

FOCUS

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Court of Appeal Affirms 7.2 Million Dollar Verdict

On February 18, 2015, a unanimous panel of the First District Court of Appeal brought to conclusion litigation which began in 2007 when the 8-year-old daughter of our clients Lorraine Wong and Mark Ng was killed when her mother's car was broadsided by an intoxicated driver. With its unpublished opinion in Wong v. Tom, A137464 (San Mateo County Sup. Ct. No. CIV464944), the Court of Appeal affirmed the verdict of \$7,200,000 obtained by Khaldoun Baghdadi and Emily Wecht Polcari in 2012.

On February 19, 2007, Sydney Ng was a rear-seat passenger in her mother's car when she was killed by Richard Tom. Her sister, 10-year-old Kendall Ng, and her mother, Lorraine, were injured. Defendant Tom had been drinking with a friend earlier in the evening

NOT TO BE PUBLISHED IN OFFICIAL REPORTS	
<small>California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.</small>	
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA	
FIRST APPELLATE DISTRICT	
DIVISION ONE	
LORRAINE WONG et al., Plaintiffs, Cross-defendants and Respondents,	A137464
v. RICHARD TOM,	(San Mateo County Super. Ct. No. CIV464944)
Defendant, Cross-complainant and Appellant.	

and was on the way home from San Carlos to his house in Redwood City as he drove east-bound on Woodside Road through its intersection with Santa Clara street. Ms. Wong was two blocks from the family home on the way to her sister's house with the girls safely seat-belted. She had driven west on Santa Clara and

was intending to make a left hand turn on to Woodside.

According to the data recorder in the Defendant's Mercedes, Tom was traveling somewhere between 51mph and 55mph in a 35mph zone. After stopping at the stop sign, Ms. Wong testified that she looked both ways before beginning her turn, saw no approaching traffic, and pulled into the roadway. Tom's vehicle then broadsided her, impacting the driver's side rear door, where Sydney was seated.

Within days after the collision, the defendant was charged with felony drunk driving. Some weeks later, our firm was retained, and filed the civil action which was the subject of this appeal. From that point forward, over the succeeding seven years, Tom vigorously
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Defective Takata Airbag Injuries Continue

The National Highway Traffic Safety Administration has issued a Consumer Advisory urging "owners of certain Toyota, Honda, Mazda, BMW, Nissan, Mitsubishi, Subaru, Chrysler, Ford and General Motors vehicles to act immediately on recall notices to replace defective Takata airbags." In response Toyota announced that it would disable defective airbags in some affected vehicles until replacement parts were available. The NHTSA Acting Administrator David Friedman agreed with the plan, saying that a vehicle with no airbag was better than one that could hurt an occupant worse with metal debris expelled into their face in

an accident upon deployment. Automakers have recalled 24 million cars with Takata airbags globally since 2008, according to Reuters estimates.

Most recently, on February 13, 2015, American Honda confirmed a Takata airbag ruptured in the fatal crash of a 2002 Accord on Jan. 18 in Texas. "Honda has communicated preliminary information collected to date about this crash to the National Highway Traffic Safety Administration (NHTSA)," the automaker's statement said. "The vehicle involved in this crash was included in a 2011 recall for the driver's frontal airbag inflator, and



our records indicate that the recall repair was never completed" ...our thoughts and deepest sympathies are with the family

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defended both cases, taking his criminal conviction all the way to the California Supreme Court, where his conviction was ultimately affirmed after an intermediate appellate court reversal. Throughout the pendency of the civil action, Tom had claimed that Ms. Wong was at fault, that he had the right of way, that the plaintiff was distracted by cell phone use and that her negligence was the primary substantial factor in causing the collision.

In 2012, the civil wrongful death case proceeded to trial. After a 19 day trial in

front of a San Mateo County jury, Khaldoun and Emily obtained a verdict of \$7.2 million, with the jury finding that Ms. Wong was not comparatively negligent. The jury also awarded modest punitive damages.

Thereafter, Tom appealed the verdict, arguing that there was not substantial evidence to support the jury's finding that Ms. Wong was not comparatively negligent or to support the imposition of punitive damages.

He again argued on appeal that Ms. Wong admitted using her handheld cell phone while she was stopped at the stop sign

at the corner of Santa Clara and Woodside, before beginning her left turn. Additionally, the defendant claimed that Ms. Wong's testimony that she did not see his oncoming vehicle was not credible, and was the equivalent of an admission of inattention.

A unanimous First District panel affirmed the judgment in its entirety, rejecting all of the defendant's arguments.

