WALKUP, MELODIA, KELLY & SCHOENBERGER

FOCUS on torts

VOLUME XX, NUMBER III Fall 2016

SECOND DISTRICT AFFIRMS $8.3 MILLION DEPUY HIP VERDICT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

COURT OF APPEAL – SECOND DIST.
FILED
Jul 21, 2016
JOSEPH A. LANE, Clerk
Derrick L. Sanders Deputy Clerk

SHERYL R. KRANSKY, as Personal Representative, etc.,

Plaintiff and Respondent,

v.

DEPUY ORTHOPAEDICS, INC.,

Defendant and Appellant.

B249576

(Los Angeles County Super. Ct. No. BC456086)

A unanimous Second District Court of Appeal panel has affirmed the $8,300,000 verdict against DePuy Orthopedics on behalf of Loren "Bill" Kransky in the first successful metal-on-metal hip implant trial. Mr. Kransky, who died during the pendency of the appeal, suffered classic complications and years of pain as a result of the debris shed by his ASR hip device.

The appeal followed a five-week trial in Los Angeles County Superior Court. The trial team included Walkup firm members Michael A. Kelly, Matthew Davis, Khaldoun Baghdadi and Valerie Rose. They tried the case in association with Brian Panish and Peter Kaufman of Panish, Shea and Boyle in Los Angeles, and John Gomez of the Gomez Law Firm in San Diego.

DePuy Orthopedics, a wholly-owned subsidiary of Johnson & Johnson, designed and marketed the ASR monoblock device as a superior product, claiming it would reduce metal wear and result in lower surgical revision rates than other hip implants. However, after five years on the U.S. market, DePuy recalled the device because its unique design features actually caused greater metal wear and higher surgical revision rates than advertised.

When it recalled the ASR, DePuy's top executives signed off on an internal document acknowledging the device was a "defective product that would affect product performance and/or could cause health problems." The Los Angeles jury agreed and found DePuy strictly liable for design defect under Montana law, the state where Mr. Kransky had undergone his implant and revision surgeries.

Shortly after the device was introduced, orthopedic surgeons began to observe much higher than expected failure rates as well as elevated metal ion levels in their ASR patients. These

Continued on page two

Firm Recognized as "Top Tier" in US News 2017 Rankings – Partners Named "Lawyer of the Year"

We are proud to announce that Mike Kelly, Rich Schoenberger, Doug Saeltzer, Matt Davis, Khaldoun Baghdadi, Doris Cheng and Spencer Pahlke have all been selected by the prestigious *US News / Best Lawyers* publication for inclusion in their 2017 edition of *Best Lawyers*.

Equally impressively, the firm as a whole has been cited as a "top tier" Best Law Firm in three different areas of specialty: Personal Injury, Medical Malpractice and Product Liability. Individual "Lawyer of the Year" honors for 2017 in the San Francisco Bay Area were bestowed on partners Doris Cheng (Medial Malpractice) and Michael Kelly (Mass Torts / Class Actions). The acknowledgments of Cheng and Kelly follow on the 2016 selection of Rich Schoenberger as the *Best Lawyers* "Lawyer of the Year" in the area of Personal Injury.

Inclusion in *Best Lawyers* is based entirely on peer review. The methodology is designed to capture, as accurately as possible, the consensus of opinions of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area. *Best Lawyers* employs a sophisticated, conscientious, ra-

Continued on page two

Firm Recognized as "Top Tier" in US News 2017

Continued from page one

tional, and transparent survey process designed to elicit meaningful and substantive evaluations of the quality of legal service. The lists of outstanding attorneys are compiled by peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers. If the votes for an attorney are positive enough for inclusion in *Best Lawyers*, that attorney must maintain those votes in subsequent polls to remain on the list for each edition. Lawyers are not permitted to pay any fee to participate in or be included on the lists.

"Lawyer of the Year" recognitions are awarded to individual attorneys with the highest overall peer feedback for a specific practice area and geographic location. Only one lawyer is recognized as the "Lawyer of the Year" for each specialty and location.

For more than three decades, *Best Lawyers* lists have earned the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals anywhere.

SECOND DISTRICT AFFIRMS $8.3 MILLION DEPUY HIP VERDICT

Continued from page one

patients suffered from hip pain, adverse local tissue reaction (ALTR) caused by metal debris, and mechanical symptoms such as clicking, popping, or catching of the hip. In the revision surgeries, doctors typically discovered black metal-stained tissue (or metallosis) surrounding the implant, loss of bone and muscle in the hip joint, fibrous fluid, and synovial masses or pseudotumors.

In December 2007, Mr. Kransky had his left hip replaced with an ASR implant because of arthritis and pain. Ironically, five years earlier he had undergone hip replacement on the right side, with a non-DePuy product. The right side implant was performing without any complications as of the time of trial. When the ASR was implanted, his treating surgeon assured him that the implant "should really last you the rest of your life."

