WALKUP, MELODIA, KELLY & SCHOENBERGER

FOCUS on torts

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San Diego Clergy Molestation Cases Resolved

On September 28, 1957, the San Diego Diocese of the Catholic Church sent one of its priests, Father Franz Robier, to a monastery in Jemez Springs, New Mexico for "treatment" because he had been sexually abusing little girls. Less than two months later the Diocese welcomed him back, proclaiming him cured. The diocese was wrong, and he continued his abuse unabated at different parishes for years thereafter.


Union-Tribune. 50¢ Regional Final

Settled: $198 million

VICTIMS TEARFUL, ELATED AFTER DEAL WITH DIOCESE

Attorney Rich Schoenberger hugged abuse victims Christine (left) and Genevieve, outside the federal building downtown after the settlement was announced. Several victims said at a news conference that no religion should be allowed to hide abuse and transfer offenders. John Gastaldo / Union-Tribune

Before January 1, 2003, Robier's victims had no legal recourse. On that date, the California legislature enacted SB 1779 which created retroactive employer liability in child abuse actions. In San Diego County, 144 such actions were filed against the Diocese. After four long years of litigation, and just four days before a Federal judge was to decide whether to dismiss the Diocese's bankruptcy petition, the Bishop of San Diego agreed to pay $198,000,000 to settle these claims, the largest per capita payment in Catholic Church history.

Walkup partners Richard H. Schoenberger and Doris Cheng represented four sisters who were systematically abused for years by Robier. Because of Robier our clients were the subject of unspeakable trauma and lived in constant fear. Rich and Doris spent nearly four years in discovery and negotiation in state and federal court on our clients' behalves. They readied the case for trial in the spring of 2007. Two weeks before trial was to begin the Diocese declared bankruptcy.

The Diocese had advance notice of Robier's unfitness as a priest but ignored it. When Robier moved to Los Angeles from Brazil in 1955, he applied for cleric faculties within the Los Angeles Diocese. An anonymous letter to the Archdiocese

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U.S. SUPREME COURT OPTS TO PROTECT MEDICAL DEVICE MAKERS INSTEAD OF CITIZENS

On February 20, 2008, the United States Supreme Court closed the doors of the courthouse to people harmed by defective medical devices where the product has undergone "premarket approval" by the FDA. (Reigel v. Medtronic, 552 U.S. ____ (2008))

The decision terminated the claim of Charlie Reigel, who sustained serious injury when a balloon catheter burst while he was undergoing angioplasty. Mr. Reigel brought an action against Medtronic alleging negligence in the manufacture, labeling and design of the catheter – claiming it should not have exploded and injured him. Medtronic, which no longer makes the balloon catheter, claimed all fault was with the doctor. The district court dismissed the case saying that federal law prohibited suing device manufacturers if the device was approved by the FDA. The Supreme Court's decision will have negative ramifications for medical consumers in pending lawsuits against multinational corporations making breast implants, defibrillators, artificial heart pumps and valves, drug-coated stents, spinal cord stimulators, and prosthetic hips and knees.

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Medicare Not Paying for Preventable Hospital Complications

Responding to Medicare and Medicaid reimbursement policies that reward poor hospital performance, Congress has mandated changes that stop paying hospitals for preventable medical complications.

Currently, post-admission complications benefit hospitals financially: as care becomes more expensive, Medicare reimbursements increase. At one Colorado hospital, for example, discharging a patient after treatment for a heart attack – free of complication – yielded a $5,436.66 Medicare reimbursement. But, if that patient suffered a post-admission urinary tract infection (UTI), the amount went to $6,721.44. A "major" complication, such as sepsis due to an indwelling catheter, netted a payment of $8,905.43.

The Deficit Reduction Act of 2005 declared that specified post-admission complications are preventable. The new policy does not provide reimbursement for the following 8 medical mistakes: leaving foreign bodies in a patient during surgery, air embolisms, blood incompatibilities, catheter-associated UTIs, decubitus ulcers, vascular catheter infections, surgical site infections, and hospital-acquired fractures and dislocations. These complications are all now deemed "preventable" as a matter of federal law.

UTIs – and their preventability – illustrate the issue quite graphically. Indwelling catheters are used with great frequency. These catheters, however, cause 80% of all post-admission infections and cost the health care system approximately $320 million per year. Many of these infections result from leaving catheters in longer than necessary. As the December 2007 issue of JAMA observed, "[t]he majority of patients do not actually require catheters for extended periods." Rather than medical necessity, prolonged catheter use often results from: "competing demands on clinical staff, transfers of care across settings, poor documentation of catheter insertion, and lack of accountability for catheter removal, oversight and awareness of urinary catheter use...."