The court concluded that Ms. Wong's actions had been "appropriately careful" and that the jury's conclusions were reasonable and supported by the evidence. With regard to the defendant's claim that plaintiff's cell phone use was per se evidence of comparative fault, the court noted that in February 2007, when the injury occurred, the law banning the use of handheld cell phones while driving, Vehicle Code section 23123, was not yet effective. The law was enacted in 2006, but the effective date established by the Legislature was July 1, 2008, over a year after the accident. In reviewing the record, the court found that Ms. Wong's "... testimony provided substantial evidence to support a conclusion (her) cell phone use did not constitute negligence. A driver's use of a cell phone can constitute negligence because attention to the device distracts a driver from single-minded concentration on the tasks of driving. Because, as Wong testified, she had completed the telephone conversation around the time she stopped at the intersection, there was no reason to presume her cell phone use distracted her or otherwise interfered with her driving in the crucial seconds as she entered the intersection. Tom does not contend merely holding the cell phone interfered with Wong's driving in any material way. Further, regardless of the cell phone, Wong's conduct at the intersection as described in her testimony, was appropriately careful: she stopped as required, and looked both ways at least twice before proceeding into the intersection. Assuming, as we must, that this testimony was true, it demonstrates the cell phone did not impair her driving."

In rejecting Tom's claim that there was insufficient evidence to support the imposition of punitive damages, the court stated: "it was not Tom's speed alone that supported a finding of malice, it was his decision to use very excessive speed at night, while approaching an intersection he knew to have an impaired view, while his judgment was impaired by alcohol." ▲

FDA ISSUES WARNING FOLLOWING SUPERBUG OUTBREAK

The Food and Drug Administration has issued a general warning to health providers regarding the use of medical endoscopes for complex endoscopic procedures such as the one that led to seven people becoming infected with a superbug bacteria at UCLA Hospital. Two of those patients died.

The FDA has determined that the design of endoscopes used in ECRP gall bladder and pancreas endoscopy may impede the ability to effectively "clean, disinfect and sterilize reusable devices," according to the warning it posted on its website. "Although the complex design of duodenoscopes improves the efficiency and effectiveness of ERCP, it causes challenges for cleaning and high-level disinfection," the warning stated. "Some parts of the scopes may be extremely difficult to access and effective cleaning of all areas of the duodenoscope may not be possible."

More than 500,000 ERCP procedures using duodenoscopes are performed in the United States annually, according to the FDA, to drain fluids from pancreatic and biliary ducts blocked by cancerous tumors, gallstones, or other conditions.

The FDA says it has received 75 medical device reports between January 2103 and December 2014 regarding possible transmission of microbial pathogens to 135 patients. Health officials in California are trying to trace as many as 179 patients who may have been exposed to CRE, an infection resistant to most antibiotics following ECRP



procedures at Ronald Reagan Medical Center between October 2014 and January 2015.

CRE, which stands for carbapenem-resistant Enterobacteriaceae, are germs that have become too difficult to treat because they are resistant to most antibiotics. The bacteria can lead to death in up to 50% of patients who become infected, according to the CDC.

According to the L.A. Times, Dr. Alex Kallen, a CDC medical officer who is assisting the county in its UCLA investigation, said he hasn't found breaches in cleaning protocol at hospitals he has visited, but that doesn't mean hospital practices are always followed. These endoscopes are "cleanable, but it's very difficult to adhere 100% every time to what you need to do." Kallen said some parts of the scope must be incredibly intricate to allow physicians to get into very tight spaces. ▲

Defective Takata Airbag Injuries Continue

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of the driver during this difficult time,” Honda said in a statement.

Honda has issued several different recalls over the last four years for Takata airbags. Walkup partners Khaldoun Baghdadi, Douglas Saeltzer and Michael A. Kelly are among a team of lawyers from across the country that has filed a California action against Honda as a result of the defective Takata airbags. (*Rosenstock v. American Honda Motor Co.*, Case No. CGC-14-542902, San Francisco Superior Court).

Takata airbags now have been linked to at least six deaths.

In its statement, Honda urged owners of its vehicles to check www.recalls.honda.com and www.recalls.acura.com to see whether their vehicles are affected by a recall.

More than 8 million vehicles in the U.S. are now under recall. The present problem has been tied to more than 140 injuries. There have been five recalls, in 2009, 2010, 2011, 2013 and 2014. And in the last two years, the Takata airbag defect has spread to nine other manufacturers.



