WALKUP, MELODIA, KELLY & SCHOENBERGER

FOCUS on torts

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# Paul Melodia Marks His 45th Year With the Firm

On October 16, 2012, Paul Melodia celebrated his 45th anniversary with the firm. While the firm's letterhead has evolved through the decades, Paul's steady, insightful and creative representation of clients has never varied. A San Francisco native and 1964 graduate of Boalt Hall (now Berkeley) School of Law, Paul joined the firm of Walkup & Downing following a distinguished military career in the JAG Corps.

Having begun his stellar career as a trial lawyer in the military, Paul next undertook a life-long body of civil trial work which continues to this day. His wealth of experience includes trials and arbitrations in a wide variety of practice areas, including medical negligence, drug and device litigation, product liability, federal tort claims and general negligence.

With Jim Downing's retirement in 1984, Paul became the other "name" by which clients, opposing counsel and claims people have known the firm for more than 28 years.

A pioneer in placing liability on drug makers for injuries resulting from oral contraceptives in the 1960s and 1970s, Paul led the early fight for compensation by women injured by the Dalkon Shield IUD. In subsequent years, his mass tort involvement included work on the Swine Flu vaccine cases, L-Tryptophan, and nutritional supplement cases. In the field of automobile crashworthiness and product safety, Paul has litigated cases involving fuel-fed fires, brake design flaws and transmission failures.


*A mega-sized card was sent to Paul by partners, associates and staff for his 45th anniversary.*

Listed among the "Best Lawyers in America" for 20 consecutive years, Paul is acknowledged as one of Northern California's very best personal injury and wrongful death attorneys. He is a member of many honorary legal societies, including the International Academy of Trial Lawyers and the American College of Trial Lawyers.

All of Paul's partners, associates and staff warmly congratulate him on this milestone, a feat never achieved by any other lawyer in the firm's 53-year history. We are proud and privileged to work alongside Paul, and look forward to celebrating his 50th anniversary!

# Trio of Jury Verdicts Demonstrates Firm's Expertise

Within the last 90 days, three Walkup trial teams achieved superb jury verdicts highlighting the firm's expertise in cases with disparate theories of liability and damages.

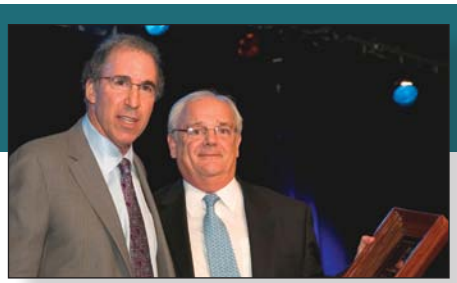
In Ludwig v. Yellow Cab, partner Douglas Saeltzer and associate Andrew P. McDevitt obtained a verdict of $416,895 on behalf of a 28-year-old San Franciscan who, after hailing a taxi cab, became involved in a verbal dispute with the driver when the cabbie refused to take him to his requested destination. While the plaintiff stood alongside the cab's open passenger-side window, the driver stepped on the gas and made a sudden right turn, knocking over the plaintiff and running over his left leg. The plaintiff was unable to take down the license plate or number of the cab. Doug and Andy were required to prove that the vehicle was a Yellow Cab via extensive circumstantial evidence. At trial, Yellow Cab argued that its vehicle was not involved, and that the yellow color scheme on the offending cab was common in San Francisco and was just as likely an illegal "gypsy cab" or the car of another company.

Mr. Ludwig sustained fractures of his left tibia and fibula, requiring open reduction and internal fixation. He continued to

*Continued on page three*

*Kammerer v. Alimak Hek*

# MICHAEL KELLY RECEIVES CAOC CARTWRIGHT AWARD



*Mike Kelly receives Cartwright Award from CAOC President–Elect John Feder*

On Saturday evening, November 10, 2012, at the Palace Hotel in San Francisco, Walkup partner Michael Kelly received the Consumer Attorneys of California's prestigious Robert E. Cartwright Award which is given annually to a CAOC member acknowledging excellence in the teaching of trial advocacy to fellow attorneys and students.

Past recipients of the Cartwright Award have included such stalwarts as Thomas Girardi, Thomas Brandi, Ron Rouda, Wylie Aitken and Craig Needham.

Mike's efforts in the area of trial advocacy teaching are near legendary. During his career he has presented lectures or presentations on more than 190 occasions for a variety of organizations and sponsors including CEB, ABOTA, CAOC, SFTLA, PLI, The Rutter Group, the National Institute of Trial Advocacy and the ABA.