The new policy went into effect on January 1, 2008 and will pay reimbursements to hospitals "as if the complication were not present... at the time of the patient's admission to the hospital." Time will only tell if the financial incentive to practice better and safer medicine achieves its aim – or whether it simply results in premature discharge of thousands of patients suffering from hospital acquired complications.

U.S. SUPREME COURT OPTS TO PROTECT MEDICAL DEVICE MAKERS INSTEAD OF CITIZENS

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The Supreme Court has now immunized manufacturers from common law claims of product defect and negligence based on a pro-business anti-patient interpretation of the 1976 Amendments to the FDA Act. The amended provision provides that "no State may establish or continue in effect any requirement ... which is different from, or in addition to, any requirement applicable under this chapter to the device."

When medical device manufacturers are granted blanket protection from all lawsuits, they no longer have any reason to make their products safe. They only need to seek FDA approval, not genuine product safety. History tells us the FDA grants its approval to deadly products on a regular basis; one need only look to Vioxx and Resulin, for evidence on the drug side, and Medtronic defibrillators on the device side.

With the U.S. Supreme Court handing medical device manufacturers freedom from accountability, the American public has no legal recourse for the harm caused by defective medical devices.

Six Walkup Lawyers Cited Among "The Best Lawyers in America" 2008

For the third year in a row, Walkup, Melodia, Kelly & Schoenberger was ranked No. 1 in all of California for the number of attorneys listed by Woodward and White in their treatise *Best Lawyers in America*.

No other California personal injury firm had as many as six attorneys selected for inclusion. Selections are based exclusively upon peer reviews.

Best Lawyers compiles lists of outstanding attorneys by conducting exhaustive professional surveys in which thousands of leading lawyers confidentially evaluate their peers. The 14th Edition of *Best Lawyers* (2008) will be based on more than 2,000,000 detailed evaluations of lawyers by other lawyers.

A listing in *Best Lawyers* is regarded as a singular honor. *Best Lawyers* lists are available on all Bloomberg professional terminals, reaching more than 260,000 businesses across the globe.

In addition to being the No. 1 ranked personal injury firm in California, WMK&S was also ranked No. 1 in San Francisco with the most firm members listed in the field of personal injury litigation.

TOP-LISTED IN Best Lawyers® THE WORLD'S PREMIER GUIDE

It is no accident that we have more listed lawyers in *Best Lawyers* than any other firm in California. For fifty years we have worked to gain and maintain a reputation of excellence, honesty and professionalism unmatched by other practitioners. We congratulate those members of the firm who have been listed for 2008. They include Matthew Davis, Daniel J. Kelly, Michael A. Kelly, Paul V. Melodia, Richard H. Schoenberger and Ronald H. Wecht. Dan, Mike and Paul have all been listed in *Best Lawyers* for more than 10 consecutive years, an achievement of which very few can boast.

FALSELY IMPRISONED

On January 10, 1991, Lisa Hopewell, 35, was found murdered inside her Cupertino residence. Investigators from the Santa Clara County Sheriff's Department placed Rick Walker, 35, on the possible suspect list because he had dated Hopewell several months before. No physical evidence tied Walker to the crime.

A crime lab technician detected the fingerprints of Rahsson Bowers, 19, on tape used to suffocate the victim. Bowers was a drug dealer who sold crack cocaine to Hopewell. He also had a record of violence. Sheriff deputies arrested and questioned Bowers. He denied any involvement in the killing. The deputies told Bowers that he might face the death penalty and also encouraged him to "come clean", repeatedly suggesting that he implicate Walker.

Bowers "confessed" after the deputies confronted him with the evidence of his fingerprints on the murder weapon. His initial story was that Walker had asked Bowers to accompany him to Hopewell's apartment to help mediate a lovers' quarrel. A polygraph examiner concluded that Bowers was lying.

Sheriff deputies then arrested Walker on first degree murder charges. He steadfastly maintained his innocence during the interrogations. Apart from Bowers' varying confessions, no evidence tying Walker to the murder ever emerged.

The criminal trial began in early November 1991. Separate attorneys represented Walker and Bowers: Walker proclaimed his total innocence. Bowers confessed, but claimed that Walker forced him to participate in the killing.