On appeal, Depuy raised numerous issues. First, it claimed the jury should have been told that the FDA had "cleared" the device for sale. Second, the company argued that the jury's verdicts on product liability and negligence were inconsistent. Finally, DePuy sought reversal of the damages awarded, on the purported basis that the verdict was excessive.

At trial and on appeal, DePuy sought to introduce evidence of the fact that the FDA had cleared the ASR to be sold in the United States. The trial court disagreed, reasoning that evidence of the FDA's clearance of the implant was not relevant to, or had little probative value in, a Montana products liability claim.

The trial court predicated its reasoning on the regulatory approach employed by DePuy to sell the ASR. Under the Medical Device Amendments of 1976 to the Food, Drug and Cosmetic Act, there are two ways medical device manufacturers like DePuy can obtain permission from the FDA to sell a product. First, there is the PMA approval process (21 U.S.C. § 360c(a)(1)(C)(ii)). This process "…is a rigorous one. Manufacturers must submit detailed information regarding the safety and efficacy of their devices, which the FDA then reviews, spending an average of 1,200 hours on each submission." Second, there is an abbreviated process under Section 510(k) of the act, which allows manufacturers to secure FDA clearance by showing that a device is "substantially equivalent" to a device already on the market. Section 510(k) is "focused on equivalence, not safety." (*Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312, 323) The FDA clearance of the ASR implant was under the abbreviated Section 510(k) review process.

Because evidence that a product meets agency standards is not relevant to whether that product is defective under Montana law, the Court of Appeal affirmed the trial court's ruling that FDA evidence had little or no probative value here. The Court of Appeal went on to stress that balancing the factors under Evidence Code Section 352, introduction of the FDA evidence would "have been expansive, complicated, and time consuming."

The Court of Appeal emphasized that the trial court was justifiably concerned that explaining the meaning and significance of 510(k) clearance, as opposed to PMA approval, "would require a full description of the difference between the [two processes] and [would] take an extensive amount of time."

On the issue of inconsistent verdicts, the Court of Appeal found no error with the jury finding a design defect on the strict liability claims, but no causation on plaintiff's negligence claims.

The Court of Appeal explained that, under the trial court's instructions, the jury could reasonably have found that DePuy was negligent when it designed the implant; or that a defect in the implant caused an injury to Kransky; but the particular defect that caused Kransky's injury was not the result of DePuy's negligence. For example, the jury could have found DePuy was negligent in designing the implant by not having a toxicologist on the design team, but Kransky did not prove that if there had been a toxicologist on that team his injuries would have been avoided. The reviewing justices determined that the jury's verdict was consistent with a determination that the defendant's negligence did not necessarily cause the defect - or it was guilty of negligence that caused a different defect from the one that injured Kransky.

Finally, on the issue of excessive damages, the Court of Appeal held the trial court acted properly by ruling that the $8.3 million verdict "does not shock the conscience" or "appear driven by passion or prejudice." The jury heard evidence of Kransky's severe pain, his loss of mobility, and his sincere and realistic fear of dying during the revision surgery. Kransky testified that for years before his revision he experienced constant, debilitating, stabbing pain that prevented him from getting any rest. His "other illnesses would come and go," but "[t]he hip [pain] was always there," and there was "no way" to "get rid of any of the pain."

The unanimous ruling brings to a close a saga which began five years ago. In large part because of this verdict, Johnson & Johnson ultimately negotiated a $2.5 billion settlement to resolve ASR claims nationwide. Thousands of Americans still have ASR devices in place and each month premature revision surgeries are required due to elevated levels of cobalt and chromium in their blood. The story of the ASR remains a sad commentary on the state of ethics and priorities in the global medical device industry.

We congratulate all of the trial and appellate attorneys who toiled tirelessly to obtain justice for Loren "Bill" Kransky.

