

# FOCUS

*on torts*

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## SUPREME COURT SIDES WITH PATIENTS AGAINST PREEMPTION

The U.S. Supreme Court recently held that pharmaceutical companies cannot use FDA approval of warning labels as a shield against common law tort liability. The high court's decision in *Wyeth v. Levine* is a significant victory for patients. In a rare instance of agreement between victims' lawyers and physicians, the California Medical Association commented: "In order to best serve patients, physicians must have complete and truthful information about the risks and benefits of the drugs they prescribe. This ruling protects patient safety and allows doctors to do their jobs."



Wyeth Pharmaceuticals is the manufacturer of Phenergan, an antihistamine used to treat nausea. The injectable form of Phenergan can be administered intravenously. With a "push IV," the drug is injected directly into the patient's vein. Because Phenergan is corrosive, if it enters a patient's artery it can cause irreversible gangrene.

In April 2007, a Vermont patient suffering from migraines was given an

injection of Demerol for her headache and Phenergan for nausea. The drugs were administered by IV push. The Phenergan entered Diana Levine's artery – either because the needle penetrated an artery directly or because the drug leaked into the surrounding tissue, mixing with arterial blood. As a result, Levine developed gangrene

and required amputation of her right arm. A Vermont jury found that Wyeth failed to warn about the catastrophic risks associated with IV administration and awarded \$7,400,000 to Levine.

Wyeth argued that federal law preempted Levine's state law "failure-to-warn" claim because the FDA approved the Phenergan warning label in 1955. The Supreme Court rejected this preemption argument. Justice John Paul Stevens, writing for a 6-3 majority, stated: "Wyeth suggests that the FDA, rather than the manufacturer, bears primary responsibility for drug labeling. Yet

*Continued on page three*

## Firm Welcomes New Associate

We are pleased to welcome Sara M. Peters as the newest member of our team. A 2008 graduate of Stanford Law School, Sara obtained her undergraduate degree, summa cum laude, from the University of California Los Angeles. While in law school, Sara was a member of the Stanford Law School Mock Trial Team, and was Articles editor for the *Stanford Journal of International Law*. Sara also served as Co-Chair for Stanford's International Human Rights Law Association. During law school, Sara obtained significant practical experience clerking for nationally-respected litigation boutique Cotchett, Pitre & McCarthy, as well as for our firm.



Sara M. Peters

A career in litigation is the culmination of years of focused training not just in substantive law, but also in public speaking and writing. Sara has competed in college speech and debate, mock trial, and while at Stanford worked on a team led by nationally known constitutional law scholar, Kathleen Sullivan, representing civil rights litigants on appeal.

Her interests in consumer protection and personal injury litigation were initially piqued before law school when she worked part-time for a community based agency securing compensation for individuals who had suffered physical, mental and emotional harm.

We are pleased to have Sara join us and look forward to her growth and development in providing individual plaintiffs with the highest quality of legal representation. ▲

# Negligent Kaiser Care Results in \$2 Million Dollar Arbitration Award

In one of the largest arbitration awards ever returned against Kaiser, Paul Melodia obtained a binding award of more than \$2,000,000 on behalf of a 52-year-old woman who suffered a respiratory arrest two days after undergoing abdominal surgery at Kaiser in Walnut Creek. The arrest occurred shortly after an epidural catheter, used for post-operative pain control, was replaced. Paul proved that the procedure resulted in a "high spinal block," a rare and potentially life-threatening complication of epidural anesthesia. Typically, the first signs of a high spinal block are a drop in blood pressure, a slowing of the heart rate, and difficulty in breathing.

A "code blue" was called after the patient stopped breathing and her blood pressure was not detectable on monitors. At least ten minutes elapsed before resuscitation was begun. There was no crash cart available with code blue/emergency resuscitation medications, or equipment to intubate the patient for emergency ventilation. Following resuscitation, Paul's client remained in a coma for more than three weeks. She continued to be hospitalized for almost three months.

Paul produced medical testimony that Kaiser failed to timely recognize the high spinal block and start appropriate resuscitation.

tive treatment. Paul's experts were critical of the delay in administering Epinephrine (a drug used to revive blood pressure) and establishing an airway for ventilation. Kaiser's attorneys produced experts who testified that Epinephrine would not have been effective until after intubation, and that the standard of care did not require that the procedure be performed in the operating room.

Because of residual cognitive and physical limitations, our client requires assistance with activities of daily living, and 24 hour per day supervision.

