WALKUP, MELODIA, KELLY & SCHOENBERGER

FOCUS on torts

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# VERDICT HIGHLIGHTS IN-OFFICE ANESTHESIA DANGERS

The profound danger of substandard post-operative care in private medical offices was highlighted by a recent excess liability verdict obtained by Walkup attorneys Paul Melodia, Melinda Derish, and Conor Kelly. After fourteen days of testimony, a San Francisco jury awarded more than $3,900,000 against an anesthesiologist and nurse who failed to properly monitor the post-operative course of a 63-year-old real estate developer who suffered a post-operative respiratory arrest in a plastic surgeon's office. Gavello v. Millman, M.D. (S.F. Sup. Ct. CGC-09-485616).

On August 18, 2008, Gary Gavello was a healthy 63-year-old husband, father, attorney and real estate developer. He underwent facial cosmetic surgery by a plastic surgeon, Donald Brown, M.D., in his San Francisco office. A local anesthesiologist, Bernard Millman, M.D., provided nine hours of general anesthesia during the in-office surgery, using an unusual combination of high dose inhaled Isoflurane and intravenous central nervous system depressant drugs.

The post-operative recovery did not proceed normally. When Mr. Gavello became agitated, the defendant anesthesiologist, Dr. Millman, ordered the nurse to put the patient in leather restraints and give an intramuscular injection of Thorazine. Twenty minutes later, before the Thorazine reached peak effect, Dr. Millman decided to go home. He did not provide any warning to the surgeon or to the nurse about the potentially dangerous interactions between Thorazine and the residual general anesthetic agents which remained in the bloodstream.

The surgeon, Dr. Brown, had arranged for overnight "recovery room" care in his office by a nurse and nurse's aide whom he selected and paid. Dr. Brown left the office shortly after the anesthesiologist. The nurse was left alone without physician

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# Walkup Attorneys Appointed Lead/ Liaison Counsel For DePuy Hip Implant JCCP

Partners Michael A. Kelly and Matthew Davis have been appointed lead/liaison counsel for all plaintiffs in the California Judicial Coordinated DePuy ASR proceedings before Judge Richard Kramer in San Francisco.

There are currently more than 750 actions pending against DePuy in the California coordinated cases and more than 1,300 in the Federal MDL pending in Toledo, Ohio.

In addition to Mike and Matt, Walkup partners Doug Saeltzer and Khaldoun Baghdadi are also involved in the DePuy litigation, as are associates Spencer Pahlke and Conor Kelly.

Since the ASR recall in August 2010, the FDA has received thousands of complaints regarding metal-on-metal prosthetic hip complications. According to a New York Times article, at the current rate, the DePuy ASR prosthesis will become the most costly medical implant disaster since Medtronic was required to recall more than 7,000 pacemakers in 2007.

In addition to those patients who have required a revision (e.g. re-operation), many DePuy implant victims need joint replacement due to highly elevated levels of cobalt and chromium in their blood. Because

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# Supreme Court Creates More Questions Than Answers With *Howell* Decision

For more than 100 years the collateral source rule had been held sacred by the California Supreme Court (Helfend v. Southern California Rapid Transit District (1970) 2 Cal.3d. 1.) It said that if a plaintiff had the good sense to purchase medical insurance, any defendant who harmed the plaintiff could not get the benefit of that prudence and thrift by obtaining an offset from the plaintiff's damages for the amount covered by the plaintiff's insurance. The rationale is simple: as between an innocent plaintiff who has been injured and a wrong-doing tortfeasor, the one who should benefit from the medical insurance is the person who paid the premiums for it – whose work, thrift and foresight provided the advantage – and not the defendant who caused the injury.

Not anymore. The verdict is in and insurance companies and corporations have declared victory. In Howell v. Hamilton Meats & Provisions, Inc., the California Supreme Court has held that in a personal injury action in which the plaintiff has private health insurance, the negotiated rate differential (or discount received by the plaintiff's own insurer) is not a benefit within the collateral source rule, and thus the plaintiff may not recover the amount of that differential as part of her economic damages for past medical expenses she incurred. The decision was rendered by a court without a single member who had handled a personal injury case in the last quarter century. Even more interestingly, Presiding Justice Cantil-Sakauye voted with the six justice majority. Just one year ago, she authored the opinion in King v. Willmett for the Third District Court of Appeal and wrote, "We see no basis in the record from which we could conclude plaintiff did not incur $169,499.94 (of which $93,213.62 was the negotiated rate differential not paid by medical insurance) in past medical expense." In holding exactly the opposite as the ruling in Howell, the King court found persuasive the Helfend view that "a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift."