WALKUPDATES

Douglas Saeltzer has been selected to serve on the State of California Committee of Bar Examiners. The appointment carries substantial responsibility as the Committee is responsible for screening all California bar applicants, administering the twice yearly California bar examination, and overseeing the process of law school accreditation throughout the state. In addition, Doug was recently elected to the Board of Governors of the Consumer Attorneys of California as Parliamentarian for 2017… **Doris Cheng** has been appointed by the Admissions to Fellowship Committee of the American College of Trial Lawyers. Earlier this year, in collaboration with the Bureau of International Narcotics and Law Enforcement Affairs, National Center for State Courts and the National Institute for Trial Advocacy, she organized and taught a trial advocacy training program for prosecutors in the Bahamas… **Rich Schoenberger** served as Program Director for the National Institute of Trial Advocacy's Robert Hanley Advanced Trial Skills Program in Boulder, Colorado. Rich also lectured at the American Board of Trial Advocates (ABOTA) Teacher's Law School on significant U.S. Supreme Court Constitutional decisions which have shaped our country… **Matt Davis** was a co-panelist along with U.S. Magistrate Laurel Beeler, Los Angeles Superior Court Judge Elihu Berle, and Alameda Superior Court Judge George Hernandez, Jr. at the American Bar Association's 3rd Annual Life Sciences Legal Summit. The panel addressed topics related to navigating the complex litigation process …**Mike Kelly** presented the keynote address at this year's Palm Springs seminar jointly sponsored by the Consumer Attorneys of the Inland Empire and the Orange County Trial Lawyers Association. Mike's presentation was entitled "Thinking Outside The Box: Connecting With Jurors Through Stories." Mike also spoke at the 360 Advocacy Institute's Fourth Annual "Damages: Go Big, Always Go Big," conference at the Encore Resort in Las Vegas. This was Mike's fourth appearance at the event, which brings together some of the very best trial lawyers in the nation to teach other lawyers how best to maximize damage recoveries. This year's presenters included such accomplished advocates as Brian Panish, Panish Shea & Boyle (Los Angeles); Mark DiCello, The DiCello Law Firm (Cleveland); Chris Searcy, Searcy Denney (West Palm Beach); and, Jim Bartimus, Bartimus Frickleton (Kansas City)… **Spencer Pahlke** served as host and organizer of Berkeley Law's elite Tournament of Champions Mock Trial Competition. He is again teaching Trial Advocacy at Berkeley Law this fall… **Sara Peters** continues to coach Stanford University Law School's Mock Trial team, which qualified for the National Trial Competition under her leadership. And in between a full time law practice, pro bono activities and volunteer law school coaching, Sara delivered full term twin boys on May 26; Corben and Emmett – weighing in at 6.7 and 6.2 lbs respectively… **Khaldoun Baghdadi** has been invited to moderate a panel of Federal and State Judges at the ABA Life Sciences Seminar, held annually at Genentech. His panel topic will address best practices for mass torts and coordinated actions. Khaldoun also accepted an invitation to speak at the New Orleans Complex Litigation Symposium… **Andrew McDevitt** served as co-chair of SFTLA's Annual Lien Seminar, "Liens: Getting to a Fast & Fair Resolution in a Changing Legal Landscape." He was also invited to serve as faculty for AAJ's Dangerous Products Series: "How to Recognize an Auto Defect Case." And on October 8 he and his wife Kristen welcomed their second daughter, 6 lb. 6 oz. Sophia Elizabeth… **Valerie Rose** moderated a panel for the SFTLA Women's Caucus entitled "Tips from the Bench." She also authored an article for CAOC's *FORUM Magazine* entitled "Kaiser Arbitration: Protecting Your Client"… **Justin Chou** is coaching Berkeley Law (Boalt Hall)'s Mock Trial Team for ABA's 13th Annual Labor & Employment Law Mock Trial Competition to be held on November 19th-20th …**Christian Jagusch** presented "Head and Brain Anatomy for Trial Lawyers" at an SFTLA Roundtable event in April. Christian also spoke at an SFTLA webinar with over 100 attendees discussing critical issues in traumatic brain injury cases… **Conor Kelly** has been invited to speak at the 2016 Consumer Attorneys of California's Annual Donald Galine Travel Seminar in November. He is also completing his final rotation as a Barrister in the Edward J. McFetridge American Inn of Court… **Jeff Clause** was invited to judge the UC Davis King Hall School of Law Frances Carr Competition. The Carr Competition is King Hall's intraschool mock trial competition, presented by its Trial Practice Honors Board every fall semester. Jeff also returned to his alma mater, Santa Clara University School of Law, to judge its Honors Moot Court Competition, a competition which he both participated in and directed when he was a law student.

Enjoying a hot Indian Summer day at the Company Picnic in September, Marx Meadow in Golden Gate Park

BILL AFFECTING BALCONY SAFETY SIGNED

Legislation written in response to the June 2015 Berkeley Library Gardens balcony collapse, which killed six young people and resulted in catastrophic injuries to seven others, has been signed by Gov. Jerry Brown after passage through both houses of the legislature. The bill, authored by Senators Jerry Hill and Lori Hancock, requires contractors to disclose to their regulator, the Contractors State License Board, any felony conviction related to their work within 90 days of the conviction. The bill also instructs the board to study whether contractors should be required to report any settlements or judgments related to faulty work. The final version of the bill passed the Senate 37-0 and the Assembly 79-0.

Continued on page four

Taking Driver Error Out Of Self Driving Cars Still A Long Way Off

As demonstrated by the recent fatality of a Tesla occupant whose autopilot drove him into a turning truck, self-driving cars are not a cure-all for car accidents. In contrast to human drivers who struggle with distractions and fatigue, self-driving cars struggle with other issues and conditions to adapt to unusual circumstances. Self-driving cars do not yet deal well with the unexpected. The human brain is still better than any computer at making decisions in the face of sudden, unforeseen events on the road – a child running into the street after a ball, a swerving cyclist, running jaywalker, or a fallen tree limb.