For more than 30 years, Walkup lawyers have represented Kaiser Foundation Health Plan members in Kaiser arbitrations. From obstetrics to neurosurgery, anesthesiology to emergency room care, our medical negligence team knows the Kaiser system as well as or better than any other California practitioners. For associate counsel currently handling Kaiser cases who are seeking referral, assistance or advice, please feel free to contact Paul Melodia, Michael Kelly, Richard Schoenberger, Doug Saeltzer, Doris Cheng or Melinda Derish, all of whom currently have claims pending on behalf of Kaiser members. ▲

## MEDICARE "NEVER EVENTS"— ARE THEY THE EQUIVALENT OF MALPRACTICE?

In our last issue of FOCUS we discussed the 2008 legislation under which the Center for Medicare and Medicaid Services (CMS) announced that it would no longer pay for treatment of certain complications. In the original press release announcing the policy, CMS identified some 28 complications as "reasonably preventable." After announcing that it will no longer pay for treatment of these complications, the national media, patient groups, and patient advocacy blogs began to call the specified complications "never events."



The rationale for the new policy was that a refusal to pay for bad care and preventable injury would cause providers to be more careful. Doctor and hospital advocacy groups have suggested, however, that *Continued on page four*

## Disney Children's Tool Set Recall Highlights CPSC Action

Roughly 20,000

Playhouse Disney "Handy Manny" toy tool sets have been recalled because the tools contain eyes that can separate, posing a choking hazard to young children. Disney has received three reports of children who have choked on the pieces. The "Handy Manny" set is a plastic, eight piece toy set that includes a tool box, hammer, saw, pliers, wrench, tape measure and two screwdrivers. The toys were sold at "The Disney Store" nationwide from October 2007 through January 2009.



Ninety-five thousand Majestic high-chairs made by Evenflo, Inc. have been recalled because they pose a hazard when parts come loose and the seat backs fall off. Dozens of injuries, including closed head injuries, have been reported. The company has received more than 100,000 reports of parts falling out. The high-chairs, made in China, were sold nationwide at mass merchandizers including Toys 'R Us, Babies 'R Us, Burlington Coat Factory and ShopCo. They were also sold on-line at Wal-Mart. Consumers who own these chairs have been advised to immediately stop using them and to contact Evenflo to receive a free repair kit.

Two thousand "Dash Buggy" strollers made in China and imported by Regal Lager of Georgia were also recalled in December because of the failure of the frame handle to latch, thereby presenting a fall hazard to small children.

On the automobile defect front, NHTSA has upgraded one investigation and opened another into possible defects in Hyundai passenger vehicles. Roughly 300,000 autos are involved. The initial engineering analysis was upgraded because of more than 9,000 complaints of airbag malfunctions involving 150,000 Elantras. The Office of Defect Investigation has collected reports of system failures resulting from liquid spills as well as wiring and loose connections under the front seats. ▲

# SUPREME COURT SIDES WITH PATIENTS AGAINST PREEMPTION

*Continued from page one*

through many amendments to the FDCA and to FDA regulations, it has remained a central premise of federal drug regulation that *the manufacturer bears responsibility for the content of its label at all times.*

Because Congress did not provide any federal remedies in the FDA legislation for consumers harmed by unsafe drugs, the Court concluded, “Evidently, [Congress] determined that widely available state rights of action provided appropriate relief for injured consumers.”

Wyeth’s lawyers argued that the FDA had already considered the risks associated with the IV push method of delivering Phenergan and that defendant’s liability should be foreclosed. But the trial record showed there was no risk benefit analysis given to the FDA about the IV push as a means of administration.

The Court held that state tort remedies complement the FDA’s goal of consumer safety. With over 11,000 drugs in the marketplace, the FDA does not have the resources to monitor each and every label. It is therefore incumbent upon manufacturers to be complete in describing known risks. Per Justice Stevens, state tort actions play an important role in enforcing the manufacturer’s responsibility to dispense adequate warnings by “uncover[ing] unknown drug hazards and provid[ing] incentives for drug manufacturers to disclose safety risks promptly.”

The Supreme Court found there was

nothing stopping Wyeth from unilaterally strengthening its label in compliance with FDA regulations. “Wyeth could have gone back to the FDA at any time and said, either based on experience or just our rethinking of the data that we have, we think the label ought to be changed to say ‘Don’t use IV push.’ Wyeth could have done that at any time, and it simply didn’t do it.”

The *Wyeth* decision is the last of three opinions recently issued by the Supreme Court on the issue of federal preemption in product liability cases. In *Altria Group, Inc. v. Good* the Court ruled in favor of consumers’ rights to pursue claims under state unfair trade laws even though cigarette labeling is regulated by the Federal Trade Commission. In *Riegel v. Medtronic, Inc.* the Court ruled in favor of preemption in FDA approved medical devices, but made clear that preemption depended on the particular federal statute at issue.