Mike started teaching for NITA at its Regional Trial Skills Programs in 1985. He has served as a faculty member, or as a program team leader, at NITA programs in Berkeley, San Francisco, San Diego, Albuquerque, New York City, Boston, San Diego and Boulder, Colorado. From 1992 through 2012, Mike coordinated and supervised all of NITA's teacher training, and in that capacity oversaw the training of more than 400 trial advocacy instructors.

From 1981 through 2001, Mike was a member of the faculty at U.C. Hastings College of the Law, where he taught trial practice, evidence advocacy and personal injury litigation. In 2009 and 2010, he travelled to Japan to assist with the training of Japanese trial lawyers in connection with Japan's newly adopted jury trial system. Since 2000, Mike has made multiple visits to England, Ireland and Scotland to assist in the training of UK solicitors. In 2008 he traveled to the Republic of Georgia to train lawyers in that country's newly adopted adversarial system of courts. He has taught advocacy teachers from China, Japan, Moldova, Croatia and Kosovo.

Mike has lectured on topics including cross-examination, opening statement, final argument, demonstrative evidence, and the effective use of expert testimony. For 25 years, he served as a panelist for CEB's annual program entitled "Recent Developments in Torts." Most recently, Mike has worked with CAOC to stage an annual conference for plaintiff's attorneys involved in the prosecution of claims against Kaiser.

This award from CAOC follows by one year his receipt of the Robert E. Oliphant Service Award, presented by the Board of Directors of the National Institute of Trial Advocacy, for outstanding service as a program director, teacher and author for NITA.

We congratulate Mike on this most well-deserved honor.

## What's Your Question?


**Question: In a Kaiser case, if an arbitrator is selected through strike and rank, can the appointed arbitrator be challenged?**

Answer: Yes, California Code of Civil Procedure §1281.91 sets forth the procedure for disqualification of a designated arbitrator within 15 days after the required disclosure of CCP §1281.9 is made. There is no limit to the number of such challenges which may be asserted. (For more information on issues involved in Kaiser arbitrations, visit our specialized Kaiser website at www.kaiserinjurylawyer.com.)

**Question: My client's car was forced off the road when debris fell from a moving truck and she was injured. She was unable to get the license plate number. Can she pursue an uninsured motorist case?**

Answer: Unfortunately, the law in California continues to require that there be physical contact between any uninsured motor vehicle (including a "hit-and-run" or phantom vehicle) before there can be recovery under the UM coverage. The "physical contact" requirement is found in Insurance Code §11580.2. Physical contact is a condition precedent in every case. (For more information on issues involving uninsured motorist claims, visit our specialized website at www.uninsuredmotoristlawyer.com.)

**Question: Our daughter was just diagnosed with a mild form of cerebral palsy. We believe it is a result of an injury during the birth process. She is five years old. Is it too late to bring a claim?**

Answer: In California, the medical malpractice statute of limitations for a child under the full age of six, is three years, or until the child's eighth birthday, whichever is later. A California appellate court has determined that CCP §425.10 permits a child who is injured during the birthing process to bring an action up until the child's eighth birthday. (For more information on obstetrical and pediatric injury cases, visit our specialized website at www.thebirthinjurylawfirm.com.)

## We Provide Answers...

**Question: I was injured when my car was struck by a Muni bus. I have heard that Muni buses have video cameras on board. Is there a video recording of my accident?**

Answer: Yes. Both diesel and electrical Municipal Railway buses are equipped with two sets of video surveillance. One is owned and operated by Muni. Additionally, Muni contracts with a third-party provider of video surveillance, analysis and screening called "Drive Cam." These videos should be available to you in discovery. (For more information on prosecuting claims against the San Francisco Muni or other common carriers, visit our specialized website at www.muniaccidentlawyers.com.)

# Trio of Jury Verdicts Demostrates Firm's Expertise

*Continued from page one*

have residual pain and discomfort as of the time of trial.

Yellow's attorneys disputed the identity of the cab and denied that the driver did anything wrong.

Prior to trial, Yellow had made a settlement offer of $75,000. The trial, which consumed eight days, was followed by a jury vote of 12-0 on liability.

Less than four weeks later, in Wong v. Tom, partner Khaldoun Baghdadi and associates Emily Polcari and Valerie Rose, obtained a jury verdict in the amount of $7,363,000 on behalf of the parents of a 10-year-old girl who was killed while riding in the backseat of her mother's car. The collision occurred just blocks from the family home when Mrs. Wong's car was hit broadside by the defendant traveling eastbound on Woodside Road. The case was tried for 16 days to a San Mateo County jury, who reached a 12-0 verdict on liability. The defendant driver had been drinking on the day of the collision but was found not to be drunk at the time of the accident.