Computer algorithms can ensure that self-driving cars obey the rules of the road — making them turn, stop, slow down when a light turns red. But technology cannot control the behavior of other negligent drivers. Autonomous vehicles are not equipped to deal with drivers who speed, pass in spite of a double yellow line, or drive the wrong way on a one-way street. Moreover sensors on self-driving cars can be tricked to register objects that do not exist. A security researcher recently demonstrated that through use of a low-power laser and pulse generator, laser-based sensors were fooled into detecting vehicles, pedestrians, or stationary obstacles that did not actually exist.

And self-driving cars struggle when their sensors give conflicting information. For example, in June's Tesla fatality, the car failed to brake because while its radar picked up the illegally turning truck, the Tesla's camera attributed the white object to the bright Florida sky (Tesla's software only applies the brakes when both sensors give the same information). Similarly, self-driving cars have difficulty when their maps do not match changed road conditions (i.e. a stop sign replaced by a traffic light). Even when the sensors agree, self-driving cars are not good at drawing inferences from what their sensors detect. A dark area on the road may be a shadow, a puddle, or a pothole – each of which requires a different driver response. These challenges are exacerbated by bad weather. Rain can reduce the range and accuracy of laser-based sensors, obscure the vision of on-board cameras, and create confusing reflections and glare. While a human driver may be able to detect the side of a snowy road, a self-driving car will be unsure where the road is, unless the yellow and white lines are visible.

Self-driving cars also face ethical dilemmas that human drivers would react to instinctively and instantaneously. While a human driver may decide in the spur of the moment to swerve into a pedestrian to avoid an oncoming truck, the designers of self-driving cars need to grapple with such moral dilemmas in advance and with the benefit of reflection and discussion. The opportunity and obligation to predetermine vehicle behavior in life or death situations creates problems that are currently impossible to answer. For a multitude of situations self-driving cars will inevitably encounter, no consensus-response exists.

According to University of Michigan researchers, road safety may also worsen before getting better. Automated cars potentially promise great benefits but there remain unintended effects that are difficult to predict. While the push for robotic technology is coming whether we like it or not, it would be naïve not to expect major disruptions and new harms. Among such harms are hackers. As cars become more connected scientists agree that hackers may to be able access personal data, including typical journeys and driver location, for the use and benefit of burglars and other criminals. The Federal Bureau of Investigation warned last summer that in a nightmare scenario, a car could be programmed to navigate safely and avoid obstacles while criminals in the car could use their free hands to shoot at pursuers.

As Yogi Berra was fond of saying, "The future ain't what it used to be." That seems particularly true for cars, drivers, car makers, and auto insurers.

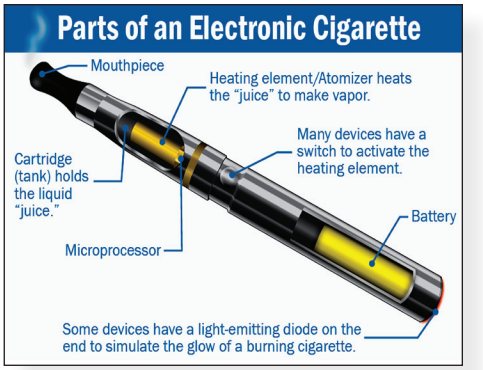
BILL AFFECTING BALCONY SAFETY SIGNED

Continued from page three

Prior to passage of the law, contractors were not required to report to the board any settlements related to defects in their work. The general contractor for the construction of the Library Gardens apartment complex was Segue Construction, Inc. After the tragedy happened it was learned that the company had previously paid settlements totaling in excess of $26 million in construction defect cases. According to the chief of enforcement of the Contractor State Licensing Board, the board would have taken action on the Segue license had it known about the lawsuits against the company and the reasons for them. The new law also authorizes state agencies to conduct research, to be completed and presented in 2018, on requirements for updating building regulations for balconies throughout California as well as requiring contractors to make public settlements in civil cases where construction defects have been alleged. Contractors must now report any felony conviction to the CLSB relating to their qualifications, functions and duties within 90 days.

Michael A. Kelly, Richard Schoenberger, Matthew Davis and Conor Kelly lead the Walkup team of attorneys who are honored to represent all of the Irish students injured in this tragedy. We applaud the Governor for signing the bill into law. As so eloquently stated by Jackie Donohoe, mother of one of the young people killed in the tragedy, "We never want to see another family go through the same pain and suffering". The legislation is a first step in making balconies across the state safer.

E-CIGARETTES INJURIES PROMPT PRODUCT LIABILITY SUITS



The popularity of e-cigarettes has increased dramatically and the number of injury cases involving their lithium ion batteries exploding or catching fire has likewise increased. In 2013, 2.6% of American adults used e-cigarettes; in 2015, 10% did. The diagram to the right identifies the typical parts of an e-cigarette.