The decision comes on the heels of a legislative push by the Obama administration to begin unraveling all of the preemption friendly executive orders issued by former President George W. Bush. The National Association of Attorneys General is urging the new administration to make preemption reversal a top issue. In a briefing released by the NAAG, it called on the President to resist federal preemption of state laws, particularly as they relate to mortgage foreclosures. The Association observed that “State Attorneys General

have traditionally resisted federal preemption of state laws, whether by congress, the courts or the executive branch,” instead supporting “a more pure federalism whereby state governments and the federal government each retain and actively exercise the powers and functions of government at the same time.”

The American Association for Justice (AAJ) has asked the Obama administration to reverse Bush-era regulations which provided near blanket immunity to some businesses and industries. During the Bush years, at least seven agencies issued more than 50 regulations with language intended to preempt state tort claims, often in direct contravention of congressional intent.

National non-profit consumer advocacy organization Public Justice has also called upon the Obama administration to “set a different course” than the Bush administration in the preemption arena. In a letter sent to the incoming Office of Management and Budget Director, Public Citizen requested that the President “make the health and safety of American families the underlying goal of all federal regulations,” asking that President Obama issue an executive order “prohibiting the abusive practice of inserting language in the preambles of federal regulations for the purpose of immunizing manufacturers from liability for injuries caused by faulty products.” ▲

## Release Language Critical to Avoid Taxes

The Internal Revenue Service has once again reaffirmed that the *exact* language of a settlement agreement can dramatically influence whether or not settlement proceeds are taxable.

In *Murphy v. IRS* (D.C. Cir. 2007) 493 F.3d 170, as well as *Sanford v. Comm.*, T.C. Memo. 2008-158, the IRS made clear that if a claimant receives something “on account of” personal physical injuries or physical sickness (per IRC §104(a)(2)) the

settlement agreement must say the money is being paid on account of those very things.

The character of amounts received as proceeds from a lawsuit or a settlement depend upon the nature of the claims and the actual basis for the recovery. Under the “origin of the claim” doctrine, classification of amounts received in settlement and litigation is to be determined by the nature and basis of the action settled, and



the amounts received in compromise of a claim must be considered as having the same nature as the rights compromised. (*Alexander v. IRS*, 72 F.3d 938 (1st Cir. 1995).) The critical inquiry is why were the damages awarded? (See *Raytheon Production Corp. v. Commissioner*, 144 F.2d 110, 113 (1st Cir. 1944).) ▲

# MEDI-CAL REIMBURSEMENT FORMULA CLARIFIED

Ever since the United States Supreme Court decided *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268, California courts have been uncertain about how to apply the new rules for Medi-Cal reimbursement. In *Ahlborn*, the Supreme Court held that any lien for reimbursement by the Federal Medicaid program (which partially funds Medi-Cal) could only be asserted on that portion of a judgment or settlement reflecting medical expenses. Where medical expenses are not identified or segregated in the settlement or judgment, the parties must determine which portion of the settlement represents medical expenses.

After *Ahlborn*, the California Medi-Cal reimbursement formula in Welfare & Institutions Code §14124.76 was changed. The statute now provides that Medi-Cal liens can only be satisfied out of that portion of any settlement or judgment representing medical expenses.

The new statute provides that "recovery of the director's lien is limited to that portion of a settlement, judgment or award that represents payments for medical expenses, or medical care...all reasonable efforts shall be made to obtain the director's advance agreement to a determination as to what portion of a settlement, judgment, or award represents payment for medical expenses or medical care.... Absent the director's agreement as to what portion of a settlement, judgment or award represents payment for medical



expenses, the matter shall be submitted to a court for a decision."

In *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, the Second District discussed the *Ahlborn* rule for the third time in just six months. In *Bolanos*, a medical malpractice case was settled in the total amount of \$1,500,000. Medi-Cal had expended \$746,000 on behalf of the plaintiff and refused to agree to a reduction in its lien amount. In the settlement between plaintiff and the medical malpractice defendant, no distribution was made as to what portion of the \$1,500,000 represented payment for medical expenses. The plaintiff sought an order from the Superior Court reducing the amount of the Medi-Cal lien, arguing that the portion of the \$1,500,000 settlement reflecting medical bills should be calculated using the ratio between the actual medical bills (\$746,000) and the "full value," or "total value" of the plaintiff's case (\$11,000,000). Medi-Cal refused to agree to using this method for collecting that portion of the \$1,500,000 reflecting medical expenses.