Plaintiff Howell suffered injuries that resulted in gross medical bills of $189,978.63. The amount paid on those bills, by her insurance carrier and herself, was $59,691.73. Before trial, defendant moved in limine to prohibit plaintiff from showing the total billed amount, and instead to show only the amount paid. The trial court denied the motion, holding that any overpayments would be dealt with using a Hanif motion after trial. At trial, the jury found for plaintiff, awarding her the full $189,978.63 in past medical specials.

The Supreme Court's analysis breaks down into a discussion of each of the following issues:

(1) Whether Hanif correctly decided that a plaintiff may only recover the amount paid for past medical specials;

(2) If Hanif was decided correctly, does it apply in the context of private health insurance;

(3) If plaintiff may only recover the amount paid on past medical specials, does the tortfeasor receive a windfall;

(4) Is the negotiated discount between health insurers and treating providers an insurance benefit?

In order, and with often tortured reasoning, the Supreme Court answered each question in such a way as to undermine the collateral source rule in the context of medical bills. It is impossible to read the opinion without observing the Supreme Court's obvious anti-consumer slant. As is typical with agenda-oriented judicial legislating, the justices left common sense in the dust. Although the court says "[W]e do not alter the collateral source rule as articulated in Helfend. Rather we conclude that because the plaintiff does not incur liability in the amount of the negotiated rate differential, which also is not paid to or on behalf of the plaintiff to cover expenses of the plaintiff's injuries, it simply does not come within the rule," the truth is otherwise.

Among the likely, and unfair, ramifications of the opinion, because contractually bargained-for reduced rates will now be admitted into evidence, pain and suffering awards for people with no health insurance will be higher than for people with health insurance. And, by allowing only the amount of paid past medical bills to be admitted for purposes of economic damages (when substantial existing case law allows the full amount of the bill to be admitted for purposes of determining non-economic damages), attorneys for faultless injured people will be forced to decide whether even making a claim for past medical bills is in the client's best interest. This Hobson's choice leaves plaintiffs in untenable and unfair positions.

And, most disturbingly, rather than settle the question by affirming a historic principle of California jurisprudence, the decision has left confusion and uncertainty in its wake. Does it apply to HMOs or just PPOs? Self-funded ERISA plans? Future economic damages? If so, how? What about traditional evidentiary requirements of certainty and prohibitions against the mention of insurance of any kind? What will be the rule for health insurers who contract for the ability to "balance bill"? How will those bills be treated at trial?

Because the decision is so clearly guided by a pro-business, pro-defendant agenda, it leaves trial courts adrift trying to decipher its far reaching and unanticipated ramifications. There will likely be as many interpretations of this opinion as there are courts. At the end of the day? Clear as mud.

# SCHOENBERGER AND SAELTZER WIN SFTLA AWARD KELLY RECEIVES OLIPHANT AWARD

For the second time in two years Walkup partners have been presented with the coveted San Francisco Trial Lawyers "Trial Lawyer of the Year Award."

At a packed Mark Hopkins Hotel ballroom, Rich Schoenberger and Doug Saeltzer received the award from last year's recipient, Mike Kelly. SFTLA Board Members voted them the award for their outstanding efforts in the matter of Liou v. State of California, a hotly contested dangerous condition of public property trial in San Mateo County where Rich and Doug prevailed against the state and obtained a verdict in excess of $12 million.

In their case, Rich and Doug presented evidence that Caltrans had known for years that marked crosswalks at uncontrolled intersections are dangerous because they give pedestrians a false sense of security. These intersections may be safer without any marked crosswalk. They showed knowledge of the dangers of such crosswalks dating back to a 1972 study which investigated 400 pedestrian accidents over a five-year period in the 1960s, and concluded "approximately twice as many pedestrian accidents (per pedestrian crossing) occur in marked crosswalks as in unmarked crosswalks."

Then in 2002, the Federal Highway Administration analyzed more data in a report that concluded marked crosswalks should not be used on roadways with four or more lanes that see an average of at least 15,000 vehicles a day. El Camino Real, in the area where Liou was struck, has six lanes of traffic and sees an average of more than 25,000 vehicles a day.

Schoenberger had previously been nominated for the award. This was Saeltzer's inaugural nomination. Rich and Doug meshed their complimentary skills seamlessly in securing justice in this case.

We are also proud to report that Mike Kelly was presented with the Robert E. Oliphant Service Award, presented by the National Institute of Trial Advocacy (NITA) at its recent 40th Anniversary Celebration. The award is presented by the NITA Board of Trustees for service in all areas, including program directorship, public service, teaching and financial support. The award honors Robert (Bob) Oliphant, NITA's first Administrator, who taught law at the University of Minnesota and William Mitchell Law School for over 35 years.