Manufacturers use lithium ion batteries because of their high energy density: they can hold more energy in less space than available alternatives. Thus, electronic cigarette manufacturers can design smaller, lighter devices without sacrificing battery performance. However, lithium ion batteries have shown a disturbing tendency to cause fires and explosions.

Chemical reactions within lithium ion batteries produce heat, and heat accelerates chemical reactions. In an improperly designed lithium ion battery, the rate of heat generation and reaction speed race out of control. This "thermal runaway" can produce temperatures high enough to melt the metal components within the battery. "Thermal runaway" also produces gases, which unless vented properly can cause overpressure, explosion, and the ejection of molten metal, hot gases, and flame.

There have been lithium ion battery fires in commercial jets (in one case grounding much of Japan Airlines' fleet), in hoverboards (causing half a million recalls so far in 2016), and in mobile phones, (Samsung Galaxy). E-cigarette users are particularly at risk because these potentially flammable or explosive devices are intended to be put inside the users' mouths.

The *Wall Street Journal* has reported that when e-cigarette owner Rachel Berven pushed the activation button, "the e-cigarette exploded, ripping a hole in her mouth and spewing battery acid across her body." At least three California cases against e-cigarette makers have resulted in successful recoveries by badly burned users.

The burgeoning e-cigarette industry remains loosely regulated, so no U.S. regulatory agency has tabulated all e-cigarette fire and explosion incidents. In many cases, even after manufacturers know about fires and explosions caused by their e-cigarettes, they continue to sell them to meet fast growing demand.

Our household and consumer product liability group headed by Andrew McDevitt is currently investigating a number of e-cigarette battery fire cases. For our associate and referring counsel who are working on, or have been consulted on, e-cigarette fire cases, we are available for referral or association.

Fiat Chrysler Shifter Defect Results In Recall

Fiat Chrysler has announced a voluntary recall of cars equipped with a unique gear shift lever that confuses drivers and results in cars being left in Drive, rather than Park, when exiting their cars. The recalled involved vehicles include the 2012-2014 Dodge Charger and Chrysler 300 sedans as well as 2014-2015 Jeep Grand Cherokee SUVs, all of which were fitted with an eight-speed "Monostable" automatic transmission. The recall includes about 812,000 vehicles in the U.S.

NHTSA has said the gear selector in question "clearly poses a safety issue" that has led to hundreds of crashes and dozens of injuries. The agency said testing of the electronic shifter found it "not intuitive and providing poor tactile and visual feedback to the driver, increasing the potential for unintended gear selection." NHTSA said the shifter is linked to 266 crashes involving 68 injuries in which owners reportedly left the transmission in gear instead of switching into Park.

The problem with the mushroom-shaped shifters is that they operate in a nonconventional manner. Though they look like conventional center-console-mounted shifters, the Monostable gearboxes do not follow the traditional "P-R-N-D-L" top to bottom pattern. Instead, the driver must push the lever up to shift into reverse and down to engage the forward gears, with Neutral being in the center position. To engage Park, the operator has to depress a side-mounted button.

There is one death under investigation, namely Star Trek actor Anton Yelchin, who was tragically crushed against a concrete reinforced mailbox by his 2015 Jeep Grand Cherokee before it was returned for repair in connection with the recall. Los Angeles police have said their detectives were examining whether the recall issue played a role. If so, the Russian-born actor would be the first fatality reported linked to the recall.

While not acknowledging a design flaw in its transmission gear selectors, the company has said roll-aways have occurred because drivers mistakenly believe they had placed the vehicles in Park before getting out. Indicator lights currently tell the driver what gear the vehicle is in. If the driver opens the door when the vehicle is not in Park a warning chime sounds and an alert is displayed in the gauge cluster. Even so, many drivers still exit their cars thinking the vehicles are safely in Park. To remedy the problem, Chrysler will enhance warnings in the vehicle and also change how the gear selector operates. The changes will automatically prevent the vehicle from moving under certain circumstances even if the driver does not select Park.

Recent Cases

Civil Rights

Ellison v. Lesher

In Ellison v. Lesher (U.S.D.C. Arkansas), Doris Cheng in association with Mike Laux and The People's Law Office, negotiated the settlement of a wrongful death case venued in the Federal District Court of Arkansas for $1,400,000, plus non-monetary consideration including a memorial bench in a public park, a public ceremony in the victim's honor, and a written apology from the public entity. The settlement represents the largest amount ever paid for an excessive force claim in the State of Arkansas. On December 9, 2010, Eugene Ellison, a 67-year-old African American male, was shot and killed in his own home by a Little Rock police officer. Two Little Rock police officers were providing security services under private contract at the victim's apartment complex when they saw his front door ajar and illegally entered his home. Alone in his apartment and not requiring any assistance, Mr. Ellison told the officers to leave, but they refused. The officers alleged that Mr. Ellison became combative and that they could not contain him with soft hand controls or a baton. When they saw him reach for his walking cane, one officer shot him twice in the chest, killing him. The case settled on the day trial was to begin.