Walker's court-appointed lawyer did not conduct any investigation into his client's claim of innocence. (The attorney was later described by the appellate court as acting "like a potted plant" during the trial.)

Bowers wept as he told jurors how Walker coerced him into killing Hopewell and the jury convicted Walker of first degree murder. The judge sentenced Walker to 26 years to life.

Walker was transferred to the custody of the California Department of Corrections. Because he had been convicted of a violent murder, the CDC assigned Walker to Pelican Bay, a "supermax" prison. He became a model inmate and tutored other prisoners. During his 12 years of incarceration he incurred only one infraction – a guard cited him for failing to be clean shaven.

Rick would have likely spent his entire life behind bars had it not been for the efforts of two extraordinary women: Alison Tucher and Karyn Sinunu.

Tucher was a Stanford Law School student who took an interest in Walker's trial. She believed him innocent and helped work on the appeals. Tucher clerked for U.S. Supreme Court Justice David Souter after graduating from Stanford. Following her clerkship she worked as a prosecutor for the Santa Clara County District Attorney – the same office that prosecuted Walker. In 1998, Tucher left the D.A.'s office and joined Morrison & Foerster. She persuaded the firm to allow her to represent Walker pro bono. Her investigation confirmed that Bowers had told several acquaintances that Walker was innocent and that his true accomplice was a man named Mark "Sharky" Swanson.

In February 2003, Tucher presented the results of her investigation to Chief Assistant District Attorney Karyn Sinunu. Sinunu had no involvement in Walker's original trial. After listening to Tucher's presentation, Sinunu thought Walker was probably guilty, but to her credit she also acknowledged that there was sufficient evidence to warrant another look at his case. She assigned two investigators to the matter.

The investigators interviewed numerous witnesses, including several men who said that Bowers told them that Walker was innocent and that Mark Swanson was the true accomplice. The investigators tracked down Swanson. The investigators also looked into Walker's alibi about being at a hotel at the time of the murder and discovered that it checked out.

Stunned by the investigators' reports, Sinunu dug into the case file herself. She discovered exculpatory evidence that had never been turned over to Walker's defense. Most important was a letter that included a crudely drawn picture of the Grim Reaper and a mock up of Bowers' death certificate. Bowers signed the letter with his own blood. The letter showed just how desperate Bowers was to get a deal. Sinunu understood that the

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San Diego Clergy Molestation Cases Resolved

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expressed concern about Robier's fitness for parish ministry. As a result, the Los Angeles Diocese rejected Robier's application. But the then-Bishop of San Diego welcomed Robier.

Between 1955 and 1957, Robier abused the little girls at their home, at the beach, at the drive-in theater, in his car and in the church itself. On September 28, 1957, after several girls had reported the abuse, the Bishop of San Diego sent Robier to Via Coeli, a "retreat" in Jemez Springs, New Mexico. After his one month stint in Jemez Springs, Robier begged the Bishop's forgiveness and asked to be given another chance. In response, the Bishop returned Robier to eleven other churches where his molesting of our clients and other young people resumed.

The Diocese of San Diego, with nearly one million Catholics and extensive real estate holdings throughout San Diego County, is the largest of five U.S. dioceses to file for Chapter 11 bankruptcy protection.

The Diocese's decision to declare bankruptcy proved disastrous. Legal experts who have followed the sexual abuse crisis in Catholic dioceses across the country believe the bankruptcy strategy actually cost the Diocese millions of dollars.

We congratulate Rich and Doris for their persistence and dedication to the cause of their clients and the remarkable result they achieved.

Recalls Highlight Importance of Product Liability Lawsuits

The recall by Mattel of over 12 million toys because of possible lead hazards grabbed the headlines – but other recalls, of products potentially more dangerous than the lead-laced toys, regularly slip under the radar. In June, a recall of 450,000 tires imported from China exposed a loophole in the regulations that exempts liability if an importer cannot afford to conduct a recall. Just a month before U.S. Marshals and FDA investigators began seizing heart valves made from cow and pig tissue by a New Jersey company because of concerns about sterility.

In December 253,000 Crafter's Square Hot Melt Mini Glue Guns were recalled after reports of fires and injuries when the guns short circuited. In August 1,500 AGA Swivels (for scuba diving masks) were recalled when it was determined that the valves could separate while diving; 138,000 ceramic oil torch lamps were recalled by Sam's Club; 4,000 spindle back chairs were recalled by J.C. Penney because of a failure in design.