In sending the matter back to the trial court for determination of the amount of the settlement representing medical expenses, the Second District held that the plaintiff's proposed methodology was proper. "We agree that *Ahlborn* itself does not require the application of the precise formula used in that case, although we do not think that this approach, which has the Supreme Court's approval, should be abandoned lightly....Section 14124.76, subdivision (a) is the best evidence [of what the legislature intended]: it states that in determining what portion of a settlement, judgment or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary and as to what the appropriate reimbursement amount to the director should be, the court shall be guided by the United States Supreme Court decision in *Arkansas Department of Health v. Ahlborn*." ▲

## MEDICARE "NEVER EVENTS"— ARE THEY THE EQUIVALENT OF MALPRACTICE?

*Continued from page two*

an unintended consequence of the new policy may be denial of care to patients who are at risk for the so-called "never events."

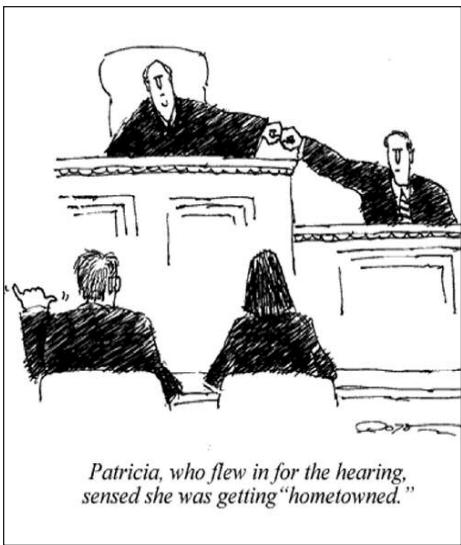
Further, questions have now arisen as to whether or not a patient who experiences a "preventable" complication has the equivalent of a "*res ipsa*" claim against the responsible provider.

The number and type of complications covered under the no-payment policy include Stage III and Stage IV pressure ulcers, pulmonary embolus from deep vein thrombosis, surgery on the wrong body part, retention of a foreign object post-operatively, surgical site infections, transfusions of the wrong blood type, and catheter-associated urinary tract infections.

It is obvious why the government might refuse to pay for some of these complications – like operating on the wrong limb – but in other circumstances, like acquisition of a wound infection, there is debate in the medical community as to whether or not such a complication necessarily implicates a breach of the standard of care.

But what will be the evidentiary impact of the refusal of Medicare to pay for a given condition, particularly in light of California's MICRA statutes? Can the plaintiff simply argue that because a patient experienced one of the proscribed "preventable" complications, the injury was caused by a breach of the standard of care?

The California law of medical *res ipsa loquitur* is articulated in CACI Instruction 518. Under California law, the traditional three elements of proof are required: the harm occurred while plaintiff was under the care and control of the defendant; nothing the plaintiff did or failed to do caused or contributed to the event; and the harm ordinarily would not have occurred unless someone was negligent. It is this last component of proof, measured by CMS determination that as a "matter of law" the complications for which they will not pay were "reasonably preventable" by following evidence based guidelines that raises the question of whether the 28 "never event" *Continued on page five*



Rich Schoenberger has been elected to the International Society of Barristers, an honor society of outstanding trial lawyers chosen by their peers on the basis of excellence and integrity in advocacy. Members (the Fellows) are elected by the Society's Board of Governors on nomination by a Fellow and after inquiry directed to other Barristers in the nominee's region and to judges before whom the nominee has tried cases. The ISOB seeks to preserve trial by jury, the adversary system, and independence of the judiciary. In May, Rich will once again act as team leader at Emory Law School's renowned Kessler-Eidson Trial Techniques Program in Atlanta, Georgia. Rich was also selected to membership on the Executive Committee of San Francisco's ABOTA Chapter and will serve as chair of its "Masters in Trial" program in May...Doris Cheng participated as a faculty member on behalf of NITA U.K. at its Solicitor Advocates Program held in Belfast, Northern Ireland. Additionally, having completed her term as Chair of the San Francisco Bar Association's Judiciary Committee, Doris was elected to membership on the Bar Association's Board of Directors...Mike Kelly returned to Osaka, Japan in January to continue training Japanese lawyers in oral advocacy and jury trial skills. In May of 2009 Japan will



implement its "Saiban-in" modified jury system. Mike previously taught in Tokyo for a nationwide training in 2008. The photo above was taken at the conclusion of the Osaka training and shows Mike together with other program faculty and attendees. More recently, Mike was honored by the Consumer Attorneys of California as one of the finalists for its prestigious "Consumer Attorney of the Year" Award...In February, Mike was invited to address the International Association of Defense Counsel's Midwinter Meeting in Carlsbad, California...Khaldoun Baghdadi lectured to the American Bar Association's product liability section on "Emerging Issues in Motor Vehicle Product Liability Litigation" at the Section's meeting in Phoenix, Arizona. Khaldoun also received an appointment as a lecturer, teaching Evidence Advocacy, at the

