

Attorneys:

Lin L. Duiven, Of Counsel

Colin R. Hatcher

David L. Hart

David J. Streza

Temojai W. Inhofe

Courtney M. King

Inside this issue:

Wrongful Death or Survival Action? 1

Recent Binding Arbitration Update 1

“Genuine Dispute” – a Defense to a Bad Faith Lawsuit 3

Recent Trial Update 5

Upcoming Events 8

# California Case Law Quarterly



Volume V, Issue I

Spring 2007

## Wrongful Death or Survival Action?

**By Colin Hatcher**  
Associate Attorney/Staff  
Writer

Cholakian & Associates has a substantial practice defending clients in catastrophic vehicle and commercial trucking accidents.

In cases of fatal accidents, two different kinds of civil action can be brought against the person responsible for the fatality. These are called “Wrongful Death” suits and “Survival Actions.” Both are strictly governed by statute and each has its own specific rules for recovery. (Wrongful Death – section 377.60 onwards of California’s Code of Civil Procedure; Survival Action – section 377.30 onwards). The difference between them is significant as to what kinds of damages can be recovered.

### WRONGFUL DEATH

When a person dies through the negligence of another, Wrongful Death claims can be brought by the heirs (usually the immediate families) of the deceased persons, who have a right to bring claims for their loss of future financial support (economic losses) from the deceased person, and for the loss of their loving relationships with the deceased (a non-economic loss that in a civil action is measured in monetary terms). The statute is also very precise as to who can be an “heir” in a Wrongful Death case, and is also very clear

about what kinds of damages can be claimed.

Damages in Wrongful Death cases are limited to the damages suffered by the heirs, not the damages suffered by the deceased:

*“In California, a wrongful death action is a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived.”* *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 283

From a Defense point of view, one of the most important rules on damages in Wrongful Death cases is that punitive Damages (damages awarded on top of all other damages, solely to “punish” a reckless Defendant for their conduct) are not permitted in a Wrongful Death case:

*“The ordinary wrongful death damages will include economic damages (financial support and loss of services) and non-economic damages (loss of companionship and consortium). (Code Civ. Proc., § 377.61.) They will not include*

*(Continued on page 2)*

## Recent Binding Arbitration Update *Michelle Smith v. Doug Orlich*

**By Lin Duiven**  
Of Counsel/Staff Writer

### Facts:

The chain of events that led to the subject accident was somewhat bizarre. Plaintiff Michelle Smith, age 30, was driving a rental car with family members as passengers. They were returning to their hotel following a rehearsal dinner for a sister’s wedding at about 10:00 p.m. on August 22, 1999. Her brother-in-law, one of the passengers, vomited in the back seat. Plaintiff pulled off to the side of the roadway and stopped the car so that the passengers could get out and clean up. Plaintiff engaged the emergency brake, took off her seat belt, and turned to check a sleeping baby. She saw headlights

approaching from behind her. The vehicle was struck by defendant, who was severely intoxicated at the time.

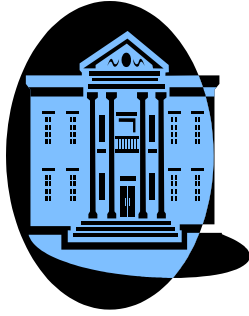
Plaintiff was evidently ejected from the vehicle, because she was found 40 – 50 feet away, on the opposite side of the roadway. She claimed that she landed on her head and “skidded on her face.” The seat-belted baby received no injuries.

Defendant admitted that he caused the collision, but disputed the nature and extent of plaintiff’s injuries and damages.

### Procedural Background:

Because the accident occurred in the State of Wisconsin and plain-

*(Continued on page 2)*



~  
**Even a short  
 period of time  
 between injury  
 and death can  
 trigger a  
 Survival Action.**  
 ~

## Wrongful Death or Survival Action?

punitive damages, nor any other special or separately arising damages to the heirs that might conceivably be separately attributable to the acts of the employer in negligently entrusting a vehicle to an allegedly accident-prone driver." *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 861-862 ; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 450.