Mike has been active with NITA since the mid 1980s. He has served as a faculty member at Regional Trial Programs in San Francisco, Los Angeles, San Diego, Chicago, New York, Boulder, Albuquerque, and Boston. He has served as a team leader at NITA's National Skills Program in Boulder on multiple occasions. Beginning ten years ago, Mike assumed responsibility for coordinating curriculum at NITA's Teacher Training Programs. Six years ago, he accepted an appointment to NITA's Governing Board.

We congratulate him on this very special and well-deserved honor.

## Walkup Attorneys Appointed Lead/Liaison Counsel For DePuy Hip Implant JCCP

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the ASR system was marketed following so-called "510(k)" approval by the FDA, there was no pre-market testing in patients to measure the potential accumulation of heavy metals in their blood, nor was there one or more clinical trials to evaluate the performance of the devices over an extended period of time in humans.

Soft tissue (muscle, fat and tendon) damage caused by excessive metal particle wear has also surfaced as a problem for many patients. Although the majority of patients experience physical pain, other ASR victims have no pain, but experience permanent soft tissue loss which complicates the nature and extent of any revision surgery.

Many surgeons have decided to abandon metal-on-metal hips, preferring instead to utilize less durable, but safer, alternatives including plastic or ceramic articulating parts. Researchers are now suggesting that all metal-on-metal hips suffer from a generic flaw which results in excessive production of cobalt and chromium.

Our firm has been in the forefront of the ASR litigation since 2008, when we filed the very first cases in California. Our attorneys have consulted with experts in the United States, the United Kingdom, Australia and western Europe. We are involved in the science, factual discovery and trial planning for the California venued cases, and are networked with lawyers handling the ones outside of California.

We currently have more than 150 cases filed in the California JCCP.

For referring counsel who have been contacted by ASR victims, we invite you to call Mike, Matt, Doug or Khaldoun to explore the potential for association or referral of these complex medical product liability claims. Our associate and referring counsel are participating in these cases consistent with the provisions of California Rule of Professional Conduct 2-200, with the individual fee-sharing in any case negotiated to reflect the degree of active participation by referring counsel.

# San Francisco Court Closure Averted by Judicial Council

After six weeks of sometimes frantic negotiations, the State Judicial Council voted to loan $2.5 million to the San Francisco Superior Court in order to keep eleven civil court rooms open. Council members responded to a plea from San Francisco Superior Court Presiding Judge Katherine Feinstein for sufficient funds to keep open courtrooms which had been slated for closure.

The San Francisco court, which had issued lay-off notices to more than two hundred employees (including clerks, shorthand reporters, staff attorneys and commissioners) predicted it would be compelled to close eleven civil departments as of October 1, 2011, leaving litigants potentially stuck in the judicial system for years.

The court closures were expected to produce lengthy delays, perhaps as long as five years, in obtaining trial dates. Criminal cases would have been given priority because of constitutional due process requirements.

Even with the emergency loan, the Superior Court budget crunch will be felt by litigants. As an example, where previously there were two law and motion departments supported by two discovery commissioners, a 50 percent reduction in judicial staffing will see Judge Harold E. Kahn replacing Judges Peter Busch and Loretta Giorgi as the sole civil law and motion judge. While in the past there were two commissioners assisting with discovery matters, those discovery departments have now been eliminated. All commissioners have been terminated. Judge Kahn will find himself basically handling the work load formerly shared by four judicial officers.

It is unknown how discovery and law and motion scheduling will be affected by the change. In the recent past, lawyers could schedule a hearing date for a motion in the San Francisco Superior Court without first reserving a date. Now, hearing dates may be rationed, allowing only a limited number of motions to be argued on any particular date.

According to some court observers, this is only the first in a list of "inconveniences" counsel will experience as the slimmed down civil side of the court moves forward with 25 percent less staff and 100 percent fewer commissioners.

## VERDICT HIGHLIGHTS IN-OFFICE ANESTHESIA DANGERS

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supervision to watch the patient in an empty office building.

About an hour later, Mr. Gavello became agitated again. Pursuant to a list of drugs contained in a set of preprinted post-operative orders developed by the anesthesiologist and surgeon, the nurse administered intravenous Thorazine and intramuscular Demerol. These combined with the other drugs in the patient's bloodstream to cause a respiratory arrest. The nurse was not trained or competent to provide proper bag and mask ventilation with oxygen. She called 911. By the time help arrived, Mr. Gavello had widespread and irreversible anoxic brain damage. He was transferred to the hospital where he died three days later.

Mrs. Gavello and her children filed suit for wrongful death against the surgeon, anesthesiologist and nurse. Paul and Melinda conducted discovery for a year while the physician defendants tried to blame the death entirely upon the nurse who was uninsured. Before trial they propounded CCP section 998 demands to each physician for their respective insurance policy limits. The surgeon settled for his policy limit. The insurance carrier for the anesthesiologist (NORCAL Mutual), however, refused to offer the anesthesiologist's $1,000,000 policy limit even though the doctor had given his consent to settle.