Recalls of food, drugs and consumer products has families wondering what else is slipping through the safety net. In 2007, another 5 million toys were recalled because they contained small, powerful magnets that could perforate a young child's intestines.

While the Consumer Product Safety Commission is officially charged with helping to keep Americans safe by checking for unreasonable risks of injury or death from consumer products, the reality is that no government agency could possibly check all products for fire, electrical, chemical or mechanical hazards. The CPSC is the nation's smallest safety agency, yet it is responsible for 15,000 different products – from chain saws to escalators and kitchen appliances to toys. Its current actual budget ($63 million) is less than half of what its 1974 startup budget ($34 million) would be today if merely corrected for inflation ($140 million). It has only one toy tester at its Maryland laboratory; worse, only 15 of 400 total staff (down from a 1980 peak of 978) are on duty full-time as port inspectors. That problem is exacerbated because since the tragedies of September 11, customs inspectors and others that had buttressed this tiny force have been re-tasked.

And while large and small manufacturers continue to bring dangerous products to the market, their lobbying groups continue to argue for "tort reform" including an abolition of a consumer's right to bring a product liability lawsuit. The Bush Administration has given speech after speech claiming "we've got too many darn lawsuits, too many frivolous and junk lawsuits that are effecting people." The Republican campaign rhetoric of McCain, Huckabee and Romney trumpeted the same tired rant. But what of the truth?

The right to bring product liability claims is most commonly the only remedy consumers have against multinational manufacturers. Consumers are at the mercy of a hyper-competitive, global marketplace, with enormous pressure to cut costs – and cut corners. And at the very moment that both corporate CEOs and top government officials should be demanding greater vigilance, we've seen regulations weakened or repealed and funding for watchdog agencies slashed. Just 20 years ago, there were twice as many staff at the Consumer Product Safety Commission (CPSC). Funding at that agency is now at an all-time low. The bottom line is clear: the right to a jury trial is the only thing protecting consumers from caveat emptor legislation and pro business jurists. Access to the courts must be preserved.

FALSELY IMPRISONED

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prosecution's entire case against Walker hinged on whether the jury believed Bowers, and that Walker's attorney could have used the letter to devastate Bowers' credibility on cross examination.

The investigation culminated with a thorough interview of Walker at Mule Creek. His story continued to hold up. Sinunu, now convinced of Walker's innocence, presented her findings to her boss, District Attorney George Kennedy.

Kennedy was the D.A. at the time of Walker's trial in 1991. He understood that the Walker matter would embarrass his office if it came to light. He nevertheless did the right thing and ordered Sinunu to help get Walker declared innocent and set free. On June 9, 2003, Walker was taken from his cell to a San Jose courtroom filled with family members and supporters. The judge set him free on the spot.

Walker retained Walkup partners Richard Schoenberger and Matthew Davis shortly after regaining his freedom. They filed suit in federal court alleging that Santa Clara County and four county employees violated Walker's civil rights during the criminal investigation and prosecution.

While the facts of Walker's case were compelling, Rich and Matt faced an uphill battle. A prosecutor cannot be liable for presenting fabricated evidence to the jury or failing to disclose exculpatory evidence. Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Similarly, the doctrine of "qualified immunity" protected the sheriff deputies – meaning that they faced liability only if they violated Walker's "clearly established" rights. Harlowe v. Fitzgerald, 457 U.S. 800, 815 (1982).

Rich and Matthew conducted extensive discovery and developed additional evidence of apparent violations of Walker's constitutional rights. Attorneys with the Santa Clara County Counsel's office represented the defendants and vigorously defended their clients. While an appeal of cross summary judgment motions was pending before the Ninth Circuit and the case settled during a settlement conference presided over by Magistrate Judge Richard Seeborg.