According to consumer advocates and safety consultants, Honda/Takata have been collecting and studying fractured airbag inflators for seven years. Those two, together with the more recent automakers subject to the recalls, have suggested multiple root cause explanations for the defect including propellant wafers with inadequate compaction force; propellant wafers exposed to elevated moisture during the manufacturing process, prolonged exposure to heat and humidity over the life-cycle of the vehicle and airbag inflators manufactured with “an incorrect part.”

The Walkup Law Firm auto defect team is currently investigating a number of Takata Airbag injury cases. For our associate counsel who have questions or referrals of these cases, please contact partners Khaldoun Baghdadi, Douglas Saeltzer, or Michael Kelly, who are heading our effort. ▲

Round Two Settlement Achieved In ASR Hip Cases

Walkup's medical product liability team, including partners Michael Kelly, Matthew Davis, and Khaldoun Baghdadi, have successfully completed negotiations with Johnson & Johnson on a second phase of settlements for those patients who underwent a hip replacement as a result of the recalled Johnson & Johnson/DePuy ASR mono block metal-on-metal hip.

An initial settlement offer in the fall of 2013, negotiated by the Walkup team in conjunction with a Settlement Oversight Committee composed of lawyers from across the country, resulted in a \$2.45 billion global settlement offer to some 8,000 plaintiffs who had undergone a premature revision surgery as of August 31, 2013. More than 98% of the eligible plaintiffs accepted the offer.

The most recent extension of the ASR settlement is aimed at duplicating the prior offer to 1,400 additional patients who underwent revision surgery after the August 31, 2013 cut-off imposed by the terms of the round one proposal. As with the first offer, Johnson & Johnson has agreed to cover medical costs and medical liens over and above the damage payments.

Johnson & Johnson and DePuy recalled 93,000 ASR hip implants worldwide in August 2010, saying 12% failed within five years. Internal Johnson & Johnson documents showed 37% of ASR hips failed after 4.6 years. The failure rate in Australia in 2012 was found to be 44% after seven years of use. A class action suit in Australia is set for trial in the next 60 days. In the U.S., a Tulsa, Oklahoma jury returned a \$2.5 million verdict against

Johnson & Johnson in January, the second verdict against the company involving the defective prosthesis. Walkup partner Matthew Davis worked closely with the lawyers in Tulsa on the science and trial tactics in the case.

Before the first settlement announced in 2013, Johnson & Johnson faced more than 12,500 lawsuits filed in federal

and state courts in Ohio, California, Illinois and New Jersey. Even after accounting for the more than 8,000 cases which have been settled, and the 1,400 cases covered by the most recent agreement, there remain approximately 3,000 suits filed by patients whose ASR hips have not yet failed. Negotiations are continuing with respect to disposition of those claims.

Walkup Melodia's product liability team is also involved with litigation involving other metal-on-metal hips, including

the DePuy Pinnacle, Biomet, and Smith and Nephew prostheses. The Walkup team is also prosecuting claims outside the orthopedic device arena, including injuries related to the blood thinner Xarelto, all brands of laparoscopic power morcellator devices (implicated in uterine cancer deaths), and Medtronic mini med insulin pumps, suspected of delivering unintended bolus doses of insulin, resulting in shock and death.

Referring counsel who have questions about drug and device litigation, or medically related product liability claims, should contact Michael Kelly, Matthew Davis, or Khaldoun Baghdadi for information or consultation. ▲



Doris Cheng Honored by SFTLA and ACTL

Walkup partner Doris Cheng is the recipient of two recent honors. First, she has been elected 2015 President of the San Francisco Trial Lawyers Association. She follows in the footsteps of James Downing, George Shelby, Dan Kelly and Mike Kelly as firm members who have served as President of SFTLA. Walkup partners have been elected head of the organization more often than members of any other firm.



Doris with outgoing SFTLA President Terry Coleman

In addition, Doris has been selected as a member of the American College of Trial Lawyers, and invited to give the Inductees' Response at the 2015 spring meeting in Key Biscayne, Florida. The Response is a tradition of the College's induction ceremony. One member of the of the newly inducted class is selected to speak on behalf of her fellow inductees.

When she is not receiving honors and awards, Doris is busy practicing law and mentoring young lawyers. In connection with that work, she has been named Director of the University of San Francisco Law School's Intensive Advocacy Program. A 1998 graduate of USF, Doris has been involved with the program since her graduation from law school. She takes over for Professor Henry Brown who guided the program previously.