### SURVIVAL ACTIONS

A Survival Action on the other hand is a special form of Wrongful Death claim that arises when a deceased person is not killed immediately by an accident, but survives for a period of time between the time of injury and the time of death. This period of survival could be months, or it could be minutes. Even a short period of time (e.g. 60 seconds) between injury and death can trigger a Survival Action. Thus, the findings as to cause and time of death by the Coroner after an autopsy is critical in determining whether an action can be brought as a Wrongful Death action or as a Survival Action. The term "Survival" does not refer to the deceased surviving an accident. It refers in fact to the cause of

action surviving beyond the death of the deceased:

*"Unlike a cause of action for wrongful death, a survivor cause of action is not a new cause of action that vests in the heirs on the death of the decedent. It is instead a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event. ... A cause of action that survives the death of a person passes to the decedent's successor in interest and is enforceable by the decedent's personal representative or, if none, by the decedent's successor in interest."* *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264-1265

In a Survival Action, the lawsuit is brought not by the heirs of the deceased, but by the deceased themselves, through a living representative. Furthermore, in a Survival Action the damages recoverable are limited to the actual loss or damage that the decedent sustained or incurred between the time of injury and the time of death (for example medical bills and destruction of clothing). Significantly punitive damages are permitted in a Survivor

Action, if the Plaintiff can prove willful, wanton, reckless or malicious conduct by the Defendant. However, damages for any pain, suffering, or disfigurement the deceased may have suffered before death, are not recoverable (See Code of Civil Procedure section 377.34).

### BOTH KINDS OF ACTION CAN BE BROUGHT IN THE SAME LAWSUIT

In a case where a person is killed in an accident, but is not killed instantly, both Wrongful Death and Survival Action can be brought. The Wrongful Death case however, can only be brought by the heirs of the deceased. The Survival Action on the other hand can only be brought on behalf of the deceased by his or her representative. Thus in this kind of case, both deceased (or rather the deceased's estate) and heirs are permitted to seek monetary compensation.

In cases where there is no time lapse between injury and death, Wrongful Death can proceed, but there can be no Survival

*(Continued on page 6)*

### Recent Binding Arbitration Update

*(Continued from page 1)*  
 tiff's attorneys were located in Spokane, Washington, and plaintiff resided in Santa Clara County, California, the parties stipulated to a binding arbitration with Kevin G. Kelly of the American Arbitration Association to take place in the San Francisco Bay Area..

#### **Claimed injuries:**

Plaintiff Michelle Smith put forth a litany of injuries, both physical and mental, that she claims to have incurred as a result of this automobile accident. She claims she suffered a brain injury. She testified that she is no longer a "people person" and that she's "not as smart as she used to be."

After the accident, she had problems with memory, concentration, and was diagnosed with post traumatic stress disorder. Several of her friends and family members testified that Michelle lost her "bubbly personality," tended to isolate herself and was apt to "snap" at her mother and other relatives, in complete contrast to her pre-accident personality.

Plaintiff also claimed a variety of bodily injuries. She had significant road rash on her face and shoulders, cuts in her eyebrows, cuts and scrapes on her elbows and knees and cuts on her feet. She received extensive debridement to her face as well as other

scar-avoiding treatment, which, after about two years, were successful in eliminating visible scarring. She had neck, shoulder and arm pain, which resolved.

Other more unusual claims included "floaters" in her eyes and seeing a blue light for a while after the accident, along with difficulty in focusing. Her treating ophthalmologist diagnosed a slight ocular deviation at the 4<sup>th</sup> nerve, but this had resolved in six months. Ms. Smith claimed a wisdom tooth was "dislodged" when she landed on the pavement, and it was surgically treated. Plaintiff

*(Continued on page 3)*

## Recent Binding Arbitration Update

(Continued from page 2)

also complained of a ringing in her ears, which gradually dissipated, and for which she received no medical treatment. Plaintiff's only residual other than the claimed brain-damage symptoms consisted of frequent headaches

The defense argued that Ms. Smith – an extremely intelligent and talented young woman – was extremely somatically aware, rather entranced with her role as a litigant, and that nearly all the injuries she sustained resolved long ago. Plaintiff, in contrast to her self-image, is a highly valued employee, and works several part time jobs in addition to her full time position as a grant writer. She has had the same boyfriend for fifteen years, and they live together in a stable, loving relationship.

### Medical treatment:

Plaintiff received emergency room treatment, with some orthopedic follow-up in the weeks and months after the accident. Her vision and hearing

problems resolved. She never received any psychiatric counseling or treatment for her PTSD claims, but instead began three years of biofeedback therapy with a licensed MFT provider, Dr. Lillian Marcus. Dr. Marcus treated her with a technique that involves the use of what is termed a QEEG (Quantitative ElectroEncephalogram). A QEEG is a method of computer processing raw EEGs that, according to some people, highlights certain data. Defense expert, board-certified neurologist Michael Cohen, opined that this method produces significant abnormalities where none exist.