Throughout the pendency of the case, the defendant claimed that the plaintiff violated his right-of-way. He argued that she had been on her cell phone and had pulled in front of him.

Khaldoun, Emily and Valerie accurately recreated the events at the scene, demonstrating that because of the defendant's excessive speed (estimated variously at 67-80 miles an hour) Mrs. Wong was prevented from seeing, appreciating or reacting to any impending hazard.

The verdict came almost six years after the child's death and was the product of a persistent and determined effort to obtain justice on behalf of the parents. The defendant used every available procedural device to prolong the litigation. He resisted discovery, required multiple law and motion interventions, changed lawyers on two occasions, and resisted settlement attempts by three different mediators.

The jurors found no comparative fault on the part of the child's mother. The verdict is thought to be the largest ever obtained for the wrongful death of a child in San Mateo County.

Finally, in Kammerer v. Alimak Hek, A.B., partners Richard Schoenberger, Michael A. Kelly and associate Andrew McDevitt obtained an $8.3 million verdict on behalf of a 46-year-old hoist operator who lost his right arm when he fell from a moving construction hoist.

Kelly and Schoenberger were substituted into the case after it had been ongoing for more than four years. In the 180 days of their involvement, they secured experts, traveled across the United States and to Sweden, pinned down liability issues, handled pretrial motions, designed and prepared trial exhibits, and spent four weeks in trial.

The verdict from the unanimous jury was $8,328,000, representing past economic losses of $499,000, future economic losses of $1,820,000, and general (non-economic) damages of $6,000,000. The jurors voted 12-0 in finding the manufacturing defendant was negligent and that the involved hoist incorporated a design defect. The jurors also found the plaintiff's employer 33 percent negligent, which eliminated a $500,000 worker's compensation lien, and wiped out any credit against future benefits.

Plaintiff Robert Kammerer was a union operating engineer. Two days after Christmas in 2005, he was operating a 34-year-old Alimak Scando 4000 construction hoist. As he transported a co-employee to the roof of the four-story building, the lift malfunctioned and would not respond to input from the operator. Unbeknownst to the plaintiff, an electrical component had short-circuited, rendering the manual controls and safety interlock system inoperable.

As the hoist climbed upwards, Mr. Kammerer pushed the emergency "stop" button and pulled on a manual lever intended to shut off power. Neither attempt to stop the hoist worked. Believing that opening the hoist gate would cut off power, he pried the front door open as the machine passed the top landing on the roof. The hoist continued to run. Fearing the hoist would ultimately come off of its mast, Mr. Kammerer began to crawl out of the moving hoist, losing his balance, and falling fifty feet to the concrete below. His passenger, who remained in the hoist did not attempt to escape and sustained no physical injuries.

Prior to trial there was no offer of settlement.

At trial, the manufacturer first claimed that it had neither designed nor built the hoist. In a court trial on this issue, the court found against Alimak and determined that it was responsible for the hoist's design and manufacture.

Alimak thereafter claimed that all fault rested with the plaintiff who should never have jumped out of the moving hoist, and his employer, Sheedy Crane, who had failed to make regular periodic inspections of the hoist's electrical components.

Rich and Mike proved that the hoist's electrical circuitry violated ANSI requirements which existed when it was manufactured in 1971. They produced expert testimony showing that as early as 1963 ANSI required a backup electric circuit to prevent just this type of problem.

In his fall, Mr. Kammerer sustained vascular and orthopedic injuries to the right arm which were so extensive that the limb required amputation. He was able to return to his job within seven months, but he was plagued by chronic and unremitting neuropathic pain. His physicians predicted that his likely work-life expectancy would be 10 years or less because of overuse of the remaining limb.

Taken together, these three jury verdicts reflect the diversity of our practice, the skill of our attorneys, and the importance of juries in the civil justice system. They also reflect the flexibility of our trial teams in adapting to various case types, in different jurisdictions, before widely varying venires.

We welcome inquiry from attorneys and firms who are looking for association or referral in cases where skilled representation and superior trial skills are required.

# DEPUY ASR METAL-ON-METAL HIP LITIGATION HEADING FOR TRIAL

San Francisco Superior Court Judge Richard Kramer, JCCP coordination trial judge, has now adopted a plan for the first of the DePuy ASR bellwether trials in California to take place in June 2013. The precise case(s) which will go to trial have not been selected, but it has been agreed that the Walkup firm will be trial counsel in the first case to be tried.

Earlier trial dates have been scheduled for MDL cases pending in the Federal District Court in Toledo, Ohio, and a series of state court trials in Illinois and New Jersey.