The case proceeded to trial in San Francisco Superior Court.

Paul, Melinda and Conor persuaded the jury that the anesthesiologist's negligence directly contributed to the respiratory arrest. They argued that it was the responsibility of the anesthesiologist to develop and oversee a safe and comprehensive plan for the use of the drugs that are used during general anesthesia and post-operatively. Through the testimony of a prominent Stanford anesthesiologist, they established that the defendant violated the standard of care by giving intramuscular Thorazine. His care was also substandard when he left before his patient had emerged from anesthesia, and he breached the standard of care by failing to provide the nurse with instructions for the safe post-operative medication.

They also showed that Dr. Millman knew about this particular nurse's peculiar deficiencies. Several years earlier, she had been held 20 percent liable for a death occurring in another plastic surgeon's office and Dr. Millman had testified as an expert on her behalf.

The jury rejected the anesthesiologist's argument that he was not responsible for guiding the post-operative drug administration. They also rejected his claim that there was no way for him to anticipate the nurse's negligence, and that his actions did not contribute to cause the death. After five days of deliberation, the jury assigned 20 percent of liability to the anesthesiologist, 25 percent to the surgeon, and 55 percent to the nurse. The jury awarded the plaintiffs $3,977,831 in damages, with roughly 75 percent of that sum reflecting economic damages for the loss of financial support and household services caused by Mr. Gavello's death.

After deduction for credit from the previous recovery and the application of MICRA, the plaintiffs' judgment against the anesthesiologist was roughly two and a half times his available insurance policy limit.

This case highlights the poor performance of California's Board of Registered Nursing. In the late 1990s, Nurse Engle was found 20 percent responsible for the death of a young woman in a plastic surgeon's office because she failed to monitor the patient's respiratory status closely and was unable to provide proper bag and mask ventilation when the patient stopped breathing. After receiving a glowing letter of recommendation from Dr. Millman, the defendant anesthesiologist in this case, the nursing board decided to let Nurse Engle keep her license. None of this became public record and none of this was ever disclosed to the patient.

Mrs. Gavello has been urging the nursing board to do something about this nurse for more than two years. The board has been provided with all the materials in this case, including thousands of pages of trial testimony. It has done nothing.

California is one of a growing number of states that now require doctors' offices to be certified for outpatient surgery, but unfortunately the certification process has not plugged the gaping holes in the patient safety net when it comes to general anesthesia in a doctor's office.

We congratulate Paul, Melinda and Conor for this outstanding result.

# WALKUPDATES

**Mike Kelly** was re-appointed to a new three year term on the Judicial Counsel Advisory Committee on Civil Jury Instructions (CACI). On the CLE front, **Mike** spoke in July at the Harris – Martin DePuy Hip Seminar, together with Mark Robinson of Orange County, on the topic of trial themes in the DePuy product liability cases. In September **Mike** co-chaired a CAOC continuing education program focused on litigating Kaiser claims under the Kaiser Arbitration system… **Doug Saeltzer** served as a lecturer at CAOC's annual auto liability seminar at Infineon Raceway on the topic of Handling Dangerous Roadway cases. In September, **Doug** managed the "Mighty Mouthpiece Softball Co." to an unprecedented 4th consecutive Lawyers League softball title… **Khaldoun Baghdadi** served as Co-Chair of the Northern District of California's Lawyer Representative Committee to the Ninth Circuit Court of Appeals. He also served as a panelist for the Bar Association of San Francisco's CLE program on Motions In Limine. Finally, he co-authored (with Andrew McDevitt) a CLE article on Person Most Knowledgeable Depositions… **Rich Schoenberger** returns to teach Advanced Trial Practice at Berkeley Law School (Boalt Hall) in the spring. Last month he served as Program Director for a NITA U.K. course training solicitors in courtroom persuasion in Belfast, Northern Ireland. **Rich** has also been elected secretary of the SF Chapter of ABOTA... **Spencer Pahlke** has accepted a position as a Lecturer at Boalt Hall, where he will teach a course in trial advocacy, as well as continue to serve as the director of Boalt's external trial competition teams. This past spring he organized a CLE event for young attorneys focusing on how to level the playing field when opposing more veteran counsel - the event's speakers included leading Bay Area judges, mediators, and attorneys. In September, **Spencer** organized a CLE event focused on cross-examination, with the keynote speaker being Michael Tigar... **Paul Melodia** participated at an ABOTA "Civility Matters" CLE program in September. The ABOTA civility initiative, started in California, is now up and running in more than 15 states… **Sara Peters** continues her work as co-director of ABC (Attorneys Bettering the Community), which this year began assisting Ala Costa Centers, an after-school program for developmentally disabled youth. She is also continuing this year as assistant mock trial coach with the Boalt Hall trial teams… **Andrew McDevitt** traveled to Long Beach to represent the Bar Association of San Francisco as a delegate at the annual California Conference of Bar Associations (CCBA). The CCBA brings together volunteer attorneys from across the State to promote creative, non-partisan solutions to law-related issues for the benefit of Californians. This past spring **Andrew** helped coach the Lowell High School mock trial team… **Doris Cheng** was elected to membership in the San Francisco chapter of ABOTA, and selected to the list of Northern California's Top 50 Women Lawyers by Super Lawyers Magazine. In July, she served as a Team Leader at the 40th anniversary NITA National Trial Skills program in Boulder, Colorado. She recently consulted for the National Center for State Courts in its bid for funding advocacy training in a foreign country… **Melinda Derish** serves on the East Bay Community Law Center (EBCLC) Advisory Board and recently joined its Pro Bono Committee. **Melinda** was also honored as a "Rising Star" by Super Lawyers Magazine... **Emily Wecht Polcari** gave birth to her first child, a son, Jack. Baby, mom and dad Mike Polcari are doing well. Before departing for maternity leave **Emily** accepted an appointment as a Moot Court instructor at UC Hastings, whose program has been ranked #1 in the nation for 2011. She also undertook an appointment from the Federal Pro Bono Project of the San Francisco Bar Association to represent a government employee... **Conor Kelly** will serve as an assistant coach for the 2011-2012 UC Hastings Trial Advocacy Team. In addition, **Conor** announced his engagement to Tanis Leuthold**,** a Hastings Class of 2009 classmate. Nuptials are planned for summer 2012.