At the conclusion of the two week summer course, each student conducts a mock jury trial. The student lawyers

Power Morcellators Recalled Due to Uterine Cancer Link

The Walkup Firm is currently investigating cases on behalf women injured by the spread of pelvic cancers after laparoscopic power morcellator treatment. These cases focus on women who have died from metastatic uterine cancers, including leiomyosarcomas where the cancer was spread by the use of a power morcellator during the removal of fibroids.

Johnson & Johnson's Ethicon division was the maker of the majority of morcellators in use during the last 15 years. According to the FDA, 1 in 350 women who undergo a hysterectomy have undetected uterine cancer cells. Morcellator use risks spreading such cells into the surrounding tissue, causing distant spread of potentially fatal leiomyosarcoma. Morcellation devices were used during hysterectomies and myomectomies, the surgical removal of fibroids or other noncancerous growths in the uterus.

After receiving FDA warnings in April 2014, Johnson & Johnson's Ethicon division ultimately issued a full recall. Ethicon stated this "worldwide voluntary market withdrawal" was simply the next step following the company's April suspension of sales and distribution. In a letter sent to hospitals, Ethicon asked that three devices be returned: the Gynecare Morcellex, the Morcellex Sigma and the

Gynecare X-Tract.

The first power morcellators were approved in 1993 by the Food and Drug Administration. In 2006, Dr. Robert Lampartar, a pathologist at Evangelical Community Hospital in Lewisburg, Pennsylvania sent a letter to Johnson & Johnson warning the company that the devices "may lead to dissemination of malignant tissue" and asking that the company carefully consider the risk of continued use. Johnson & Johnson subsequently added a label-

ing precaution in the use instructions but did not issue any widespread warnings and subsequently ignored additional letters from Dr. Lampartar.

Walkup attorneys are working with gynecologic experts, product designers and oncologists in evaluating and prosecuting potential claims on behalf of the surviving spouses and children of women whose disease was spread through this laparoscopic procedure.

Referring counsel who have questions about potential claims where women have died as a result of metastatic leiomyosarcoma where previous laparoscopic removal of fibroids or other pelvic lesions took place utilizing a morcellator should call and speak with a member of our medical device product liability team. [▲](#)



work in teams of two and try either a civil or criminal case before a judge and jury. The trial exercise gives students the opportunity to bring together all of the acquired knowledge and skills developed in the various workshops over the course of the program.

The course features more than 80 hours of lectures, demonstrations, and practice workshops covering the ins and outs of all stages of trial advocacy. Topics covered include taking and defending depositions, evidence, direct and cross-examination of witnesses, direct and cross-examination of experts, jury selection, opening statements, and closing arguments. Throughout the course,

students receive feedback and critique from IAP faculty, made up of dozens of seasoned lawyers and judges from across the nation.

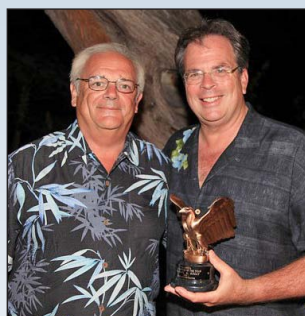
Doris has been involved with the program since 1999. She is a frequent guest lecturer and adjunct professor, training lawyers and judges nationally and internationally for NITA, Emory University Law School and the ABA Rule of Law Program. "Doris Cheng teaches litigation to attorneys across the country, so what better person for our students to learn from?" said U.S.F. law school Dean John Trasviña. "She combines excellence in teaching with excellence as a trial attorney." [▲](#)

WALKUPDATES

Mike Kelly was presented with the Cal-ABOTA Trial Lawyer of the Year Award at the organization's annual meeting in Hawaii. Mike's selection makes the Walkup firm the only California law firm that has had three members selected for this most prestigious award. Mike follows in the footsteps of Bruce Walkup who received the honor and in 1968 and Jim Downing who was the organization's honoree in 1978. Mike also traveled to Belfast, Northern Ireland, to serve as Program Director for a NITA-UK program tutoring Irish solicitors in courtroom tactics and strategies....