Michael Kelly and Matthew Davis are serving as co-liaison counsel in the coordinated California state cases, and are working closely with lawyers representing over 2,000 plaintiffs in California.

Including all venues, some 10,000 ASR patients have filed lawsuits. Roughly 37,000 Americans were implanted with the ASR device between 2006 and 2010. This represents 36 percent of the patients who received the device worldwide. On August 24, 2010, DePuy recalled the faulty hip.

Recently published medical literature suggests that the failure rate for the ASR may ultimately be anywhere from 25 to 60 percent at five years.

No cases have yet gone to verdict. No attempt at global or individual resolution of the cases has occurred. It is hoped that verdicts in the upcoming cases will serve to give some indication of jury verdict value, and reasonable settlement value.

Walkup partners Kelly and Davis have been intimately involved in key liability discovery, including depositions of critical company witnesses in the areas of engineering, failure mode and effect analysis, marketing and sales.

Generic discovery efforts have been coordinated between the various state and federal court judges to try and minimize expense and expedite fact-finding. Attorneys from the various jurisdictions have collaborated to acquire the testimony of the primary design surgeons and biomechanical engineers who brought the disaster about, the marketing and advertising personnel who hawked the devices in the United States, and senior regulatory and management personnel with DePuy and Johnson & Johnson who were responsible for keeping the device on the market.

In the coming months, Kelly and Davis will participate in the depositions of DePuy's current and former presidents, as well as other high-ranking corporate officials. They will also participate in the taking of DePuy's designated trial experts in the initial cases set for trial.

More than 45 million pages of documents have been produced by DePuy, Johnson & Johnson, and related entities. As discovery has moved forward, more and more has been learned about the process by which the ASR device was brought to market, kept on the market, and ultimately recalled.

As time passes, more and more DePuy ASR patients are undergoing "revision" surgery – "revision" being the surgical removal of the failed metal-on-metal device, and replacement with a new artificial hip. Revision patients are at greater risk for complications such as infections and dislocations, compared to a patient undergoing an initial hip replacement.

The great majority of the information generated in the discovery process is confidential and governed by various protective orders. Thus, it is not possible to reveal with specificity any protected information developed in the depositions or document production. But, non-privileged information has now started to surface in peer reviewed medical journals. One of the co-designers of the ASR (Thomas Vail, M.D.) and DePuy consultants (Thomas Fehring, M.D. and William Griffin, M.D. of North Carolina) as well as a team of Southern California surgeons (headed by DePuy consultant Thomas Oakes, M.D.) have published articles describing the startling high premature failure rate of the ASR, patient injuries and flaws within the design of the ASR.

Dr. Oakes and his co-authors published an article in the Journal of Arthroplasty entitled "Disappointing Short-Term Results with the DePuy ASR XL" in which they reported that 28.6 percent of 70 hips studied demonstrated implant dysfunction. They wrote: "The failures noted with this design do not correlate to cup placement. The high rate of implant dysfunction at early follow-up suggests serious concerns with the concept of metal-on-metal total hip arthrodesis with an ultra large diameter femoral head paired with a monoblock acetabular cup."

Drs. Fehring and Griffin, in a September 2011 article in the same journal, pointedly observed that the ASR debacle might have been avoided had clinical trials been conducted before DePuy sold the device. Dr. Vail, together with researchers at UCSF and Duke, now questions the benefits of metal-on-metal prostheses in populations other than certain selected young adults.

The medical product liability team at the Walkup law firm continues to interview and be retained by new DePuy hip patients on a weekly basis. If you have existing clients with ASR prostheses that are now becoming symptomatic, who wish an honest and thorough evaluation of their legal rights, please call Valerie Rose, Matthew Davis or Michael Kelly of our firm to discuss potential referral or association.

# WALKUPDATES

**Doris Cheng, Emily Polcari, Conor Kelly, Andrew McDevitt** and **Valerie Rose** served as volunteer counselors for unrepresented tenants at mandatory settlement conferences in San Francisco Superior Court as part of the Volunteer Legal Service Program's Housing Negotiation Project… **Doris Cheng, Conor Kelly** and **Andrew McDevitt** served as coaches for the 2011-2012 Lowell High School Mock Trial Team,