*Members of the 1995 Mighty Mouthpiece softball team gathered to pay tribute to the late Hal Stone, sporting his signature red bandanna.*

# Children's Products Lead Fall Recalls

In cooperation with the U.S. Consumer Products Safety Commission, Battat Inc. has recalled its "Wooden Musical Table" product because of the choking hazard posed to young children by loose or detached pegs in the xylophone-like toy. The table stands about seven and a half inches tall and combines a xylophone, cymbal, drum and two drum sticks for use by young children.

Little Tykes has expanded its voluntary recall of "Little Tykes Workshop and Tool Sets" to 1.7 million additional units. 1.6 million toy workshops sets and trucks with the same problem were recalled in August 2009. The recalled toy has oversized plastic toy nails that can pose a choking hazard to young children. The nails are three and one-quarter inches long by one and one-quarter inch in diameter. The company has acknowledged multiple incidents of children choking on the nails. The toys are manufactured in both the United States and in China.

Finally, Pottery Barn Kids, a division of Williams-Sonoma, is voluntarily recalling roughly 80,000 Sophie and Audrey soft dolls. The hair on the dolls may contain poorly secured loops large enough to fit around a child's head and throat. Additionally, the decorative headband on one of the dolls, if loosened, can form a loop which fits around a child's head and neck. Both characteristics pose a strangulation hazard. The company has received multiple reports of problems with the dolls, including one report in which a loop was found around the neck of a 21-month old infant. The recalled toys are manufactured in China.

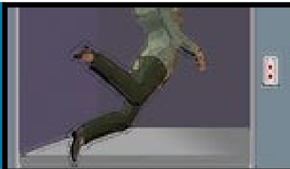
# RECENT CASES

## INDUSTRIAL INJURY

### Boilermaker v. Oil Rig Contractors

In Boilermaker v. Oil Rig Contractors (No. Dist. Fed. Ct.), Douglas S. Saeltzer and Spencer J. Pahlke reached a confidential seven figure settlement on behalf of a 32-year old boilermaker who received second and third degree burns on his arm, face, and neck during a "shut down" at a large Bay Area refinery when the plant was closed for maintenance. The maintenance project was to run 24 hours a day for two weeks. Because a delay of even one day can cost millions of dollars in lost revenue, timing is key. On the day of the accident the refinery told plaintiff's employer that the pipe he was to service was cleared and drained. When plaintiff began opening the pipe he encountered liquid. Plaintiff's employer testified that the refinery assured them that the pipe was drained and to continue. The defendant alleged plaintiff was told by his supervisor to stop all work until "flash suits" arrived, that plaintiff ignored this instruction and opened a valve causing hot oily liquid to spray the right side of his body, producing widespread burn injuries. The case settled at mediation following the conclusion of non-expert discovery.