University of California's Boalt Hall School of Law...Emily Wecht was elected to membership in the Edward J. McFetridge San Francisco American Inn of Court. Emily also served as a judge at the John F. Kennedy School of Law's 2008 Moot Court Competition...Spencer Pahlke received an appointment as an Assistant Adjunct Professor at his alma mater, Boalt Hall, where he serves as a coach for the Boalt Hall Mock Trial Teams...Dan Kelly has been appointed to serve on Santa Clara University School of Law's Strategic Planning Committee and was selected to chair his law school class's 40 year reunion...Matthew Davis represented the firm at the San Francisco Bicycle Coalition's Golden Wheel Awards...Melinda Derish attended a national conference on preventing obstetrical injury. ▲

## MEDICARE "NEVER EVENTS"— ARE THEY THE EQUIVALENT OF MALPRACTICE?

*Continued from page four*

complications necessarily fall within the *res ipsa* rule.

Historically, *res ipsa* has not been commonly used in medical malpractice or elder abuse cases. Although there is authority for the proposition that in certain types of claims, negligence exists as a matter of law (i.e. retained sponges or towels), those types of cases make up less than 1% of the matters that find their way to trial.

On the other hand, most infection cases do not fall within *res ipsa*; most surgical site infections are not deemed "pre-

ventable;" and while catheter-associated urinary tract infections may be frequent, they have never been determined by a California court to be "preventable" as a matter of law.

Now, with the Center for Medicare and Medicaid Services' reimbursement decisions announcing that such complications are "reasonably preventable," a question inevitably arises as to whether or not *res ipsa* applies.

To be sure, hospitals, physicians and medical associations uniformly disagree with the notion that complications like patient falls, pressure sores, DVT's and iatrogenic injuries are necessarily the product of negligence. In fact, some medical spokespeople have suggested that Medicare's refusal to pay for these 28 complications may not improve

patient care at all, but instead make the quality of care worse as some hospitals transfer patients from one to another (because Medicare will not refuse to reimburse the second hospital for the first hospital's mistake), screen patients so that those who are at higher risk of having a "never event" are not admitted (i.e. the immuno compromised, obese or emotionally unstable), and make it more difficult to find nursing homes who will accept seniors at higher risk for decubitus ulcers, thereby excluding the most frail or elderly from quality care.

Where no good deed goes unpunished, patients are cautious about what unintended consequences will follow from an idea that originated from a desire to improve patient care and reduce government reimbursement obligations. ▲

# RECENT CASES

## PRODUCT LIABILITY



### Pedestrian v. Device Manufacturer

In Pedestrian v. Device Manufacturer (Marin Co. Sup. Ct. – Confidential), Paul Melodia and Douglas Saeltzer resolved a product liability claim on behalf of a 30-year-old woman who sustained severe pelvic and lower extremity fractures as a result of being struck by an automobile. The vehicle was being driven by a disabled driver who had no function in his lower extremities. He had contracted with the defendants to install a hand-control device in his vehicle, to enable him to brake / accelerate. As designed, the hand control lever extended into an area where it could be moved by pressure from the left side of the driver's torso or legs. As the plaintiff was walking with a friend, the defendant driver reached around through his driver's side window to retrieve a parking ticket and his left leg moved the hand control lever resulting in full acceleration. Defendants included the negligent operator, the manufacturer of the hand control device, the installer and the dealership which facilitated original sale of the defendant's car. The case resolved after two sessions of mediation with all defendants contributing to a settlement totaling \$4,330,000 as follows: \$1,944,000 from the driver; \$993,000 from the manufacturer; \$993,000 from the installer; and \$400,000 from the dealer.

## GOVERNMENT LIABILITY



### Cyclist v. Union Pacific Railroad

In Cyclist v. Union Pacific Railroad (Santa Clara Sup. Ct. No. 107CV078657), Mike Kelly and Emily Wecht negotiated a \$1,300,000 (present cash value) settlement on behalf of a 61-year-old part-time college history professor who was injured when his bicycle wheel became lodged in a dilapidated wooden railroad crossing. As the plaintiff rode through the crossing (located in a major thoroughfare in the City of Saratoga) his bicycle froze, vaulting him over the handlebars. He sustained multiple skull fractures and a brain injury. Reconstruction of the accident was challenging because the plaintiff was amnesic for the events leading up to the fall. Plaintiff's experts utilized damage to the bicycle, helmet and front wheel assembly of the cycle to reconstruct how the events occurred. In discovery, Mike and Emily demonstrated that both the Railroad and the City had been aware that the crossing was known to present a danger to bicyclists for at least fifteen years before the happening of the event. The defendants had spent five years arguing between themselves about who should pay to upgrade and resurface the crossing. The settlement included a combination of cash and future annuity payments.