*The 2012 Champion Lowell High Mock Trial Team coached by Doris Cheng, Conor Kelly and Andrew McDevitt*

and led them to a first-place finish in the San Francisco Regional Competition, and a sixth place finish at the State finals held in Sacramento…**Doris Cheng** received The Hon. Robert E. Keeton Award for Outstanding Service as a NITA Faculty Member. This award is named for Bob Keeton, one of the original teachers at the National Session and a long-time contributor to many programs. **Doris** also trained Solicitor Advocates in Belfast, Northern Ireland, and served as a panel presenter on computer simulation and animations for the San Francisco ABOTA Chapter's "Masters in Trial" Demonstration held in October...The Boalt Hall Trial Advocacy Program, which **Spencer Pahlke** directs, received its first-ever invitation to the law school trial advocacy Tournament of Champions, held this year in Chicago. **Spencer** was also named as a Rising Star for the second year by the Northern California Super Lawyers Magazine…**Melinda Derish** served as a judge at the American Bar Association's Regional National Appellate Advocacy Competition, which took place at the Northern District of California courthouse…**Sara Peters** is continuing with her volunteer work on behalf of Attorneys Bettering the Community. **Sara** has also accepted a position as a coach of the Stanford Mock Trial Team (her alma mater)… **Andrew McDevitt** announced his engagement to Kristin Edgren. He also served as Chair of the Civil Procedure Section on behalf of the Bar Association of San Francisco at the State Conference of Delegates in Monterey last September… **Paul Melodia** was listed by the Best Lawyers in America for the 20th consecutive year, a feat achieved by less than one-tenth of one percent of honorees…**Valerie Rose** served as a mock trial coach at her alma mater, Boalt Hall (aka Berkeley law)…**Doug Saeltzer**, manager of the ten-time Lawyers League Softball Champion "Mighty Mouthpiece Softball Company," and his wife, Kris, welcomed a new baby boy, Santiago. We congratulate the Saeltzers…**Conor M. Kelly** and Tanis Leuthold were married at a ceremony in Sonoma, with a reception at the Chateau St. Jean Winery…**Rich Schoenberger** participated as a faculty member at NITA's West Coast Teacher Training program held during the first week of November. **Rich** was also elected as Treasurer of the San Francisco Chapter of ABOTA…**Khaldoun Baghdadi** has returned to teach as an adjunct professor of law at University of California, Berkeley. He taught Civil Trial Practice in the Spring Semester. **Khaldoun** was invited to present on recent verdicts in auto defect cases at the American Bar Association's Conference on Emerging Issues in Product Liability Litigation, held in Arizona. In between trials and legal organization volunteer work, **Khaldoun** had the privilege of coaching a Junior Giants little league team. His team finished the season with no major injuries to the players or parents…Walkup partner and regular bike commuter **Matt Davis** was featured in an article on the front page of The Recorder legal newspaper ("Two Wheels Good? More Bikes Mean More Accidents, But Cases Aren't Slam Dunks"). **Matt** can be seen riding his bike in a video that accompanies the online version of the story, which can be found at http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202548993494. **Matt** has represented injured cyclists across Northern California and is an outspoken advocate of bicycle safety.

*Bike commuter Matt Davis on his way to work*

# MORE RECALLS FROM TOYOTA

Toyota is recalling 670,000 Prius hybrids in the U.S. -- out of 2.77 million Toyotas worldwide -- for weak steering linkages that could break and hybrid systems that could fail. Second-generation Prius models from 2004-2009 may have intermediate extension shafts that are of "insufficient strength" and could snap, said Alain Taverriti, a Toyota spokesman in Europe. The shafts connect the steering wheel near its gear box inside the cabin. Toyota says the shaft could break if drivers turn the steering wheel to its full left or right positions at low speeds, such as when parking, or if a tire were to hit a curb at low speeds.

In 2006, Toyota recalled 170,856 Prius models in the U.S. from the 2004-2006 model year for other steering components that could break -- caused by the same low-speed turning maneuvers -- and cause drivers to lose steering control.

Of the 670,000 models recalled, 350,000 will also be recalled to repair the electric water pump that helps cool the hybrid battery pack. Toyota said that the pump could stop working and cause the car's hybrid system to shut down while driving -- which could mean a complete loss of battery assist.

In October, Toyota issued the industry's largest recall in 16 years for faulty power-window switches that could cause electrical fires. A total of 7.43 million cars were affected, including 2.5 million in the U.S. During the first week of November, Toyota recalled the Scion iQ for airbag sensor problems.