## PREMISES LIABILITY



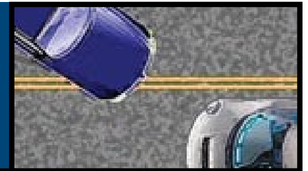
### Receptionist v. Office Building Owner

In Receptionist v. Office Building Owner (S.F. Sup. Ct.), Matt Davis and Rich Schoenberger obtained a $4.5 million settlement on behalf of an 80-year-old woman who attempted to board an elevator and tripped because the floor had "misleveled" and was higher than the floor of the adjacent lobby. She fell forward and struck her head on the back of the elevator and suffered partial paralysis as a result. Despite her age, at the time of her injury she was working as a full-time receptionist. The injury happened at her workplace during her morning break. Discovery revealed that the elevator system was more than 50 years old and there had been a number of problems with the elevator in the past. Rich and Matt also discovered correspondence from an elevator consultant who had warned the building owner several years before the accident that it needed to modernize the elevators, or risk passengers getting injured and filing lawsuits. With worker's compensation benefits, our client's total recovery was $5.3 million.

### Surviving Parents v. Property Management Co.

In Surviving Parents v. Property Management Co. (confidential court and county), Emily Wecht Polcari and Michael A. Kelly successfully resolved a wrongful death action in which a 27-year-old man died as a result of smoke inhalation after a fire in his apartment building. The fire was started by building tenants who disposed of smoldering ashes in a plastic community garbage can in the apartment building's breezeway. Suit was filed against the tenants as well as the building owner and a property management company hired to manage the building. The owner and the property management company claimed that the garbage was stored in a manner consistent with industry standards. They argued that the fire was entirely the fault of the tenants, and that the decedent likely disarmed the smoke detector in his unit, and that but for that conduct he would have escaped the building without harm. Mike and Emily demonstrated that garbage storage in the breezeway violated the California Building Code as well as numerous local code provisions, and that that the owner and manager did not comply with non-delegable duties to maintain the building. The case resolved for the limits of the tenants' insurance policy, $1,000,000 from the owner's policy, and $800,000 from the property management company's policy.

## VEHICULAR NEGLIGENCE



### Retired Grandmother v. Moon Valley Winery

In Retired Grandmother v. Moon Valley Winery, (confidential county and case number), Richard Schoenberger, Khaldoun Baghdadi, and Sara Peters achieved a $4,750,000 settlement on behalf of a 58-year-old woman who was driving to babysit her grandchildren when an undocumented vineyard worker, on his way home from work, lost control on rain-slick asphalt, crossed a double yellow line, and collided with her head-on. The collision shattered plaintiff's pelvis, fractured her lumbar spine, lacerated her spleen, herniated her stomach into her chest cavity, and fractured all the metatarsals on her left foot. She spent two months in the hospital. The responsible driver had only $50,000 in insurance coverage. Rich, Khaldoun, and Sara established that the vineyard workers used their vehicles to get from parcel to parcel on the vineyard, which saved time and maximized efficiency for the vineyard owner. Utilizing these facts, they successfully opposed summary judgment on the ground that the vineyard worker's commute came within the "implied benefit" exception to the "going and coming" rule. The mediated settlement was achieved after successfully defeating the vineyard operators' summary judgment motion.

### Veterinary Tech v. Winery Owner

In Veterinary Tech v. Winery Owner (Ala. Sup. Ct.), Michael A. Kelly and Emily Wecht Polcari recovered $4,000,000 on behalf of a motorist who sustained catastrophic injuries when her car struck an escaped horse on a suburban roadway. The plaintiff sustained a closed head injury with multiple areas of hemorrhage and a Grade III open tibial fracture after three horses escaped from their pasture on the property of a family-owned winery and ran into the middle of a public street. Her head injury has left her with irritability and memory difficulties. The defendant argued that the horses had been set free by vandals, and that a wrangler had secured the horses in their pasture less than twenty-four hours before they escaped. The defendant relied on pieces of cut barbed wire found in the pasture to argue that a third party had purposely opened a gate in the middle of the night and let the horses out. Mike and Emily demonstrated through metallurgical

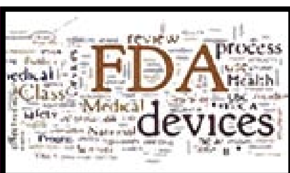
analyses that the wire fragments at the scene had been cut long before the horses escaped. The settlement was in the form of cash and future structured payments.