Vehicular Negligence

Laborers v. Grading Company

In Laborers v. Grading Company (court and case confidential), Richard Schoenberger, Michael A. Kelly and Conor M. Kelly obtained a cash and annuity settlement having a present cash value of $7,900,000 on behalf of two undocumented laborers injured in a head-on crash in rural Northern California. The night time collision occurred on a dark two-lane highway which was undergoing road resurfacing. The plaintiffs were driving northbound when a southbound pickup truck crossed into their lane and struck them head on. The truck driver claimed he was unable to determine his position in the roadway because temporary pavement markings (intended to replace the solid double yellow line which was previously painted on the highway) were missing. In discovery our team developed evidence that the paving and grading company had paved over the lane markings. On the morning following the collision, the defendant sent a crew to replace the temporary reflectors. The construction company claimed all blame rested with the truck driver who crossed the double yellow line. Rich, Mike and Conor retained a team of technical experts to create a visual animation depicting the condition of the roadway on the night of the accident. The most seriously injured plaintiff was driving without automobile insurance and was limited to the recovery of economic damages. He suffered a traumatic brain injury and required constant supervision. His passenger sustained orthopedic injuries and developed severe PTSD. The defendants vigorously disputed each plaintiff's damage claims, arguing that the plaintiffs had received little treatment after their acute hospitalizations. The case settled after the commencement of trial with $6,900,000 being paid to the cognitively impaired uninsured driver and $1,000,000 to the passenger.

Survivors v. Transportation Provider

In Survivors v. Transportation Provider (No. Calif. Sup. Ct.), Khaldoun Baghdadi and Doris Cheng negotiated a wrongful death settlement of $5,100,000 on behalf of the surviving family members of a 70-year-old woman who died after being stuck in a crosswalk by a tour bus. The defendant tour company attempted to prove that the decedent was partially at fault in failing to avoid the collision. However, reconstruction experts retained by Khaldoun and Doris were able to locate and utilize security video footage from adjacent businesses which captured the event to prove that all fault rested with the bus operator. The case settled following mediation, where our team produced and showed a narrated video which illustrated the life of this family before their loss. The settlement documentary showed the horrific nature of this tragedy, while affording the dignity to the decedent which the family deserved.

Pedestrian v. Bus Service Operator

In Pedestrian v. Bus Service Operator (confidential), Richard Schoenberger and Douglas S. Saeltzer recovered $7,000,000 on behalf of a 32-year-old man who was injured when struck by a bus while crossing an urban street in a marked crosswalk. Rich and Doug established that the bus driver ran a red light while using a handheld device. Plaintiff suffered fractures in both lower extremities, a lacerated spleen, and other injuries. He also suffered a mild traumatic brain injury. Prior to the accident, plaintiff worked as a security guard earning approximately $27,000 per year. Past medical specials totaled $657,000 with a past wage loss of $37,029. Plaintiff claimed he could no longer work in any occupation, and that the injury occurred at a time when he was planning to launch into a more lucrative career. He also alleged the need for multiple future orthopedic procedures and an increased susceptibility to infection as a result of his splenectomy. The defendants vigorously disputed the nature and extent of plaintiff's future damages and claimed that he could return to work without restriction at his former occupation. The case settled following expert disclosure.

Pedestrian v. Trucking Broker

In Pedestrian v. Trucking Broker (court and case number confidential), Michael A. Kelly, Richard Schoenberger and Conor M. Kelly recovered $6,500,000 on behalf of a 26-year-old man who sustained serious head injuries when struck by a falling traffic signal pole. The injury occurred when the rear of a 48-foot tractor-trailer rig drove up onto the sidewalk during a right turn, shearing the pole off at its base. The plaintiff was standing on the corner waiting to cross the street. Suit was brought against multiple defendants, including the labor broker and trucking company responsible for the truck's operation, and the public entity and construction firms responsible for construction of the intersection. Post-accident investigation revealed that the traffic light had been struck by right turning vehicles on prior occasions. The trucking operator defendants argued that the traffic light was too close to the street and that the intersection constituted a dangerous condition of public property. Throughout discovery the truck driver refused to answer questions about the accident by invoking the Fifth Amendment. During the motion in limine process, the Walkup team worked with the local District Attorney to secure immunity for the driver from criminal prosecution. The trial judge thereafter granted a motion conveying immunity and compelled the driver to give deposition testimony. In that deposition (the third he had given), the driver admitted he was talking

on a handheld cell phone at the time of the crash. The matter resolved shortly thereafter. The faultless plaintiff sustained multiple facial fractures and a traumatic brain injury.