# Recent Cases

## Workplace Injuries

### Laborer v. Earthmover Equipment Co.

In Laborer v. Earthmover Equipment Co. (S.F. Sup. Ct., confidential settlement), Richard H. Schoenberger and Michael A. Kelly negotiated an all-cash settlement in the amount of $7,000,000 on behalf of a laborer who was run over by a front-end loader when its operator inadvertently put the machine in reverse while the plaintiff was directing traffic at a job site. The machine ran over the plaintiff's left side causing permanent nerve damage to his left shoulder and arm as well as a fractured pelvis, multiple fractured ribs and lacerations of the spleen, kidney and bladder. Medical expenses exceeded $900,000. The 47-year-old plaintiff was rendered totally disabled from returning to his occupation as a laborer and light-equipment operator. The general contractor, who employed the loader operator, alleged that the plaintiff was in a place where he should not have been, and that he was partially at fault because he had time to avoid being run over before being struck. As part of the negotiated resolution, Rich and Mike were able to reduce the worker's compensation lien by 50 percent, and secure an agreement to keep worker's compensation benefits open for future medical care without any assertion of a credit by the employer's carrier.

## Vehicular Negligence

### Cyclist v. Defendants

In Cyclist v. Defendants (S.F. Sup. Ct., confidential settlement), Douglas Saeltzer and Emily Wecht Polcari successfully resolved a claim against multiple defendants for $4,173,975 on behalf of a 53-year-old man who was rendered a quadriplegic. The plaintiff was riding his folding bicycle as he approached a wide and busy intersection. He timed the light so that he entered the intersection just as his light turned green. Unbeknownst to the plaintiff, a taxi cab was still in the process of clearing the intersection. Once he saw the taxi, plaintiff slammed on his brakes, flew over the handlebars of his bicycle and the hood of taxicab, and landed on his head causing quadriplegia. The taxicab company argued that the taxi had entered the intersection with a green light and that the plaintiff had entered on a red light. Doug and Emily also included a product liability cause of action against the retailer, distributor, and manufacturer of the folding bicycle. They argued that the design of the bicycle placed the rider's center of gravity very high and his body very close to the handlebars, making the bicycle unstable and the rider prone to flipping over. The defendants argued that the bicycle was no more unstable than an ordinary bicycle, that the plaintiff had modified the bicycle in an unforeseeable way by placing a bar to extend the seat under the seat, that they had warned the plaintiff to remove the seat extender, and that the plaintiff caused the accident himself by "panic braking."

### Sunset Resident v. SUV

In Sunset Resident v. SUV (S.F. Sup. Ct., case number confidential), Paul Melodia and Conor M. Kelly reached a mediated settlement of $2,250,000 on behalf of a 71-year-old retiree. The plaintiff had emigrated to San Francisco from China in 1980. She was struck while crossing the street at the intersection of Turk and Leavenworth. The defendant driver initially told police that the woman had darted in front of his car, but during discovery admitted that he did not see the plaintiff prior to impact. The speed of the impact was minor, but caused the plaintiff to fall and strike her head. She suffered a basilar skull fracture with diffuse axonal injury. She was hospitalized one week at San Francisco General Hospital for pain management and then released. The total paid medical bills were less than $50,000 and there was no wage loss claim. Paul and Conor successfully demonstrated that the plaintiff had suffered a profound injury notwithstanding the minimal economic damages. Working with medical experts, and using family and friends to verify the impact of the brain injury, they created a video presentation that illustrated how the plaintiff's brain injury changed her life. The settlement included a lump sum payment of $1,750,000 and the purchase of a $500,000 annuity.

### Surviving Child v. Industrial Rigging Co.

In Surviving Child v. Industrial Rigging Co. (confidential settlement), Michael A. Kelly and Spencer Pahlke settled a wrongful death claim on behalf of the heirs of a vibrant 72-year-old woman who was walking to work in the SOMA district when she was struck by a large industrial truck. The operator of the rig failed to yield as the decedent crossed the street with the right-of-way. Not seeing the decedent, the vehicle operator struck her, throwing her several feet and causing an intracranial hemorrhage. A vigorous woman for her age, the decedent helped support her daughter and two grandchildren. Without substantial economic loss, the focus in the case was on establishing and proving the unique, close bond the adult plaintiff shared with her mother. At mediation our attorneys offered extensive interviews with co-workers and friends of the decedent, describing the tight-knit family relationship. The matter resolved for $2,000,000.