Spencer Pahlke was featured in an article in Berkeley Law's alumni magazine, Transcript, highlighting his efforts to build the law school's trial advocacy program into one of the nation's premier programs. Proving his ability as a trial team coach, Spencer's mock trial team made it to Nationals....Andrew

McDevitt has been appointed Vice Chair for the Bar Association of San Francisco's (BASF) Delegation to the California Conference of Bar Associations. He was also appointed as a member of the Executive Committee for BASF's Barristers Litigation Section. Next year, Andrew will act as Chair of BASF's Delegation to



Mike Kelly receiving the 2014 Cal-ABOTA Trial Lawyer of the Year Award from Cal-ABOTA President Steve Glickman

the California Conference of Bar Associations and was chosen to sit on the 2015 Barristers Board of Directors Nominating Committee....Conor M. Kelly was elected to membership in the Edward J. McFetridge Inn of Court. Conor and his pupillage group presented an ethics and civility CLE for the Inn of Court members. The presentation focused on the rules of professional conduct governing attorney interactions with non-attorneys....Doris Cheng was elected as a National Board representative by the San Francisco Chapter of ABOTA. Doris Cheng also travelled to Montgomery, Alabama to train advocacy instructors at the Maxwell Air Force Judge Advocates General's

Corps....Emily Wecht Polcari spoke at the CAOC Hawaii seminar in December and presented at the CAOC Kaiser Seminar in November....Khaloud Baghdadi appeared on ABC news as part of a public interest story on the safety risks of aging tires. In March he acted as moderator for a panel discussion on "Best Practices" in complex litigation at the Genentech Life Sciences Legal Summit. In April he will present at the 8th Annual Wildland Fire Litigation Conference in Monterey....Sara Peters was appointed as a Contributing Editor for the Rutter Group's "Claims and Defenses" California Practice Guide. Sara was also invited to serve as a member of the BASF Litigation

Committee Executive Board... Rich Schoenberg acted as Program Director for the National Institute of Trial Advocacy's Hanley Advanced Trial Skills Program in San Francisco....Paul Melodia was presented with the prestigious San Francisco Trial Lawyers "Lifetime Achievement Award". Paul was introduced by Dan Kelly, who gave a memorable introductory speech detailing Paul's many courtroom accomplishments through the years. ▲



Dan Kelly and Paul Melodia at the SFTLA Awards Ceremony

Walkup Welcomes Babies - Congratulations to all the New Moms & Dads!



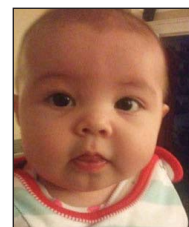
Keira Jane Polcari 12/2/13
Emily Wecht Polcari & Mike Polcari

Asber Daniel Peters 5/20/14
Sara & Andrew Peters



Brynn Meredith Kelly 7/03/14
Conor & Tanis Kelly

Madison Grace McDevitt 8/15/14
Andy & Kristen McDevitt



Violet Grace Gosling 9/24/14
Valerie Rose & Justin Gosling

Justin Chou Joins Firm As Associate

We are pleased to welcome Justin Chou to the firm as our newest associate. A former Deputy Public Defender in Contra Costa County, Justin brings significant jury trial experience (14 trials to verdict) to his work on behalf of our clients. In an era of diminishing or "vanishing" jury trials, it is difficult for young lawyers to get the kind of real-world experience Justin brings with him.

Justin received his J.D. from Berkeley Law (Boalt Hall) in 2011, and his B.A. with distinction in Political Science from

UC Berkeley in 2008.

As a law student he was selected to participate in the American Advocates for Justice Trial Competition and the National Trial Competition. In 2010-11, he co-chaired the Board of Advocates, overseeing the school's appellate, negotiation, and trial competition teams. He served as Managing Editor of the California Annual Criminal Review, and in 2009 he authored an article that was published by the Berkeley Journal of Criminal Law.



Justin remains active as a coach for the Berkeley Law Mock Trial team and is a member of the San Francisco Trial Lawyers Association, American Association for Justice, and Attorneys Information Exchange Group. He is also an avid motorcycle rider, mechanic, musician, and martial artist. ▲

RECENT CASES

PREMISES LIABILITY



Sales Rep. v. Southwestern Lodge

In *Sales Rep. v. Southwestern Lodge* (state and county confidential), Michael A. Kelly, Richard Schoenberger, and Andrew McDevitt obtained a seven-figure settlement after three weeks of trial on behalf of a 54-year-old jewelry supply vendor who fell and fractured his neck after becoming intoxicated in the defendant hotel's bar. Our team showed that hotel staff served the injured client more than 18 drinks over the course of the evening, resulting in a blood alcohol nearly four times the legal limit. After becoming disruptive in the hotel bar, one of the defendant's employees escorted the client to his room, but left him unsteady in the hallway before arriving at his door. One hour later, another hotel guest awoke as a result of cries from the adjoining hallway. Our client was found face down in a pool of blood, presumably having fallen as a result of intoxication. The injured plaintiff had no memory of the night's events. Hotel staff denied knowledge of the injury. Our attorneys proceeded to trial in the out-of-state venue on theories that the hotel violated the local dram shop law and the hotel staff negligently abandoned the client in the hallway without getting him safely to his room knowing that he was too intoxicated to care for himself. Two days before final argument the defendants' insurers agreed to pay a confidential amount to conclude the case.