WALKUPDATES

Mike Kelly, shown below with (from left to right) Professor Takashi Takano of Tokyo's Waseda Law School, William Hunt of Cambridge, Massachusetts, and Japan Federation of Bar Associations President Seigoh Hirayama, traveled to Japan for a trial skills boot camp for 104 Japanese lawyers, in anticipation of Japan's adoption of a quasi jury system ("Saiban-in"). The Japanese Constitution was amended in 2007 to provide for a modified form of jury trial in criminal cases beginning in 2009. This system will replace the current three-judge tribunals that hear criminal matters. Mike, who also serves as the Director of Teacher Training for NITA, provided a primer to the participants on how to teach direct and cross-examination, opening statements and final argument. Attorneys who attended were handpicked from each of Japan's 52 prefectures. The training clinic was covered in national newspapers and on nightly television. The sessions were also

sent via closed circuit T.V. throughout Japan so that attorneys in remote locations could observe. Domestically, Mike will co-direct NITA's Harvard Teacher Training Program in Boston later in the Spring.... **Khaldoun Baghdadi** was nominated to membership on the San Francisco Bar Association's Litigation Section Executive Committee..... **Spencer Pahlke**, shown here, at right, being sworn in by S.F. Superior Court Judge Mary Wiss, volunteered as a coach for the U.C. Berkeley Boalt Hall trial advocacy team. Spencer also participated in the 2007 NITA Pacific Region Deposition Skills training program in San Diego..... An impromptu office party broke out to celebrate **Rich Schoenberger's** 20th year with the firm. In this photo, shown above, Rich was joined by staff members who organized a "spontaneous" celebration (after he reminded them that he had been here 240 months!); party-goers hold twenty year old issues of Focus on Torts with Rich's photo adorning the front page. Now, after many years litigating, he is almost unrecognizable. Rich, whose career started at the Alameda District attorneys office, is still punishing the bad guys as one of the top civil litigators in the state..... **Emily Wecht** served as a trial judge for the San Francisco Trial Lawyer's annual Carlene Caldwell Scholarship mock trial competition held at the 9th Circuit Court of Appeals in San Francisco. She also attended the National Institute of Trial Advocacy's two week National session at NITA's National

Education Center in July..... **Matthew Davis** was acknowledged for his public service at the recent BASF annual awards luncheon. Matt joined 5 other firm members as faculty at a special three-day skills training course sponsored by BASF for juvenile court advocates..... **Doug Saeltzer** has begun another year on the adjunct faculty at UC Hastings. As usual, demand for his P.I. Litigation seminar exceeded the capacity of the classroom. On the home front, Doug and his wife Kris welcomed Andres, their first child, in February..... **Doris Cheng** was selected as the John J. Meehan Fellow (2007 Distinguished Alumnus of the Year) by the University of San Francisco School of Law.

The prestigious award, presented by Dean Jeffrey Brand (see photo above), saluted Doris's commitment to the University's Intensive Advocacy Program (where she has served as co-director), the Asian Pacific Law Students Association (for whom she has served as a mock trial coach and mentor) and the schools Board of Governors where she sat as a member for three years. Also pictured with Doris is the Award's namesake, retired Alameda Chief District Attorney John J. Meehan. On the local public service front, Doris was appointed Chair of the Bar Association of San Francisco's Judicial Evaluation Committee.

Recent Cases

Medical Negligence

Dahl v. Stone

In Dahl v. Stone M.D. (Sonoma Co. Sup. Ct. No. 236939), Michael A. Kelly and Doris Cheng obtained a jury verdict in the amount of $9,480,820 on behalf of a 29-year-old Sonoma County laborer , who suffered permanent paraplegia from the navel down as a result of an untreated spinal epidural abscess. The Defendant had been treating the plaintiff for skin infections for approximately two months when our client began to develop unremitting pain in his back. The defendant charted a suspicion of epidural abscess, a condition that could potentially cause permanent paralysis, but never ordered the appropriate diagnostic tests to confirm his suspicion. Two years later in deposition he alleged that abscess was never a concern. After a 4th office visit he sent the patient home with a prescription for pain medication and instructions to proceed to the Emergency Room, if the pain worsened or he developed neurological symptoms. Several hours later, the pain worsened, and the young man's mother drove him to the Emergency Room at Santa Rosa's Warrack Hospital. Unbeknownst to them, Warrack did not have neurosurgeons on-call. The E.R. doctor failed to treat the enhancing abscess, and the following morning, paraplegia was complete. Defendant Stone claimed that although he did not record it in his chart, he really did instruct the patient to immediately go to the E.R., but the young man refused! After 14 days of trial and 2 1/2 days of deliberation, the jury awarded $5,630,820 for future medical care, attendant care, and wage loss; and $3,850,000 for past and future general damages. In addition, because a CCP 998 offer in the amount of the defendant's policy limits ($1,000,000) was tendered and lapsed 18 months prior to the verdict, plaintiff also recovered $780,000 in prejudgment interest and $142,000 in costs.