Estate of City Resident v. Bank Employee

In Estate of City Resident v. Bank Employee (case number confidential), Spencer Pahlke negotiated a $1,500,000 settlement on behalf of the heirs of a San Francisco resident fatally injured while crossing Sunset Boulevard. Returning from work in the financial district at dusk, the decedent had alighted from a Muni bus and crossed three lanes of southbound Sunset Boulevard traffic heading from west to east. As she traversed the northbound traffic lanes she was struck just prior to reaching the eastern sidewalk. At impact she was thrown approximately 50 feet, sustaining multiple traumatic injuries which ultimately caused her death 18 months later. Spencer brought a wrongful death action against the driver's employer, a major bank, alleging that the driver was in the course and scope of his employment. Discovery demonstrated that the defendant driver was returning from a business trip when the incident occurred, though he had made an extended stop with his spouse to have dinner at a local restaurant before heading home. The matter resolved at mediation after the completion of course and scope discovery.

Cycling Injury

Female Cyclist v. Messenger Service

In Female Cyclist v. Messenger Service (court and case number confidential), Richard Schoenberger and Valerie Rose obtained a major confidential settlement on behalf of the sole heir of a bicyclist who was struck and killed by a delivery van as she rode down a popular Bay Area biking road. The decedent was traveling straight and the defendant's driver turned in front of her. The defendant company claimed it was not liable for its driver's actions because he was an independent contractor rather than an employee. Central to its argument were contracts supporting that position. In defending against the summary judgment motion, Rich and Valerie marshaled nearly 500 pages of evidence and conducted more than 20 depositions on the employment issue. They argued that the employment contracts were not controlling and that the delivery company "exercised all necessary control" over the delivery process, including the requirement that drivers follow mandatory specific procedures each time a package delivery was attempted. The drivers also wore uniforms and displayed company advertising on their delivery vans. The major confidential seven-figure settlement was negotiated at mediation while the motion for summary judgment was awaiting hearing.

Product Liability

Auto Passenger v. Aftermarket Accessory Manufacturers

In Auto Passenger v. Aftermarket Accessory Manufacturers (court and county confidential), Michael Kelly and Andrew McDevitt negotiated a $12,500,000 global resolution on behalf of a student who suffered a paralyzing neck injury during a single vehicle rollover crash. Our client rode as a belted front seat passenger in a vehicle driven by a schoolmate. When the driver navigated through a series of tight turns on a rural road, the back end of the vehicle began to fishtail. The SUV rolled and came to rest on its roof. Michael and Andrew filed suit against the auto manufacturer, and multiple equipment and the aftermarket component suppliers. Vehicle occupants testified that the driver had been speeding and proclaimed that he was going to get the vehicle "sideways" minutes before the event. The defendants all denied responsibility, arguing that the driver was 100% at fault. Our attorneys established that the added aftermarket optional equipment made the already unstable vehicle even more prone to rollover. They also showed that the post-sale equipment seller failed to test the product consistent with accepted industry practices.

Medical Negligence

Doe Infant v. Healthcare Facility

In Doe Infant v. Healthcare Facility (court and county confidential), Khaldoun Baghdadi negotiated a combination cash and annuity settlement with a present value of $9,000,000 on behalf of a disabled 4-year-old child and her parents. The child was born with severe congenital disabilities. The matter was prosecuted per CACI 512 and premised upon the failure to conduct follow up prenatal diagnostic testing which was indicated according to the standard of care. Pursuant to the holding in *Turpin v. Sortini* (1982) 31 Cal.3d 220, the parents sought recovery of the economic damages required to care for their daughter. The child's ongoing medical needs were substantial. She required treatment for seizure management and attendant care for activities of daily living. The child was unable to walk or provide for her own needs. In addition to the customary experts in the fields of physical medicine and rehabilitation, liability experts in the field of radiology and obstetrics were retained to testify in the case. By utilizing a special needs trust in conjunction with structured annuities and a substantial cash payment, Khaldoun was able to help the parents maintain their daughter's right to receive public benefits.

Infant v. OB/GYN Group

In Infant v. OB/GYN Group (No. Calif. Sup. Ct.), Doris Cheng concluded a medical negligence action on behalf of a 4-year-old child who suffered Erbs palsy as a result of shoulder dystocia. The plaintiff's mother was 37 weeks and 4 days into her pregnancy when she went into labor. At the hospital, the attending obstetrician grossly underestimated the fetal weight. The doctor started the mother on Pitocin to increase contractions and then handed off the medical care to a second member of his group. The second OB/GYN never assessed the fetal weight. As the baby failed to descend during labor, the second OB/GYN did not recognize that the fetus was too large to safely pass through the birth canal. A Cesarean section should have been performed, but the second obstetrician never offered that choice to the parents. Multiple maneuvers were performed until the baby was finally delivered vaginally. By then, the baby had suffered severe traction injury. The OB/GYN group paid $1,975,000 in settlement of the claim.