Plaintiff's QEEG expert, Dr. Jack Johnstone, was forced to admit that QEEG readings should not be used as a diagnostic tool alone. He testified that there are "no clear EEG or QEEG features unique to brain injury." He agrees with the American Psychological Association's position that QEEG cannot discriminate between psychiatric and normal patients and should not be used for such purposes.

Nonetheless, plaintiff had almost 100 treatments with Dr. Marcus, and was continuing with the therapy up to the time of the arbitration in August 2006.

The neuro-psychological testing performed by experts on both sides of this lawsuit confirmed that Ms. Smith is extremely bright. The Independent Psychological Examination conducted by Dr. Carol Walser showed that plaintiff tested in the **superior to very superior** I.Q. range

Dr. Walser testified that plaintiff's alleged negative reactions when she heard sounds of glass breaking or when she saw accidents along the roadway, or even hesitating to drive a car are not sufficient to establish a diagnosis of PTSD.

Defendant did not challenge the possibility that Ms. Smith suffered a mild concussion as a result of the accident, but ar-

(Continued on page 7)

~

**The "genuine dispute" standard is merely a means of objectively establishing that the insurer treated the insured fairly and in good faith**

~

## "Genuine Dispute" – a Defense to a Bad Faith Lawsuit

**By Temojai Inhofe**  
Associate Attorney/Staff Writer

When an insurance carrier questions the validity of a UM/UIM claim, either by challenging coverage or by questioning the amount of damages claimed, there is often a concern that at some point in the future the Claimant may bring a bad faith action. It has however been established in California that an insurer denying or delaying the payment of policy benefits has a defense to a claim of bad faith where the insurer can show the existence of a "genuine dispute" over coverage or payments. *Fraleigh v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282 [97 Cal.Rptr.2d 386].

Recently in California, in *Laura Rappaport-Scott v. Interinsurance*

*Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831 [53 Cal.Rptr.3d 245], the Court illustrated a practical application of this "genuine dispute" defense.

In this case Interinsurance Exchange issued an automobile insurance policy to Rappaport-Scott which included coverage for bodily injury caused by uninsured and underinsured motorists, with a limit of \$100,000.00 per person. Under the terms of that coverage, Interinsurance agreed to pay all sums that the insured was "legally entitled to recover" as damages from an uninsured or underinsured motorist because of bodily injury caused by said uninsured or underinsured motorist.

After Rappaport-Scott sustained injuries in a rear-end automobile accident caused by an underinsured third party, and she collected the \$25,000.00 coverage limit from that party, she made a claim to her own insurer. Rappaport-Scott then made a demand for arbitration of her claim and the parties submitted the claim to arbitration. She claimed that the total value of her injuries and losses caused by the underinsured motorist was \$346,732.34, including \$26,732.34 in medical expenses incurred, \$20,000 in future medical expenses, \$150,000 in lost income, and \$150,000 in general damages. She requested an arbitration award in the amount of \$75,000, calculated by deduct-

(Continued on page 4)



### *“Genuine Dispute” – a Defense to a Bad Faith Lawsuit*

(Continued from page 3)  
ing the \$25,000 paid by the underinsured motorist from the \$100,000 coverage limit. She also made what she characterized as a “settlement demand” on Interinsurance for payment in that amount. Interinsurance offered her only \$7,000 on the claim.

At the arbitration hearing the parties stipulated that: the policy provided coverage for the claim; that Rappaport-Scott had received some benefits under her medical expenses coverage and \$25,000 from the underinsured motorist; and, that she was free of fault. The parties disputed only the amount payable on the claim. The arbitrator found that Rappaport-Scott had suffered damages of \$15,000 for medical expenses, \$3,000 for loss of earnings and \$45,000 for pain, suffering, and future medical care, for a total of \$63,000. The arbitrator reduced the total amount by \$25,000 for the settlement with the underinsured motorist and \$10,000 for medical expenses benefits previously paid, and awarded a net amount of \$28,000. The parties corrected the \$10,000 figure to reflect the actual prior payment of benefits of only \$ 5,000, and agreed that Rappaport-Scott was entitled to \$33,000 under the award.

After Interinsurance paid the \$33,000.00 under the arbitration award, Rappaport-Scott sued for

bad faith, alleging that Interinsurance had refused to negotiate with her in good faith and had caused unreasonable delay in concluding her underinsurance claim. She based her allegation of bad faith upon the difference between the amount offered by Interinsurance (\$7,000) and the net arbitration award (\$33,000).