Injured Infant v. Major Health Plan

In Injured Infant v. Major Health Plan (Private Contractual Arbitration) Paul Melodia obtained a mediated settlement in a major obstetrical injury case brought on behalf of a two-year-old Sonoma County boy who sustained global brain damage when fetal distress was neither noted nor responded to during his birth. The settlement also included compromise of his parent's claims for emotions distress and future wrongful death. Their recovery was in the amount of the unfair and discriminatory limit of $250,000 per claim imposed by California's outdated MICRA statute. A special needs trust was established with an initial corpus of more than $1,250,000 into which future annuity payments (commencing at $5,000 per month, increasing at 5% annually, for life, guaranteed 20 years) are to be deposited. A second, separate annuity will begin paying an additional $4,000 per month, increasing at 4% per year, when the child reaches his 18th birthday. Because the child is eligible for both CCS and Regional Center benefits until he reaches age three, the past out of pocket expenditures made by the parents have been modest – as a result the settlement was designed to be back-loaded (and guaranteed) to protect against the cost of custodial and attendant care in a home-based environment in the future. The settlement is believed to be among the largest ever negotiated on behalf of a North Bay plan member of this HMO.

Heirs v. San Mateo Emergency Department

In Heirs v. San Mateo Emergency Department (San Mateo Co. Sup. Ct.), Khaldoun Baghdadi negotiated a wrongful death settlement of $950,000 on behalf of the surviving husband and daughter of a 37 year-old school teacher who died from untreated hypertension. The decedent had given birth to her daughter just days before presenting to the emergency department with extremely high blood pressure. The blood pressure was left untreated. Depositions of the nursing staff revealed that they repeatedly and unsuccessfully tried to warn the physician on duty of the elevated blood pressure to no avail. The prolonged failure to treat the condition resulted in a massive intracerebral hemorrhage. Following percipient witness discovery, the case settled at a second session of mediation. Non-economic damages were limited to the artificial and unfair MICRA cap of $250,000. The survivors claimed in excess of $1,000,000 in lost support. The settlement proceeds apportioned to the infant daughter were structured.

Jastrab v. Ling

In Jastrab v. Ling (El Dorado Co. Sup. Ct. No. PC20040405) a jury verdict award in the amount of $3,162,000, the largest verdict for a medical negligence action in the history of El Dorado County, was obtained by Michael A. Kelly and Melinda Derish on behalf of a 13-year-old boy who suffered septic shock and required multiple surgeries because his treating doctors failed to diagnose and treat a staph infection in his leg. The youngster developed pain in his thigh following his first day of high school football practice. In the ensuing week, the pain in his leg worsened, and although the defendant diagnosed a "bruise," the child did not improve. The defendant orthopedic surgeon (Ling) never ordered any tests or prescribed any medications. After several days, the child went to the emergency room with respiratory and kidney failure, and an entrenched infection as well as necrosis of his thigh muscles, femur and hip. He has undergone two hip fusion surgeries. At the time of his acute decompensation he also experienced ARDS, and is now left with lung function which is only 70% of normal. The verdict was three times the available policy limits of the defendant doctor, who refused to settle the case in the amount of a $1,000,000 policy limit §998. The judgment has been satisfied.

Newborn v. Family Practitioner

In Newborn v. Family Practitioner (Sonoma Co. Sup. Ct.), a case involving cerebral palsy and cortical blindness, Michael Kelly and Doris Cheng negotiated resolution of a birth injury claim against a Sonoma County family practitioner and her clinic. The case was brought on behalf of a 5-year-old girl who was the first child for a 42-year-old mother. The defendant doctor was not an obstetrician. Mike and Doris claimed that the physician should have referred the mother to a "high risk" obstetrical program in light of the expectant mom's advanced age. During labor the child's fetal monitoring demonstrated worrisome heart rate decelerations, but these were ignored by the attending nurses. Our experts in obstetrical nursing were prepared to testify that the nurses should have invoked the "chain of command" hours prior to the delivery so as to obtain consultation from another obstetrician. The case was resolved in an amount sufficient to pay both cash and future monthly installments to cover the cost of the child's forecasted care. The settlement also included a component to pay for future lost wages. A special needs trust was established to preserve the child's eligibility to receive public benefits while simultaneously receiving tax-free annuity benefits.