## UNINSURED MOTORIST

### High School Senior v. Uninsured Motorist

In High School Senior v. Uninsured Motorist (Santa Clara Co. Sup. Ct.), Michael A. Kelly negotiated a cash and annuity settlement in the amount of $3,450,000 on behalf of a peninsula high schooler who suffered a traumatic brain injury when struck by an uninsured motorist on Highway 280. The plaintiff was travelling within the posted speed limit on the freeway in northern San Mateo county when she was rear-ended in the #2 travel lane by an uninsured motorist weaving in and out of traffic. She lost control and collided with the center divider. Minutes later, while stopped against the median, she was struck a second time by an oncoming SUV travelling at 70 mph. The second collision caused a severe closed head injury resulting in 14 days of coma. The settlement was contributed to by the minor's UIM carrier as well as the primary and excess carriers for the SUV driver/owner. The settlement agreement established a special needs trust and resulted in an 80 percent reduction of the medical lien asserted by the child's health insurer.

## MEDICAL DEVICE




### Medical Device Victims v. Female Incontinence Product Manufacturer

Medical Device Victims v. Female Incontinence Product Manufacturer (confidential settlement – consolidated actions), Khaldoun Baghdadi and Melinda Derish successfully resolved the claims of 21 women in their consolidated cases against a national maker of medical devices. The women brought claims for injuries caused by an implantable mesh sling, which was designed to treat stress urinary incontinence. The device was withdrawn from the market in 2006. Khaldoun served as one of three attorneys on the Plaintiff's Steering Committee that guided the Multi-District Litigation proceedings, which were based in the U.S. District Court for the Middle District of Georgia. Liability discovery and expert depositions were undertaken across the United States and in Europe. The settlements were individually tailored to account for each woman's unique injuries and were overseen by a court appointed referee. Individual injuries ranged from pelvic pain, to increased urinary incontinence, to vaginal tissue erosion, to severe infection requiring multiple surgical procedures and operative removal of the implanted mesh.

## MEDICAL NEGLIGENCE

### Anonymous Patient v. Teaching Hospital

In Anonymous Patient v. Teaching Hospital (court and county confidential), Paul Melodia and Doris Cheng concluded a medical negligence claim against a leading medical center for the death of a 33-year-old hematologist/oncologist, survived by her spouse and child. The patient was a medical resident when she underwent two endoscopic procedures for biliary problems. The procedures were performed under conscious sedation with a registered nurse monitoring and managing the patient's airway. Sedation is a continuum. Nurse practitioners who provide deep sedation must be prepared to rescue the patient who slips into a state of general anesthesia, which often requires intervention for impairment of airway patency or cardiovascular function. During the procedure, the nurse deeply sedated the decedent and failed to appreciate that she was obtunded and that her airway had become compromised. The medical practitioners failed to rescue the patient, she went into respiratory arrest and ultimately died. Defendant settled the case during expert discovery in the amount of $5,000,000.

### Retiree v. Delta HMO

In Retiree v. Delta HMO (arbitration, confidential settlement), Melinda Derish and Doris Cheng obtained a confidential seven-figure settlement on behalf of a 64-year-old retiree who suffered permanent paraplegia due to his physicians' four month delay in diagnosing and treating a lumbar spine infection. Over a period of two months the patient was seen several times by his primary care physician complaining of a painful gait. Blood tests were abnormal and consistent with possible bone infection. An abdominal CT scan revealed enlarged lymph nodes. After two months the patient suddenly became unable to walk. He was hospitalized by his primary care physician. The hospitalist failed to recognize the patient's loss of the ability to walk was a neurologic deterioration that mandated an MRI of the spine. Two days later, with the infection still undiagnosed and untreated, the patient was transferred to a skilled nursing facility. While at the nursing facility the patient lost bowel and bladder function. By the time an MRI was finally performed, the second and third lumbar vertebrae had collapsed into the spinal cord. It was too late for surgical decompression and stabilization to reverse the paraplegia.

### Physician v. Medical Providers

In Physician v. Medical Providers (confidential settlement), Doris Cheng obtained a cash and annuity settlement with a present cash value of $5,500,000 on behalf of a 56-year-old physician who suffered paralysis after his doctors failed to timely recognize and treat an evolving spinal infection. The plaintiff called the defendants' office with complaints of back pain and fever. A nurse suggested he not go to the ER but come and see his physician instead. That doctor believed that plaintiff might have an epidural abscess in his cervical spine, and sent him to the Emergency Department for an MRI. Although an epidural abscess is considered a neurosurgical emergency, the MRI tech refused to complete the scan because

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# Recent Cases

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the plaintiff was unable to lay still as a result of neck pain. As a result, his providers failed to complete the MRI and get him into surgery to decompress the spine and clean out the infection. The client suffered irreversible paralysis from the chest down as a result of the delay. The defendants disputed causation and vigorously contested future economic losses on the basis of MICRA.