The trial court ruled, and the Court of Appeal affirmed, that despite the disparity between the \$7,000 offered and the \$33,000 ultimately paid, the “vast difference” between the amount Rappaport-Scott claimed as damages (\$346,000) and the amount in damages determined by the arbitrator (\$63,000) demonstrated, as a matter of law, that a “genuine dispute” existed as to the amount payable on the claim. Therefore, the Court determined that Rappaport-Scott failed to allege facts sufficient to support her breach of the implied covenant based on an unreasonable delay in the payment of policy benefits.

Some “genuine disputes” can be on the issue of damages, as above. Others can be threshold disputes affecting coverage. One such example of a threshold dispute is what is sometimes referred to as a “phantom car” UM claim. In this type of UM

claim the Claimant alleges that he was struck by a car in a hit and run collision, but has no evidence as to the adverse driver nor the adverse vehicle, and no proof that such a car ever existed.

Pursuant to Insurance Code section 11580.2(b) in order for a UM claim to be made where the adverse driver is unknown, bodily injury must be shown to have resulted from either physical contact between an adverse vehicle and the insured’s vehicle, or physical contact between an adverse vehicle and the insured’s body:

“...Insurance Code section 11580.2 ... provides, in statutory terms, that the insurer shall pay all sums which the insured shall become legally entitled to recover as damages for bodily injury from the owner or operator of an uninsured motor vehicle. An uninsured motor vehicle is defined to include a hit-and-run automobile which causes “bodily injury” to the insured arising “out of physical contact of such automobile with the insured or with an automobile which the insured is occupying.”” *Orpustan v. State Farm* (1972) 7 Cal.3d 988, 990 [103 Cal.Rptr. 919, 920].

The purpose of the “physical contact” requirement is to curb

(Continued on page 6)



### *Merri Olive—In Loving Memory*

Cholakian & Associates recently lost a long time employee and dear friend.

If there ever was a model employee, Merri Olive was her name. Merri was the type of employee who reports to work early and leaves the office late. Responsible, hard-working and dedicated (and that infectious laugh!), she was one of the pillars of the

firm.

Every firm should have a Merri Olive. We were one of the lucky ones.

Merri, you will be sorely missed...

## *Recent Trial Update*

### **DINA SAFFORD V. WALTER BUTLER ANOTHER DEFENSE VERDICT FOR CHOLAKIAN & ASSOCIATES**

**By Colin Hatcher**

Associate Attorney/Staff Writer

Recently the Cholakian firm won yet another impressive Defense verdict in an environmental commercial building case.

In this case, from April 2003 to October 2005, plaintiff Dina Safford, unemployed, rented a two-bedroom Richmond apartment from married couple Gi Gi Wilson and Walter Butler for \$1,000 per month. In February 2004, mold was discovered in the unit. Claiming mold-related physical illness and emotional distress damages, Safford sued Butler for breach of warranty of habitability, breach of implied covenant of quiet enjoyment, nuisance, negligent infliction of emotional distress, intentional infliction of emotional distress and unlawful business practices. (Wilson was not included as a defendant.) Safford claimed that Butler failed to provide her with habitable living quarters, reporting that the unit had mold and mice. Safford also claimed that she frequently alerted Butler to the conditions, but he failed to respond in a timely or adequate manner. Safford also claimed that the building envelope had breaches, which allowed water intrusion and mold. She said that she regularly cleaned inside the unit, but that mold grew anyway.

Butler disputed the allegations, contending that he was not made aware of the mold problem until Feb. 15, 2005, and that he immediately brought in a mold remediation company to inspect the premises the following day. Butler claimed that Safford was 100% liable for the condition of the unit due to her failure to clean or ventilate, and the fact that she was overcrowding the unit by allowing additional people to live in the unit without the landlords' approval or knowledge. Based upon his contention that the problems in the unit were solely tenant caused, Butler filed a Cross-complaint against Safford, for \$6,000.00 in combined rent arrears and the cost of clean up.

Safford claimed that she was allergic to the mold. She claimed \$4,000 in medical specials with unknown future medical expenses. She also made an unspecified demand for emotional distress damages, a \$14,000 claim for damage to personal property and an \$18,000 claim for loss of rental value to the unit. In addition Safford sought \$150,000 in attorney fees.