Recent Cases

Vehicular Negligence

Family v. Disposal Company and State of California

In Family v. Disposal Company and State of California (Sonoma Co. Sup. Ct.) Douglas Saeltzer and Doris Cheng obtained a $1,900,000 dollar wrongful death recovery on behalf of the husband and three adult children of a wife and mother who was killed while driving home from her nursing job at a local hospital. This head-on collision occurred on a curvy, undivided, two lane section of highway 116 between Petaluma and the town of Sonoma. Both drivers were killed as a result of the collision. Defendants blamed the accident entirely on the negligent driving of the vehicle that crossed the centerline and struck the decedent. However, the CHP investigation identified multiple plastic containers littering the road in the vicinity of the accident scene, which had spilled kerosene across the road. Through pre-trial discovery Doug and Doris established strong circumstantial evidence that the containers belonged to the defendant disposal company, who vigorously denied ownership or control. Discovery also revealed that several years prior to this collision Caltrans had studied this roadway and recommended several changes to decrease the likelihood of just such head-on collisions. As of the date this accident Caltrans had not put into place any of its own recommendations.

Surviving Children v. Bus Company

In Surviving Children v. Bus Company (Los Angeles Co. Sup. Ct.) Douglas S. Saeltzer and Khaldoun Baghdadi successfully recovered wrongful death damages in the amount of $1,139,700 on behalf of the seven adult children of a sixty year old mother killed when the bus she was taking from Arizona to Mexico experienced brake failure as it descended a freeway off-ramp in Phoenix. The high speed crash also killed the driver and severely injured several other passengers. The bus company had a principal place of business in Los Angeles, and the lawsuit was successfully filed and kept in Los Angeles Superior Court. Shortly after the lawsuit was filed the defendant declared bankruptcy. Plaintiffs obtained relief from the bankruptcy stay by stipulating that the amount of any recovery would be limited to the amount of the insurance policy limits of 5 million dollars. As the case progressed the bankruptcy attorney for the Trustee filed an interpleader claiming that the insurance proceeds were assets of the estate. Our attorneys recognized that the interpleader, if unopposed, would significantly diminish the policy limits because bankruptcy laws gave the Trustee and the bankruptcy attorneys priority of payment over the injury claimants. We filed an opposition to the interpleader complaint. The settlement was negotiated while a ruling on the opposition was pending.

Family of L. v. Roadside Hauling Contractors

In Family of L. v. Roadside (Alameda Co. Sup. Ct.) Doris Cheng and Michael A. Kelly settled a wrongful death case on behalf of the two adult children of an 80-year-old University of California Berkeley Department Chair who was killed when a runaway dump-truck careened down a hill and struck her while she was on her way to work. The decedent, a nationally known educator, had a particularly close relationship with her adult children. They continued to receive financial support from her, and looked to her for guidance and inspiration. The defendants claimed that because the children were fully emancipated their loss was modest. Further, given their mother's advanced age, the defendants claimed that her shortened life expectancy would have resulted in her death from natural causes in a relatively short time. The total amount of the settlement with the plaintiffs at mediation was in the amount of $1,575,000.

Cyclist v. BMW Operator

In Cyclist v. BMW Operator (S.F. Co. Sup. Ct.) Michael A. Kelly and Doris Cheng recovered $800,000 on behalf of a motorcyclist who was forced to "lay down" her cycle in the face of a left turning BMW near the intersection of Townsend and Third Streets. The defendant BMW operator had turned left in front of the plaintiff in order to enter a garage located mid-block. His view of oncoming traffic was obscured by a stopped Muni bus. He claimed that he had "inched out" so as to avoid contact with any oncoming vehicles. For her part, the plaintiff testified that the defendant aggressively entered her lane, leaving her nowhere to go. She braked as soon as she saw the nose of the X-5 enter her lane. She sustained multiple fractures and intra-abdominal injuries, incurring medical bills in excess of $150,000. The defendant vigorously denied liability, retaining experts in the fields of reconstruction, cycle operation and human factors. Plaintiff's consulting accident reconstruction engineers were able to recover physical evidence (plastic debris) from the undercarriage of the defendant's vehicle which impeached his story given at deposition and undermined his expert's accident reconstruction.