### Parents v. East Bay Public Entity

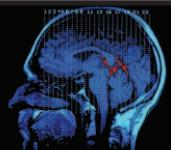
In Parents v. East Bay Public Entity (Alameda Sup. Ct.), Matthew Davis and Richard Schoenberger represented the parents of a 14-year-old eighth grader who drowned in a public pool when three lifeguards on duty failed to see him submerged in 6 feet of water. The pool, operated by the local

park district, provided professional lifeguards. The incident occurred during a junior high school year-end picnic. At the time, dozens of eighth graders were in the pool. In spite of industry standards obligating life guards to scan their assigned zone every 30 seconds, none of the three lifeguards saw the young man sink below the surface – even though he was directly in front of them. At deposition, none of the lifeguards were able to explain how the drowning occurred. One of the students, not a lifeguard, was the first person to notice the young man beneath the surface of the water. The decedent was the oldest of five children. The claim was settled for \$2,250,000 following an all-day mediation.

## Senior Pedestrian v. City and County of San Francisco

In Senior Pedestrian v. City and County of San Francisco (S.F. Sup. Ct.), Matthew Davis and Khaldoun Baghdadi recovered a settlement in the amount of \$2,000,000 on behalf of a 90-year-old woman who was struck by a Municipal Railway N-Judah streetcar at the intersection of 9th and Irving Street in San Francisco. The plaintiff, a holocaust survivor, was unable to clear the path of the streetcar which turned left against a red light. The settlement was achieved at private mediation, following the compilation of a documentary video which detailed the extent of our client's injuries, as well as the devastating impact on her life and family.

## MEDICAL NEGLIGENCE



### Engineer v. Medical Physicians

In Engineer v. Medical Physicians (Private HMO Arbitration), Michael A. Kelly and Doris Cheng settled a medical negligence action in the amount of \$5,475,000 (present cash value) on behalf of a 35-year-old Silicon Valley electrical engineer and his wife when the patient suffered global brain damage as a result of delayed diagnosis and treatment of an intracranial bleed. The patient presented to the defendants' emergency department with a facial droop, slurred speech and numbness in his face and tongue. His HMO-provided physicians refused to admit him for testing, contrary to the recommendation of the E.R. physician. While the patient waited ten days for a non-emergent MRI, the leaking aneurysm ruptured. Medical experts opined that if the aneurysm had been treated earlier, the devastating consequences of the rupture would have been averted. Defendants argued that even if the patient had been admitted to the hospital, neither a brain MRI nor surgery would have been emergent and that the patient would have suffered the same injuries. The patient now requires 24-hour a day attendant care because he is unable to perform any activities of daily living. The settlement was composed of both cash and tax free annuities.

### Chu v. Bay Community Services

In Chu v. Bay Community Services (Alameda Sup. Ct. No. HG06-298475), Richard Schoenberger and Spencer Pahlke obtained a jury verdict in the amount of \$996,000, following a ten day trial, on behalf of a mentally disabled woman who jumped from her second story window in a psychiatric facility where she was supposed to have been monitored for suicidal ideation. The plaintiff, who suffered from schizophrenia, jumped

# RECENT CASES

from the second floor window at approximately 1:00 a.m., and thereafter lay outside for more than five hours, becoming progressively hypothermic, until a staff member eventually noticed that she was missing. At trial, the facility claimed the plaintiff had been regularly checked on "throughout the night" and that she probably jumped out the window shortly after 6:00 a.m., rather than five hours earlier. The jury rejected the defense claims. As a result of the fall the plaintiff suffered a burst fracture of her thoracic spine, multiple broken ribs, and residual disability.

## Heirs v. Health Maintenance Organization

In Heirs v. Health Maintenance Organization (Mandatory HMO Arbitration), Michael Kelly obtained a settlement in the amount of \$1,200,000 on behalf of the surviving spouse and adult son of a 49-year-old San Mateo County data analyst who suffered a fatal heart attack after HMO physicians delayed in carrying out appropriate diagnostic studies and definitive treatment despite clear indications that urgent treatment was necessary. Three weeks before his death the decedent, who had been an HMO member for many years, made complaints to his primary treating physician of chest pain and shortness of breath. Examination and subsequent testing revealed that the decedent had likely already suffered a small heart attack and was at high risk for another. Angiography was scheduled for the future, and nitroglycerin was prescribed. Our experts testified that the delay in scheduling the angiogram on a "STAT" basis was below the standard of care. The decedent continued to have attacks of angina, but telephone calls to HMO personnel were unsuccessful in getting him seen on an urgent basis. The fatal heart attack occurred the day before the angiogram was to have been performed. General damages were limited by the \$250,000 limit of MICRA. Lost wages, benefits and household help were estimated at \$950,000 by claimants' retained economist.