Expert inspection by the Defense found mold in the master bedroom and high humidity throughout the unit, but no problems in the envelope. Defense construction expert Dwayne Brown, mold expert Eric Brown and water intrusion expert Victor McQueen testified for the Defense that the moisture problems were caused by Safford's closing the windows and failing to provide adequate ventilation. Notably, Defense counsel was granted a motion excluding Plaintiff's housing expert Claudio Bluer on the grounds that he did not qualify as an expert on building habitability.

The Defense was also granted a motion excluding all of Safford's personal injury claims due to lack of evidence. Defendant's toxicology expert Janet Weiss testified that Safford was allergic to dust mites, not mold.

On the property claims, Defense mold expert Eric Brown found that Safford's private property could have easily been cleaned and restored, and did not need to be thrown away, as she had done. Defense presented evidence that the total personal property loss was no more than \$1,000 and that the rental value of the property was commensurate with market value.

After a two week trial and seven hours of deliberations the jury returned a Defense verdict. On the cross-complaint, the jury found for Butler, awarding \$5,959. After trial the court also awarded Defendant attorney fees of \$93,457.75 and Costs of \$64,170.52 (total award to the Defense: \$175,628.270).



### *“Genuine Dispute” – a Defense to a Bad Faith Lawsuit*

(Continued from page 4)  
fraudulent claims, and to reduce the possibility that an insured might receive uninsured motorist coverage for injuries caused by the insured’s own negligence:

“These amendments . . . were designed to curb fraud, collusion, and other abuses arising from claims that phantom cars had caused accidents which, in fact, had resulted solely from the carelessness of the insured. For example, a driver who fell asleep and hit a telephone pole might claim he had swerved off the road to avoid being hit by an unidentified vehicle. The provision requiring physical contact with the unknown vehicle was added to the statute in order to eliminate such fictitious claims.”

*State Farm v. Yang* (1995) 35 Cal.App.4th 563, 569 [41 Cal.Rptr.2d 210, 213].

The court in *Orpustan* continued:

“The statute makes proof of “physical contact” a condition precedent in every case for the recovery of damages caused by an unknown vehicle. There are no exceptions.” *Orpustan, supra.*, at 994 [103 Cal.Rptr., at 923].

The need for a “genuine dispute” is especially important when coverage is being questioned. Insurance carriers choosing to challenge a “phantom car” claim, for example, would be wise to establish in their files beyond any dispute the existence of a “genuine dispute”, so as to avoid any accusation later that they acted in bad faith in challenging the claim. To accomplish this a complete investigation is required, in which the carrier can clearly show that it’s position on coverage was not motivated by intent to frustrate the Claimant’s

claim, but was taken in reliance on the objective and scientific advice of independently retained expert witnesses in the relevant fields (e.g. accident reconstruction, biomechanics, or medical).

As attorney and insurance bad faith expert witness Barry Zalva, of Culver City, CA writes: “The “genuine dispute” standard is merely a means of objectively establishing that the insurer treated the insured fairly and in good faith. The insurer with a well trained, intelligent and thorough claims department . . . will avoid charges of bad faith . . . by proving beyond a preponderance of the available evidence that the claim denial was based upon a well reasoned decision where the insurer is allowed to dispute and debate a genuine dispute between it and the insured as to the applicability of coverage.”

### *Wrongful Death or Survival Action?*

(Continued from page 2)

Action. Thus, from a Defense point of view, cases where there is a time lapse between injury and death give rise to more Plaintiffs and greater liability.

#### **LIMITATIONS ON RECOVERY**

Two areas of monetary recovery are barred to Plaintiffs in Wrongful Death cases and Survival Actions, which can come as a surprise to a jury:

Firstly, in both Wrongful Death cases and Survival Actions there is no recovery for any alleged pain and suffering experienced by the deceased at time of death. In Wrongful Death cases the deceased dies immediately. In Survival Actions there is a period of time between injury and death. But even in cases where there is evidence that the deceased actually suffered pain between injury and death, no recovery for this pain is permissible under the Survival Action statute. This can be a difficult concept to grasp by a jury, who, on seeing evidence of great trauma in an accident, may wish to award money to the deceased for what he or she suffered at death. But the jury instructions issued to the jury in these kinds of cases clearly instructs the jury as to what it can and cannot award. Jury sympathy in tort claims usually translates into a monetary award for pain and suffering. But this is not permitted in Wrongful Death and Survival Actions:

“*In California, a claim for pain and suffering damages [of a deceased] does not survive the death of the victim.*”  
*Kuehn v. Childrens Hosp.* (1997) 119 F.3d 1296; Code of Civil Procedure section 377.34.