MARITIME INJURY



Fisherman v. Recreational Boater

In *Fisherman v. Recreational Boater* (San Mateo Sup. Ct.), Doug Saeltzer and Matt Davis negotiated a \$1.5 million settlement on the eve of trial on behalf of two surviving minor children of a fisherman who was killed on the bay when the defendant's yacht ran over the decedent's small fishing skiff. The defendant was at the helm of his yacht at the time of the collision and claimed that the fishing skiff had driven erratically into the path of his vessel. Expert retention and analysis included accident recreation and seamanship. Based upon the expert analysis, Matt and Doug conducted discovery against the yacht owner, which they shared with the San Mateo District Attorney who brought criminal charges against the defendant and a jury convicted him of misdemeanor manslaughter. The case settled for the owner's insurance policy limits as well as a substantial contribution from the yacht owner's personal funds. In the criminal action the yacht owner was ordered to pay restitution to the mother of the children, who had not been married to the decedent.

GOVERNMENT LIABILITY



Pedestrian's Heirs v. CCSF MUNI

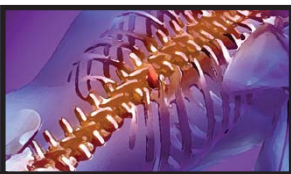
In *Pedestrian's Heirs v. CCSF MUNI* (S.F. Sup. Ct.), Michael A. Kelly and Andrew McDevitt recovered \$2,850,000 on behalf of the parents of a 23-year-old woman struck and killed by a MUNI bus in a marked crosswalk in the Castro District. MUNI dispatch had taken the driver off of his assigned route and directed him to provide assistance as a bus bridge for the F line streetcars. While trying to find the starting point for his route, he turned onto a street that was too narrow for Muni buses. Apparently overwhelmed by the unfamiliar traffic in the area, he looked away from the pedestrian crosswalk, and struck our clients' daughter after she had traveled more than 50% of the way across the street. Mike and Andrew established that MUNI provided turn-by-turn directions for drivers headed to normally scheduled routes but did not provide the same for drivers "dead heading" to special assignments. MUNI sought to limit introduction of evidence of its institutional negligence by moving for summary adjudication on plaintiffs' theories of negligent training and supervision. Mike and Andrew defeated MUNI's motion, prompting settlement negotiations. Our clients used the funds recovered in the settlement to establish a charitable foundation in memory of their daughter.

Wyatt v. USA

In *Wyatt v. USA*, Michael A. Kelly and Conor M. Kelly recovered \$2,250,000 in a Federal Tort Claim Act lawsuit venued in the Middle District of Tennessee on behalf of three minor children whose mother died from carbon monoxide poisoning while she slept in a rented RV during a weekend long music festival in Clarksville, Tennessee. The RV was powered by a gas powered generator. When the generator was initially set up, it was placed several feet away from the RV to ensure fumes did not enter the vehicle. However, on the last night of the festival an unknown person moved the generator within inches of the RV. The generator produced carbon monoxide exhaust through the night which leaked into the RV. The RV was equipped with a carbon monoxide detector, but the alarm did not sound because the rental agency had not checked to make sure it had operable batteries. The RV had been rented from a nearby US Army equipment retailer. Mike and Conor brought suit alleging that the Army had negligently rented the RV without a functioning carbon monoxide detector. The Army's policy required that all life safety devices were be inspected before renting to the public. The plaintiffs' experts testified that the Army breached industry safety standards by renting the RV without a functioning alarm. The government disputed that it was negligent and argued that a functioning alarm would not have woken the occupants of the RV even if it had sounded. The settlement was reached after the completion of expert depositions and following an all-day settlement conference. The settlement included both cash and the purchase of annuities to provide for the minor plaintiffs' educational needs.