## Survivors v. Associated Group

In Survivors v. Associated Group (Contractual Arbitration – Confidential Settlement), Melinda Derish obtained a wrongful death settlement of \$800,000 on behalf of the surviving wife and daughter of a 55-year-old contractor who died of an undiagnosed aortic dissection after spending 36 hours in the hospital without ever being seen by a cardiologist. The doctors who saw the patient were internal medicine hospitalists. These physicians failed to recognize that the patient needed an emergency evaluation to rule out aortic dissection.

The patient was initially seen in a non-affiliated emergency room for acute onset of severe chest pain. The pain did not respond to nitroglycerin, as would be typical for coronary artery disease. A blood test that is often elevated for pulmonary embolism or aortic dissection was elevated. The E.R. physician wanted the patient to have a specialized CT that would have made the diagnosis of aortic dissection. The Defendant Group wanted the patient transferred to a different hospital. A cardiology consultation and echocardiogram could also have made the diagnosis, but these were never ordered. Instead, the hospitalists continued to prescribe nitroglycerine and intravenous morphine for ongoing chest pain. The decedent died shortly after a stress treadmill test, which worsens the tearing of an aortic dissection.

## Newborn v. Obstetricians and Hospital

In Newborn v. Obstetricians and Hospital (Costal County – Confidential Settlement), a case involving cerebral palsy, Michael Kelly and Melinda Derish negotiated settlement of a claim brought on behalf

of a 2-year-old Santa Cruz County girl who sustained hypoxic brain damage during labor and delivery. Mike and Melinda claimed that during the mother's labor, when the child's care was signed over from a senior obstetrician to one with far less experience, the baby's head was in a position that contraindicated vaginal delivery. The inexperienced obstetrician attempted to perform a vacuum delivery for fetal distress. The attempt to extract the baby by vacuum was unsuccessful, but the obstetrician did not proceed to a cesarean section. The baby was not delivered until more than one hour later. She developed seizures shortly after delivery. She was eventually diagnosed with hypoxic ischemic brain damage. A special needs trust was established for the little girl with an initial corpus of more than \$1.4 million dollars.

## Female v. Physician and Hospital

In Female v. Physician and Hospital (Central California – Confidential Settlement), Paul Melodia and Melinda Derish obtained a mediated settlement in the amount of \$1,100,000 on behalf of a 21-year-old woman who lost sight in both eyes over a period of weeks while her primary treating physician and hospital emergency room doctors failed to recognize and treat increased intraocular pressure which ultimately caused optic nerve atrophy. Although her condition should have been treatable, none of her physicians appreciated its significance or cause. The case concluded after expert discovery. The amount of the settlement reflects the unfair and unequal treatment of victims of medical negligence. Had the plaintiff's injuries occurred as the result of a product failure, auto accident, or wrongdoing other than medical negligence, her general damage award would likely have been in excess of \$10,000,000. Here, because of the Draconian damage cap of MICRA, her compensation for a lifetime of blindness (over 60 years) was limited to less than \$5,000 per year.

## WORK PLACE NEGLIGENCE



## Commercial Driver v. USA

In Commercial Driver v. USA (USDC Eastern Dist.), Matthew Davis and Khaldoun Baghdadi negotiated a cash settlement in the amount of \$1,900,000 on behalf of a truck driver who was injured when his belly-dump rig fell into a steep ravine after the roadway below gave way. The settlement also resolved an outstanding worker's compensation lien claim, and provided for future medical care. The plaintiff's employer had been hired by the general contractor on behalf of the U.S. Forest Service to repair a rural fire road in Fresno County. After heavy snows the year before, the road had washed out during the spring thaw. The general contractor hired the plaintiff's employer to dump "riprap" at the washout site. The general's representative directed our client to back his fully loaded truck, weighing in excess of 12 tons, down a narrow unimproved road cut into a steep ravine adjacent to the Tuolumne River. The edge of the roadway gave way, and the plaintiff's truck rolled down the ravine. Trapped in the wreckage for more than eight hours, our client suffered neurological injuries to his back and legs which make it impossible for him to continue driving a truck. The settlement was contributed to by both the general contractor and the Forest Service.