Construction Site Injuries

Laborer v. Realty Management Associates

In Laborer v. Realty Management Associates (S.F. Co. Sup. Ct.) Rich Schoenberger and Douglas Saeltzer negotiated a $6,000,000 policy limit settlement on behalf of a 47-year-old San Francisco window contractor who fell from a negligently erected scaffold. The defendant realty company contracted with the plaintiff to perform window maintenance and installation. Plaintiff requested that a scaffold be placed, and rather than contract with a licensed and bonded scaffold company, the defendant utilized its own equipment, which it had in storage. That equipment was not code compliant. While attempting to descend the scaffold, the plaintiff lost his footing when he reached the level where there was an inadequate number of planks. The defense contended the plaintiff was negligent for descending the scaffold, knowing that an adequate number of planks was not present. Plaintiff's experts in the field of construction, scaffolding and scaffold safety testified that the failure of the defendants to erect a ladder adjacent to, or within, the confines of the scaffolding constituted a violation of governing labor safety ordinances. As a result of his injuries, plaintiff is permanently disabled, sustaining catastrophic short and long-term memory loss, and requiring 24-hour per day attendant care.

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Recent Cases

Premises Liability

Pacific Heights Tenant v. Realty Management

In Pacific Heights Tenant v. Realty Management (S.F. Co. Sup. Ct.) Rich Schoenberger negotiated a settlement for a 64-year-old Italian tourist who was visiting friends in San Francisco when she fell 20 feet from an unguarded elevated patio. The incident, which occurred in San Francisco's Pacific Heights area, caused spinal burst fractures and bilateral lower extremity fractures. The injured plaintiff's ability to walk is permanently compromised both because of back and leg pain. The defendant property owners were aware that patio had no guardrail, but claimed that the tenant should not have permitted anyone onto the balcony; the landlord further claimed that both the plaintiff and tenant were intoxicated. The defendants jointly paid $1,565,000.00, which represented the entirety of the insurance coverage available to both, plus a personal contribution from each totaling $265,000.

Residential Renter v. Alameda County Landlord

In Residential Renter v. Alameda County Landlord (Alameda Co. Sup. Ct.) Paul Melodia and Rich Schoenberger negotiated a settlement having a $3,500,000 present cash value on behalf of a 38-year-old Oakland resident who fell from the stairway of his home when a rotted guardrail gave way, causing him to fall backwards, striking his head and fracturing his neck resulting in permanent quadriplegia. The landlord was a licensed architect. Plaintiff claimed he should have been familiar with applicable codes and the need to carry out periodic site inspections to determine the existence of latent hazards. Percipient witness discovery revealed that a number of witnesses were prepared to testify that they had given the landlord actual notice that the handrail was defective and dangerous. The property owner, who was underinsured, contributed $2,900,000 from his own pocket towards the settlement. While the ultimate recovery was less than the probable jury verdict range, the settlement obviated future problems with a threatened declaration of bankruptcy by the landowner.

Physician v. Town of Danville

In Physician v. Town of Danville (Contra Costa Co. Sup. Ct.) Doris Cheng settled a premises liability claim in the amount of $875,000 on behalf of a 62-year-old obstetrician, who slipped and fell at a city parking lot which was under renovation. The Town of Danville had contracted with a private contractor to perform construction and renovation of its Clock Tower parking lot, including installation of in-ground planting containers which incorporated a three-and-a-half inch drop-off. During the construction, the defendant neither warned of nor protected against the unplanted areas of excavation. At the time of his injury, the doctor was walking toward a restaurant for dinner. In the darkness there was no warning of the sudden change in elevation. He fell into a planter and fractured his right wrist, permanently disabling him as an obstetrician. Because of residual pain and limited range of motion, he was unable to perform many typical procedures, causing him to retire from his medical practice prematurely. Past special damages were approximately $200,000.

Government Liability

Salinas Senior v. Local Transit Agency

In Salinas Senior v. Local Transit Agency (Monterey Co. Sup. Ct.) Matthew Davis and Michael A. Kelly obtained a settlement having a present cash value of $3,000,000 on behalf of a 66-year-old Monterey resident who was struck while crossing a downtown Salinas street in a marked crosswalk. The bus driver had initially claimed that the plaintiff "darted out" in front of him. Exterior video footage captured by the bus's on-board cameras showed that the elderly plaintiff was almost halfway across the street when struck. At deposition, the driver admitted that he had never driven this particular route before, and had not been trained or familiarized with the intersection. It was the first time he had ever made a left turn at this location. The plaintiff sustained a closed head injury resulting in significant personality changes and an inability to care for her own needs. Her children, who became her primary caretakers after the incident, were required to leave their jobs and provide 24-hour care. The case concluded at mediation, following the retention of experts in accident reconstruction, bus operation and human factors.

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

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