### PhD Student v. Driver

In PhD Student v. Driver (S.F. Sup. Ct., confidential settlement), Khaldoun Baghdadi and Sara Peters negotiated a seven-figure settlement on behalf of a pedestrian who sustained injury when a truck driver exited his vehicle and punched plaintiff in the face after the plaintiff had jaywalked in front of the defendant. The driver honked. Plaintiff made a shoulder-shrug gesture. The defendant then got out of his truck and punched plaintiff in the face, knocking him unconscious. When he fell to the ground the back of his head struck the asphalt and he sustained face and skull fractures. He was left with migraines and tinnitus. The defendant's employer filed a summary judgment motion, contending the driver was not in the course of his employment and not covered under any insurance policy. The driver was employed as a service technician in a job that put him on the road for most of the day. He did not have any record of violence known to his employer. Although the employer expressly prohibited violent behavior, Khaldoun and Sara argued that the employee was

# Recent Cases

acting for the employer's benefit by driving his vehicle to carry out the employer's time-sensitive projects. It was in the course of those duties that he foreseeably encountered jaywalkers and the potential for road rage. The court denied the defendant's summary judgment motion, finding the violence "arose out of" the employee's job-related duties. The parties then reached a mediated settlement.

### Motorcyclist v. Truck Driver

In Motorcyclist v. Truck Driver (court and county confidential), Richard Schoenberger and Conor M. Kelly secured a $950,000 settlement on behalf of a 42-year-old motorcyclist who was travelling to morning prayer at his mosque when he collided with a truck at an Oakland intersection. The intersection was controlled by traffic lights in all directions. There were no independent witnesses. The defendant truck driver claimed that his light was green. The plaintiff suffered multiple orthopedic injuries and a concussion in the crash. Due to his head injury, the plaintiff had no recollection of the crash and could not testify as to the color of his light. Rich and Conor were able to demonstrate that the truck driver's testimony regarding the accident was implausible and that he must have run the red light. They uncovered testimony from one of the investigating police officers that the defendant was ambivalent about the light at the scene, and using the resting place of the vehicles and the defendant's testimony regarding the speed of his vehicle, proved the defendant's version of events was impossible.

## Medical Negligence

### Toddler v. Medical Center Obstetrics Group

In Toddler v. Medical Center Obstetrics Group (San Mateo Co. Sup. Ct., confidential settlement), Paul Melodia and Melinda Derish negotiated a settlement of $6,000,000 on behalf of a 2-year-old boy who sustained hypoxic brain injury during labor and delivery. Paul and Melinda proved that the labor and delivery nurse and the obstetrician failed to communicate when the mother's uterine and fetal monitor tracings demonstrated signs of placental abruption. The mother was at risk for placental abruption because of preeclampsia and an intravenous infusion of Pitocin for induction of labor. After the mother had received several hours of Pitocin the obstetrician's examination showed the cervix was dilating. The obstetrician concluded that labor was progressing adequately and left the hospital to go back to his office. Shortly after he left the bedside, signs of placental abruption appeared - contractions were too strong and too frequent and the uterus never relaxed to a normal baseline pressure. The labor and delivery nurse responded by shutting off the Pitocin and placing the mother on oxygen, but the uterine pressures continued to rise and soon fetal distress developed. The nurse claimed she recognized the emergency and called the obstetrician. He in turn claimed the nurse did not inform him adequately about the emergency during their phone conversation. By the time the baby was finally delivered he was limp and pale, not breathing, and without a heart rate, having suffered hypoxic ischemic encephalopathy.

### ICU Patient v. Southbay Hospital

In ICU Patient v. Southbay Hospital (court and venue confidential), Doug Saeltzer and Melinda Derish negotiated a $4,000,000 settlement on behalf of a young man who was left in a permanent vegetative state after hospital physicians and nurses failed to treat worsening sepsis and pneumonia and overdosed him with intravenous tranquilizers, causing ischemic brain damage. The plaintiff, a 27-year-old restaurant worker, presented to the Emergency Room with vomiting, shortness of breath, and pleuritic chest pain. Blood tests and a chest CT scan proved consistent with sepsis and pneumonia. The ER physician started intravenous antibiotics and transferred the patient to the ICU, but no ICU physician assumed responsibility for his care. Instead his internist ordered an autopilot nursing protocol that authorized the nurses to give escalating doses of intravenous tranquilizers. Overnight the patient developed signs of worsening sepsis and impending respiratory failure. Instead of summoning a physician to the bedside the nurses continued to give intravenous tranquilizers. Finally, after 20 hours without evaluation by a physician, the patient became obtunded and his breathing slowed. The physician who finally did arrive at the bedside lacked the ICU skills to place a breathing tube to connect the patient to a ventilator. The defendants claimed the nurses' use of tranquilizers was proper according to "protocol." Doug and Melinda were able to establish that the hospital endangered the patient by allowing the nurses to follow an autopilot drug protocol to treat the patient's worsening respiratory and neurologic status.