# RECENT CASES

## PREMISES LIABILITY



### Paralyzed Student v. Dance Club

In Paralyzed Student v. Dance Club (S.F. Sup. Ct.), Matthew Davis represented a 22-year-old college athlete who was injured after paying \$10 to attend a hip hop dance party. The club where the party took place was in a high-crime neighborhood. After fights broke out on the dance floor, hundreds of attendees were ordered to leave the hall. Once evicted from the premises, a crowd gathered in front of the establishment. The plaintiff was walking on the sidewalk, headed to his car, when one of the party-goers pulled out a hand gun and began firing shots. A stray bullet struck plaintiff in the back and rendered him paraplegic. The shooter was never apprehended. We brought suit against the dance promoter, the owner of the premises where the party was held, and other defendants, on the theory that their negligence in failing to properly organize, supervise and control the crowd was a causal factor in producing the violence in the street. The case was settled in the amount of \$1,425,000.

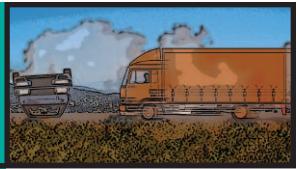
### Renters v. Residential Landlord

In Renters v. Residential Landlord (Alameda Sup. Ct.), Doris Cheng resolved a premises liability claim on behalf of a mother and her 16-year-old son, arising out of their chronic exposure to carbon monoxide. Their landlord failed to maintain and repair an old gas-fired wall heater in the plaintiffs' Oakland apartment. Unknown to our clients, the heater continuously emitted excessive amounts of carbon monoxide and soot. Both of the plaintiffs developed headaches and nausea. When the presence of carbon monoxide was discovered by PG&E, medical providers checked the son's carboxyhemoglobin level and found that it was abnormally high. As a result of their chronic carbon monoxide exposure, both the mother and son sustained mild but irreversible brain injury including deterioration in executive function, impaired concentration, and increased emotional lability. Defendants argued that the heater had been inspected and replaced only two years earlier, and that plaintiffs' damage claims were overstated. The case settled just prior to trial for the available policy limit of \$1,000,000.

### Student v. Pool Service Retailer and Manufacturer

In Student v. Pool Service Retailer and Manufacturer (Confidential Settlement), Doris Cheng negotiated a seven-figure resolution of a wrongful death claim on behalf of the surviving mother of a college student who died from carbon monoxide poisoning while sleeping in her family's pool house. After the tragedy occurred, investigation revealed that a recently-installed pool heater was producing hazardous levels of carbon monoxide. Further investigation indicated that the retailer who installed the pool had not vented it correctly. Litigation against the manufacturer of the defective heater is continuing. Suit was initially brought against both the installation company and the heater manufacturer. The partial settlement achieved with the retailer was in the full amount of the available policy limits. As part of the settlement, the settling defendant agreed to support California state legislation requiring carbon monoxide detectors to be installed anytime a pool heater is sold, or included with new pool construction.

## VEHICULAR NEGLIGENCE



### Heirs v. Commercial Hauling Company

In Heirs v. Commercial Hauling Company (Alameda Sup. Ct.), Richard Schoenberger recovered \$1,265,000 on behalf of the mother, wife and children of a 38-year-old Daly City resident killed when his auto was struck by defendant's truck. The decedent, who worked at the San Francisco Public Library, was riding as a passenger in a car driven by a friend. The friend lost control of and rolled the vehicle, straddling the number one and two lanes of southbound I-5. During the rollover, a plume of dust was generated, obscuring the vision of oncoming drivers. All oncoming traffic, except for the defendant, slowed. The defendant's truck barreled into the decedent's stalled auto at more than 40 miles an hour. Experts retained on behalf of the plaintiffs testified that the truck driver's reactions were too slow, and his vehicle speed too fast, for prevailing conditions. The defense contended that the truck driver was faced with an emergency and that his efforts to avoid the collision were as good, or better than, could be reasonably expected from a professional driver.

### Secretary v. Stone Mason Construction

In Secretary v. Stone Mason Construction (S.F. Sup. Ct. No. CGC-07-462841), Michael A. Kelly and Spencer Pahlke negotiated a \$750,000 settlement on behalf of a 28-year-old woman who was struck by a fully loaded Ford F-450 pickup truck as it made a right turn from Market Street onto the Central Freeway onramp at Octavia Street in San Francisco. The collision took place as plaintiff was traveling eastbound on her bicycle in a designated bike lane. The defendant struck her while making an illegal right turn from Market Street onto the freeway. In the process, his vehicle pinned her against a retaining wall, resulting in more than 20 fractures to her ribs. The rib fractures caused flail chest and plural scarring, leaving plaintiff with traumatic asthma. Defendant contended that plaintiff had made a full recovery and had no functional disabilities. The defense also claimed that the intersection itself was partially to blame, as statistics demonstrated that it was the most dangerous bicycling intersection in all of San Francisco. The City and County of San Francisco had been an original defendant, but obtained summary judgment based upon "approved plan and design immunity" as set forth in Government Code §830.5. 

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](http://www.walkuplawoffice.com).



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