Recent Cases

Patient v. Healthcare Provider

In Patient v. Healthcare Provider (confidential venue), Doris Cheng resolved a medical negligence action on behalf of a 56-year-old man who suffered permanent damage to his heart during a minimally invasive cardiac procedure. Plaintiff was placed on cardiopulmonary bypass during heart surgery for eight hours. Doris alleged that patients should not be on the bypass machine for more than 90 minutes. The prolonged time on bypass during the surgery caused heart damage, resulting in multi-organ injury. The plaintiff now requires a heart transplant and has a shortened life expectancy. Capped by the provisions of California's antiquated and unfair MICRA law, a recovery of $3,000,000 was achieved on behalf of Doris' client.

Pregnant Mother v. Obstetric Clinic

In Pregnant Mother v. Obstetric Clinic (confidential venue and case number), Michael A. Kelly and Sara Peters obtained a cash and annuity settlement in excess of $7,000,000 on behalf of an infant afflicted with cerebral palsy secondary to improper placement of an IUD. The child's mother sought birth control counseling from her OB group after the birth of her fourth child. Her physician placed an IUD without checking to see if she was pregnant. When the doctor realized the patient was pregnant an attempt was made to remove the IUD, but the physician could not safely retrieve the device. The expectant mother refused the defendant's suggestion of an abortion and carried her child to term. The presence of the IUD caused the development of an intrauterine infection and chorioamnionitis, which in turn caused brain damage and cerebral palsy. Under the terms of the mediated settlement a multimillion dollar cash payment as well as tax-free future monthly payments for the life of the child were negotiated.

Industrial Injury

Technician v. Hazardous Waste Disposal Company

In Technician v. Hazardous Waste Disposal Company (confidential), Doris Cheng and Andrew McDevitt negotiated a confidential settlement including third party and workers' compensation benefits with a present value in excess of $14,250,000. The injury arose from an industrial workplace fire and explosion in which our client suffered disfiguring burns to his face and hands. The plaintiff was a 50-year-old technical engineer involved in the fabrication of semiconductors. As part of his job he was required to clean flammable product residue from fabricating equipment. In order to protect himself from flash fires, plaintiff consulted the product's manufacturer and a hazardous waste disposal company. The manufacturer knew that there was no safe way to perform cleaning on the machine but did not disclose that fact or provide any useful information that the plaintiff could use to protect himself. While performing routine cleaning a major explosion occurred. In their defense, defendants alleged that the injury was entirely the fault of the injured plaintiff for creating an unsafe cleaning protocol. The multi-party settlement was contributed to by both defendants as well as the workers compensation carrier.

Daughter v. Worksite Contractor

In Daughter v. Worksite Contractor (confidential case number and venue), Douglas Saeltzer and Michael A. Kelly obtained a confidential eight-figure settlement in a case arising out of the death of a 33-year-old mother who was killed when a trailer filled with gravel tipped over and crushed her. Just prior to the fatal event, employees of one defendant had knocked on the decedent's door and requested that she move her car out of her driveway so paving work could be completed. While she was preparing to exit her driveway, a second defendant elevated the bed of his tractor to off-load its contents. Because the trailer was parked on a side slope it tipped laterally when it reached its apex, falling on the decedent's car with her trapped inside. The event was witnessed by her 5-year-old daughter and fiancé. The deceased was pregnant with the couple's second child at the time of her death. In addition to the wrongful death and *Dillon v. Legg* case filed on behalf of the daughter, Mike and Doug also filed a negligent infliction of emotional distress case on behalf of the fiancé who witnessed the death of his unborn child, a claim which withstood demurrer. The injury occurred during a municipal sidewalk reconstruction project. Defendants included the truck driver, the owner of the truck, and the project's general contractor.

Premises Liability

Commercial Guest v. Auctioneer

In Commercial Guest v. Auctioneer (No. Calif. Sup. Ct.), Khaldoun Baghdadi and Valerie Rose recovered $2,250,000 on behalf of a 30-year-old auto auction attendee. Our client was injured when he was struck by a truck operated by one of the auctioneer's employees, sustaining major crush injuries to his legs and pelvis which required five different surgeries. As a condition of attending the auction, the defendant included a preprinted waiver agreement on the back of the "Guest Pass" required for entry to the property. A motion for summary judgment based upon the terms of the waiver was filed by the defendant. Khaldoun and Valerie opposed the motion on the basis that the terms of the waiver did not absolve the defendant of its own negligence, that the document was misrepresented as a "Guest Pass," and that the waiver was not properly explained to the plaintiff, a Spanish-speaker who did not understand or read English. The matter was mediated while the summary judgment motion was pending.

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.

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

Printed on recycled paper stock.