RECENT CASES

HMO NEGLIGENCE



Member v. Health Service Organization

In Member v. Health Service Organization (arbitration, confidential venue), Doris Cheng and Andrew McDevitt negotiated a confidential major resolution on behalf of a 50 year old appliance technician who was rendered quadriplegic after developing a post-surgical blood clot in his spinal canal. Because of severe disc protrusion his treating doctors recommended cervical spine surgery. The plaintiff had a significant risk of bleeding because he had been taking non-steroidal anti-inflammatory pain medicine pre-operatively. The surgery was a success but on post op day two he developed sharp pain in his forearm. Shortly thereafter a PA removed a drain at the operative site and noted significant bleeding and pain. Neither the physician's assistant nor the surgeon investigated the cause of the bleed or ruled out the possibility of a blood clot in the area of the surgery. By the afternoon, the client was paralyzed from the neck down. At arbitration, the surgeon testified that he saw the patient soon after the physician assistant told him of the bleeding with the drain removal. There was no record of this visit in the hospital chart. The PA denied that such an event occurred. The inconsistency reflected the surgeon's consciousness of guilt and confirmed that the epidural hematoma should have been diagnosed earlier. Plaintiff's expert testified that the defendant should have anticipated the increased risk of bleeding and clotting in the patient; should have followed the symptoms more closely; and should have identified the epidural hematoma before the patient became paralyzed.

Family of Jane Doe v. HMO

In Family of Jane Doe v. HMO (confidential settlement), Richard Schoenberger and Conor M. Kelly represented the surviving spouse and children of a 34-year-old bartender who died following surgery to remove kidney stones. The patient had a history of painful kidney stones and in October 2012 was admitted to the hospital for a recommended surgery known as percutaneous nephrostolithotomy. During the surgery an incision was made over the patient's kidney and a catheter inserted into the renal collecting system. The procedure was performed without apparent complications, but in the Post-Anesthesia Care Unit she awoke and complained of severe pain. Her condition quickly deteriorated and she became non-responsive. A code was called and resuscitation measures were taken, but the patient passed away within a few hours. Lab results taken from the patient during resuscitation revealed evidence of hyponatremia or water intoxication. Rich and Conor demanded arbitration and, working with their experts, developed persuasive evidence that the patient died because a surgical nurse breached the standard of care by using water, instead of an isotonic solution such as Lactated Ringers, to irrigate the operative field during surgery. Large HMO disputed that water intoxication was the cause of the patient's death and maintained the proper irrigation fluid was used. The case settled after the completion of fact discovery for \$1,000,000. As part of the settlement, annuities were purchased for both of the patient's young children which will pay guaranteed sums until the children are 34-years-old.

Young Family v. Internal Medicine Doctor

In Young Family v. Internal Medicine Doctor (binding arbitration), Michael Kelly and Emily Polcari recovered \$2,250,000 in settlement of a wrongful death case. Mike and Emily represented the surviving widow and two small children of a 47-year-old sales director at a private Silicon Valley technology company who died two months after seeking medical attention for symptoms of coronary artery disease. He had presented to his primary care doctor with complaints of chest pain. Given his height, weight, gender and laboratory results, the standard of care required a work up for coronary artery disease, which would have led to an urgent bypass surgery and saved his life. Instead, his physician attributed his symptoms to "anxiety" and did no further work up. General damages for the loss of a husband and father's love, care, comfort and society were capped by the unfair and barbaric \$250,000 general damage limits of MICRA. The balance of the recovery represented the present cash value of future lost wages and household services. Future structured payments to fund the college education of the minor children were approved as part of the minors' compromise.

VEHICULAR NEGLIGENCE



Motorist v. Local Taxi

In Motorist v. Local Taxi (S.F. Sup. Ct.), Matthew Davis and Spencer Pahlke obtained a seven-figure settlement on behalf of a young woman injured when she was struck by a San Francisco cab. On the evening of the collision our client was riding her scooter from the Mission to Potrero Hill. As she proceeded through the intersection where the collision occurred, a taxi approached from the opposite direction and made a left-hand turn in front of her. She struck the front-left side of the cab, flew through the air, striking the ground, suffering serious injuries. Matt and Spencer retained and used both liability and damage experts to demonstrate the driver's inattention, and the extent and nature of plaintiff's future disability. Given our client's young age (mid 20s) particular attention was paid to how her injuries would affect her in the future. A \$1 million dollar policy limit settlement was reached prior to the mandatory settlement conference.