### Heirs v. HMO

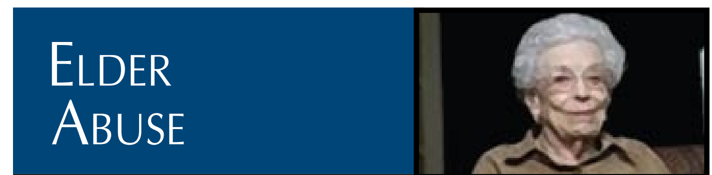
In Heirs v. HMO (arbitration, confidential settlement), Michael Kelly and Melinda Derish concluded a wrongful death claim against a health maintenance organization on behalf of the husband and four children of a 42-year-old municipal bus driver who died after the flawed insertion of a medical device intended to prevent pulmonary embolism. The patient developed a deep vein thrombosis that caused a pulmonary embolism. She was hospitalized with shortness of breath and a radiologist inserted a vascular filter. During the radiologist's insertion of the filter she failed to properly seat two of the four strut hooks to hold the filter in place. The filter came loose, unwound, and migrated into the heart where the two loose strut hooks became lodged in the atrial chamber of the heart. Although chest and abdominal CT scans revealed the filter had migrated to the heart, which requires prompt removal, the patient's physicians did not remove the filter. The case was resolved for $1,750,000.

### Amputee v. Medical Group

In Amputee v. Medical Group (Solano Co. Sup. Ct., confidential settlement), Melinda Derish obtained a seven-figure settlement on behalf of an elderly woman who underwent knee replacement surgery and ended up with a mid-thigh amputation due to the surgeon's failure to respond to post-operative signs of ischemia. Shortly after the surgery, the patient developed foot pain and her family notified her nurses. The nursing staff could not find pulses in the foot and notified the orthopedic surgeon who did not come to the hospital to evaluate the problem until the next day. A well-known risk of knee replacement surgery is injury to the popliteal artery. Left untreated, popliteal artery injury can cause compromised blood flow leading to limb loss. Melinda proved that the standard of care required prompt radiology studies and a vascular surgery evaluation for this emergency. The orthopedist claimed he thought the patient had arterial spasm that merely needed a wait and see approach. Although the condition persisted for three days while the patient lost strength and sensation in the foot, the orthopedist transferred the patient to a skilled nursing facility. Before the amputation, the patient and her husband were able to live independently, with the wife providing all the care for her frail husband. The settlement included compensation for the patient's action for medical negligence and her husband's claim for loss of consortium.

### Seaman v. Tug Owner

In Seaman v. Tug Owner (No. Dist. Fed. Ct.), Michael A. Kelly and Spencer J. Pahlke concluded a procedurally complicated catastrophic maritime injury case that was venued in both Federal Court for limitation of liability proceedings and Superior Court for damages. The plaintiff suffered complex regional pain syndrome (RSD) as a result of trauma to his left lower extremity while working as a deckhand when a gray water pump dropped from a catwalk to the vessel's deck. Early conservative care did not resolve increasing pain. A treating podiatrist performed two surgeries intended to deaden the injured nerves. When those surgeries were unsuccessful, he underwent a third exploratory nerve surgery with a micro surgeon. That surgery also failed to halt the ongoing pain. He is left with chronic foot and leg pain. Defendant alleged the injuries occurred without the required knowledge and privity and it was entitled to the maritime remedy of limited liability of the defendant. Mike and Spencer established that the acting captain of the boat was a managing agent of the defendant, and that the corporate defendant was directly liable because it failed to establish proper safety procedures for storing and moving equipment on its boats. After two mediation sessions, the matter settled for $2,000,000.




### Nonagenarian v. San Francisco Convalescent Home

In Nonagenarian v. San Francisco Convalescent Home (confidential settlement), Sara Peters obtained a six-figure recovery for a 92-year-old woman who was injured at a skilled nursing facility after a partial hip replacement. The client complained of severe pain and inability to bear weight in physical therapy, but days passed without appropriately evaluating her complaints. Finally, a physical therapist noticed a leg length discrepancy. Ultimately, plaintiff was diagnosed with an irreducible dislocation and required multiple surgeries. While the case was pending, the plaintiff became mentally incapacitated and was not able to testify regarding the abuse she suffered. Defendants denied ever mishandling the plaintiff and alleged that plaintiff's hip dislocated spontaneously, as it had after the second surgery. Despite plaintiff's short life expectancy, her inability to testify and her other maladies, a highly favorable confidential settlement was reached on the eve of trial.

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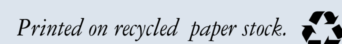
Additionally, if there is a particular subject you would like to see discussed in future issues of *Focus on Torts* please contact Michael Kelly. Visit us on the web at www.walkuplawoffice.com.

650 California Street, 26th Fl., San Francisco, CA 94108
(415) 981-7210 Fax (415) 391-6965
1 (888) SF ATTYS www.walkuplawoffice.com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