dangerous condition of public property/general negligence case involving the State's configuration of the car pool lane at the San Francisco-Oakland Bay Bridge toll plaza. The defendant motorist, in stop and go traffic, suddenly pulled into the adjacent car pool lane in which plaintiff was legally riding his motorcycle. The evidence at trial showed that multiple pylons intended to separate the two lanes of traffic were missing; the solid white line intended to separate the lanes had faded to the point of invisibility; and, at the point of the injury, the number two lane had not been clearly marked as an HOV lane. All of these conditions combined to entice frustrated motorists to make inappropriate lane changes. The State claimed that the sole cause of the incident was the negligence of the defendant driver. The jury returned a verdict against all defendants, apportioning fault between the driver and the State, and awarding plaintiff his entire claim for economic damages, for which the State is 100% liable pursuant to Civil Code §1431.2. (The defendant driver had a 15/30 automobile liability policy.) Prior to trial, plaintiff had made a settlement demand of $75,000 to the State which it refused to pay.

MEDICAL NEGLIGENCE

Couple v. Central Valley Hospital and Surgeon

In Couple v. Central Valley Hospital and Surgeon (confidential settlement), Douglas Saeltzer negotiated a $1,000,000 settlement on behalf of an elderly woman who experienced severe sepsis following routine laparoscopic hernia surgery. Plaintiff claimed the operating surgeon was negligent in "nicking" her intestines during the procedure and in failing to conduct a required post-operative examination before her discharge. As a result, there was a negligent delay in failing to identify a small leak in her bowel. The plaintiff's sepsis required multiple surgeries and more than one month of hospitalization.

The defendant surgeon contended that the patient suffered an accepted complication of laparoscopic surgery and that the standard of care did not require a post-operative examination for a routine "come and go" procedure. Further, the surgeon defended on the basis that no unusual symptoms were reported prior to discharge. The defendant hospital contended

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that its nurses properly monitored the patient's post-operative condition and informed the operating surgeon of changes in the patient's vital signs, as well as an increase in her pain medication, prior to discharge. The settlement included payment for the husband's loss of consortium claim. General damages for both plaintiffs were capped by the MICRA limit.

Hospital Patient v. California Pacific Medical Center

In Hospital Patient v. California Pacific Medical Center (S.F. Sup.Ct.), Doris Cheng obtained a jury verdict of $185,000 on behalf of a 62-year-old office building manager who contracted Hepatitis C during gall bladder surgery. The infection was diagnosed on routine liver enzyme screening two months after surgery. Because the plaintiff was on a cholesterol lowering drug that required regular lab work, he was able to prove that for twenty months before the surgery his liver enzyme levels were normal, and only became elevated after his gall bladder removal. The defendant hospital vigorously contested liability and sought to shield from discovery its infection control policies pursuant to Evidence Code §1157. The hospital argued that plaintiff was unable to identify the specific source, person or instrument that infected him, and that the statistical likelihood of having contracted the infection in the hospital was minuscule. The defense also sought to minimize the importance of the pre-operative enzyme levels.

Plaintiff required treatment with chemotherapy agents, including Interferon and Ribavirin. At the time of trial virus levels were undetectable. The entirety of the award was for general damages as plaintiff made no claim for medical expenses or lost wages. The defendant's pretrial settlement offer was a waiver of costs.

VEHICULAR NEGLIGENCE

Graduate Student v. University Sorority

In Graduate Student v. University Sorority (S.F. Sup.Ct. No. 324932), Ronald Wecht negotiated a pre-trial settlement having a present cash value in excess of $2,100,000 on behalf of a 22-year-old student who sustained multiple fractures as the result of an automobile-motorcycle collision. While riding as a passenger on a motorcycle, the plaintiff was struck by an auto driven by a sorority chapter advisor at the University of San Francisco who had run a red light. After being injured, plaintiff was hospitalized, and during her hospital stay vascular compromise in her lower extremities went unrecognized, with the result that she ultimately experienced a below-the-knee amputation. Resolution of the claim against the healthcare providers who failed to properly monitor and treat her fractures was the subject of a separate action.

Senior v. Airport Shuttle

In Senior v. Airport Shuttle (Ala. Sup.Ct.), Doris Cheng negotiated a cash settlement in the amount of $550,000 on behalf of a 70-year-old retired nurse who suffered traumatic brain damage when her 2002 Honda Accord was struck at approximately 35 miles an hour from the rear by defendant's airport shuttle. The plaintiff was initially hospitalized for an intracranial hemorrhage which resolved without the necessity of surgery. After approximately two months of occupational therapy, she was discharged from care. Plaintiff claimed that she continued to have residual short-term memory deficit, impaired judgment and impaired sense of direction, requiring some degree of ongoing care and case management. The defendant did not dispute liability but vigorously contested damages, and alleged that plaintiff's residual problems, if any, were modest, as reflected by the fact that she had returned to almost all of her pre-accident regular activities, including participation in tennis and bridge. Plaintiff claimed past medical expenses of $128,000. The matter was settled on the first day of trial.

Passenger v. Driver

In Passenger v. Driver (Napa County – confidential settlement), Matt Davis and Doug Saeltzer negotiated a $325,000 pretrial settlement on behalf of a front seat passenger who suffered closed head injuries when the driver of the Shelby Cobra vehicle in which he was riding lost control on a country road and crashed. The defendant claimed that the sudden acceleration of the vehicle was due to a vehicle malfunction. The investigating police officers ruled out any vehicle defect. The plaintiff sustained a significant blow to the head with brief loss of consciousness. Subsequent to the accident he experienced symptoms of vertigo, dizziness, headache and neck stiffness. Medical bills exceeded $30,000. The complaint filed on behalf of the plaintiff sought punitive damages and the settlement which was negotiated included not only payment of the defendant's insurance policy limits of $250,000, but a personal contribution by the defendant of $75,000 as well.

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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