WORKPLACE INJURIES



Arborist v. Bay Area Crane Service

In Arborist v. Bay Area Crane Service (Sonoma Co. Sup. Ct.), Rich Schoenberger and Matt Davis obtained a \$6 million settlement on behalf of a 33-year-old employee rendered a paraplegic during a tree removal project at a Sonoma County home. The defendant crane company was hired by the plaintiff's employer to hoist and move sections of cut trees over a residence and place them into a "safety zone" where the plaintiff was to cut the sections into smaller pieces. During the work a large limb broke free from the crane's rigging and

Continued on back page

RECENT CASES

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fell on the plaintiff. His employer was in charge of the jobsite and he was cited by Cal-OSHA for safety violations. Suit was brought against the crane operator and his employer. During depositions evidence was developed showing numerous safety violations by the crane operator. The defendants moved for summary judgment on the ground that the crane operator was a "special employee" of the plaintiff's employer and therefore the suit was barred by the exclusive remedy rule and the holding in Privette v. Superior Court and its progeny. In support of their motion the defendants pointed to the contract that defined the crane operator as a "special employee" of the arborist company. Rich and Matt developed evidence showing that the crane company and operator retained control over how the crane was operated during the job and prevailed at the summary judgment hearing citing case law holding that the facts of how a job was actually run are more important than what is written in the contract. The court denied the defense motion and the case settled for the crane company's policy limits shortly thereafter.

MEDICAL NEGLIGENCE



Family v. Teaching Hospital and Surgeon

In Family v. Teaching Hospital and Surgeon (confidential settlement), Michael Kelly and Melinda Derish resolved a medical negligence wrongful death claim for \$5.8 million on behalf of the widow and children of a young executive who died after routine back surgery. The patient was kept postoperatively for pain management with narcotic medications administered via an intravenous pump, and the plan was for him to go home the next day. When the surgeon rounded that evening his patient had an elevated pulse rate (tachycardia) so he summoned a hospital resident to transfer the patient to the ICU and obtain a cardiology consult. The surgeon left the hospital and the resident thereafter asked another resident to see the patient. Neither resident transferred the patient to the ICU. The patient went on to suffer a cardiorespiratory arrest. The two residents claimed that the surgeon had not made it clear that he wanted the patient transferred to the ICU. They also claimed that they telephoned a cardiologist who told them they did not need to transfer the patient. All defendants claimed the patient had not received enough narcotic to cause a respiratory arrest. Mike and Melinda proved that the hospital violated its own narcotic policies by failing to retain the records of how much narcotic had been administered. The general damage recovery for the widow and three children was limited to a total of \$250,000 by the unfair and barbaric MICRA cap.

Heirs v. Bariatric Surgeon

In Heirs v. Bariatric Surgeon (court and case number confidential), Melinda Derish negotiated a \$2 million policy limit settlement on behalf of the family members of a corporate executive who died after being prematurely discharged after weight reduction surgery. The surgery was performed in the morning and the patient was stable during the afternoon, but in the early evening hours his recovery room nurses noted he had low oxygen levels that required a steadily increasing oxygen supply. The nurses notified the defendant bariatric surgeon, who did not come to see the patient until he was awake and his oxygen lev-

els had normalized. The surgeon discharged the patient, giving him a prescription for oral narcotics. The patient slept heavily that night and the next morning his wife could not awaken him. Paramedics were summoned but the patient experienced a cardiac arrest, which caused brain death. Melinda argued that the patient's low oxygen levels when he was monitored in the hospital were caused by obstructive sleep apnea, a common condition in overweight patients. Death was preventable had the surgeon kept the patient in the hospital for monitoring and treatment with oxygen and a CPAP machine until his breathing patterns were back to baseline. The narcotic pain medication exacerbated the condition and in combination with postoperative pain caused progressive de-oxygenation and arrest.

CYCLING INJURY



Stewart v. State of California

In Stewart v. State of California (S.F. Sup. Ct.), Conor M. Kelly obtained a \$400,000 settlement on behalf of a veteran who sustained a mild traumatic brain injury and a fractured pelvis while riding with a group of three other cyclists on Skyline Boulevard when his front tire struck an area of uneven pavement. He lost control of his bicycle and fell to the ground, striking his head and hip. Conor filed suit against the State alleging the roadway constituted a dangerous condition of public property. The State claimed that the road was not dangerous and that plaintiff was solely at fault for the incident. The State denied notice of prior accidents at this location, but during discovery Conor obtained documents which demonstrated Caltrans had been informed about problems with the pavement in the two years prior to the accident. During deposition, a Caltrans maintenance supervisor admitted complaints about the road were not promptly investigated as required by Caltrans policy. Conor retained experts who opined that the roadway was unsafe and that the plaintiff's bicycle operation was reasonable. There was no wage loss claim and economic damages were limited to a VA lien for treatment at the San Francisco VA Hospital. The settlement was reached at mediation three weeks before trial. ▲

We are available for association and/or referral in all types of personal injury matters. Fees are shared with referring counsel in accord with Rule of Professional Conduct 2-200.

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



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