### Vision Care Member v. HMO

In Vision Care Member v. HMO, Doug Saeltzer and Melinda Derish obtained a $2,000,000 settlement on behalf of a teenage girl who experienced delayed treatment of a surgically treatable condition called pseudotumor cerebri. The previously healthy girl presented several times to a clinic operated by the HMO with the new onset of severe headaches and visual complaints, which began after she had received a tetracycline type antibiotic. Despite this classic presentation of pseudotumor cerebri, no ophthalmology evaluation was performed for two weeks. Once the diagnosis was finally made, the attending physicians failed to recognize the need for emergency surgical intervention, allowing her vision to deteriorate for three more weeks. By then, increased pressure on her optic nerve had caused permanent vision loss that could not be reversed.

## Premises Liability

### Guest v. Tahoe Homeowner

In Guest v. Tahoe Homeowner (confidential settlement), Michael Kelly and Conor M. Kelly recovered $1,600,000 on behalf of a 56-year-old Marin resident who fell from a second story balcony while visiting a friend's cabin near Lake Tahoe. The plaintiff leaned against a deck railing to speak to his friend below and it gave way. He fell more than 20 feet landing on his feet, sustaining a severely comminuted calcaneus fracture and a spinal compression fracture. During discovery, it was revealed that the defendant had installed

*Continued on back page*

# Recent Cases

*Continued from page seven*

the deck railing shortly before the incident but had not properly secured it. Within days of the fall, the plaintiff underwent surgery to repair the calcaneus fracture. He underwent a second surgery a year later to remove the hardware placed during the first surgery. He claimed past medical expenses and the cost of a future surgery. Medical expense were $140,000. Lost wages were in excess of $200,000. The plaintiff was a self-employed realtor and experienced a reduction in sales commissions. The defendant did not dispute liability but alleged comparative fault and resisted the wage loss claim, arguing that the plaintiff's decreased earnings were due to the recession. The defense also disputed that any future surgery would be necessary. The settlement was reached after two full day mediation sessions.

## Product Liability

### Male Consumer v. Surgical Toolmaker

In Male Consumer v. Surgical Toolmaker (confidential settlement), Doris Cheng and Conor M. Kelly negotiated a $1,409,999 settlement on behalf of a 41-year-old plaintiff who underwent a urethrotomy to dissect scar tissue. During the procedure, the tip of the surgical instrument fractured. The surgeon used a surgical grasper to retrieve the piece of the fractured blade. He then attached a second blade and attempted to cut through the scar tissue once again, only to have the second blade fracture as well. This time, the fracture fragment migrated behind the pubic symphysis, making an open procedure and wide exploration necessary to remove the broken piece. The retrieval surgery lasted more than five hours. The plaintiff suffered significant blood loss intra-operatively. His kidney function deteriorated and he required dialysis following surgery. He remained in the hospital for three weeks. The plaintiff suffered residual decreased sensitivity around his genitals. The defendant aggressively disputed liability, claiming there was no defect with the metal; the materials and assembly of the product conformed to all prevailing standards; and the fractured tips could only have been caused by inappropriate surgical technique. The parties settled after lengthy mediation efforts.

## Uninsured Motorist

### Elders v. Defendant Driver

In Elders v. Defendant Driver (Uninsured Motorist Arbitration), Spencer Pahlke obtained a $500,000 settlement on behalf of a couple struck by a car while crossing a street in Oakland. The couple was attempting to cross Claremont when a passing driver struck them. The impact fractured the husband's hip. The wife suffered a minor ankle fracture. With a third party policy in the statutory minimum, the focus was on plaintiffs' $250,000 / $500,000 UM/UIM policy. The wife had an excellent medical recovery and less than $25,000 in paid medical bills. To support a policy limit demand, Spencer stressed the emotional impact of the incident, using a video interview to make this point. Given the impact of Howell, the wife's recovery was more than ten times the paid medical bills.

## Elder Care Liability

### Senior v. Paratransit Company

In Senior v. Paratransit Company (S.F. Sup. Ct., confidential settlement), Sara Peters resolved a wrongful death case brought by the adult children of a 78-year-old disabled woman who was undergoing outpatient dialysis for end-stage renal disease. Her family enrolled her in defendant's paratransit service and requested that someone carry her up and down the stairs to her home because she was wheelchair bound. The company promised that its employees would carry the decedent as requested. The dispatcher who scheduled her first ride did not arrange for stair assistance. The bus driver who arrived required the decedent to get out of her wheelchair and walk down the stairs. She collapsed, fracturing both femurs. She required surgical intervention for the femur fractures and after a several-month hospital stay, succumbed to infection. Causation was disputed with the defendant company arguing pre-existing infections and bone density problems caused the death. The parties settled for $375,000.

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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