The second restriction on recovery of damages also comes as a surprise to juries: a Plaintiff in a Wrongful Death or a Survival Action may not recover for the grief experienced by the bereaved family. For Wrongful Death:

“*Damages awarded to an heir in a wrongful death action are in the nature of compensation for personal injury to the heir. A plaintiff in a wrongful death action is entitled to recover damages for his own pecuniary loss, which may include (1) the loss of the decedent’s financial support, services, training and advice, and (2) the pecuniary value of*



(Continued on page 7)



### *Gladiator of the Year!*

Cholakian & Associates is pleased to announce that Kevin Cholakian recently became the proud recipient of Farmers/Zurich Commercial Claims' 2006 Gladiator of the Year Award. The Gladiator of the Year award is presented annually by Farmers/Zurich in recognition of outstanding trial results to its top trial attorneys in California.

Mr. Cholakian successfully defended four high stake defense commercial

fire, environmental injury trials in 2006. All four cases were transferred cases from other law firms for Mr. Cholakian to try and with settlement offers that were rejected ranging from \$50,000 to \$250,000. As a result of his successful trial results, VerdictSearch National did a feature article in their April 30, 2007 issue on the firm. (VerdictSearch National; Vol. 6; Issue 18; April 30, 2007; Tactics in Practice, pp. 29)

### *Wrongful Death or Survival Action?*

(Continued from page 6)  
*the decedent's society and companionship—but he may not recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss.*" *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256 [45 Cal.Rptr.3d 222, 226-227].

And for Survival Actions, the Plaintiff may not recover for the grief experienced by the bereaved family, because in a Survival Action the Plaintiff can only recover for losses caused to the deceased (not to the family).

In the Cholakian firm's experience

Wrongful Death and Survival Actions are often plead poorly and incorrectly by Plaintiffs' counsel, mixing up the two types of action and mixing up damages. We often have to inform opposing counsel that the initial Complaints are defective and must be changed. The reluctance to modify their pleadings by Plaintiffs' counsel (which usually means eliminating various damages claims) often means that the initial stages of the Cholakian firm's defense work in these kinds of cases involves multiple motions to the court (Demurrers and Motions to Strike), to correct pleadings so as to eliminate claims for damages that are barred by law. In fact it is not unusual for Plaintiffs to have to

amend their Complaint several times before we are satisfied that the law is being properly followed. Many of our Wrongful Death cases and Survival Actions thus end up with a Third or Fourth Amended Complaint before we are willing to proceed to answer the Complaint. This is not the Defense being obstructive: the monetary stakes are high in catastrophic cases, and these cases involve death, grief and bereavement. But Cholakian & Associates would be failing in its ethical duties to its clients if it permitted monetary claims in Wrongful Death and Survival Actions, which are often driven by powerful emotions, to remain in these cases when they are clearly barred at law.

### *Recent Binding Arbitration Update*

(Continued from page 3)  
 sued that since Ms. Smith did not seek psychological treatment or diagnosis of any sort until March of 2001 – more than a year and a half after the accident, the potential that her late reported and long-lasting psychological symptoms were litigation inspired.

#### **Medical specials:**

Plaintiff claimed \$15,710 in past medical specials and future medicals specials for continuing treatment with Dr. Marcus.

#### **Employment-related claims:**

Michelle Smith had been employed at Friends for Youth, a non-profit corporation whose objective is matching youth with adult community member mentors, since 1997. She received regular raises (except when salary freezes were in effect)

from FFY. Her salary, not including bonuses, started at \$27,000 in 1997. At the time of arbitration, she was making \$67,275 in that position, and also had part time employment as a grant writer, earning approximately \$20,000 - \$30,000 per year.

Plaintiff claimed \$3,840.00 in lost earnings immediately after the accident, plus additional amounts for missed time due to medical appointments. The most problematic aspect of her claim involved testimony from her employer, which asserted that because of her personality changes, plaintiff would not be able to obtain the position of executive director of FFY or a similar non-profit organization, which was her ultimate career goal. The evidence, however, showed that Ms. Smith's yearly performance reviews were universally outstanding. There was no indication in any of the employment records -- even a

subtle hint -- that supported plaintiff's allegation that she found herself losing patience with some of the people she supervised.

Plaintiff's claims for lost future earnings and loss of earning capacity were significant components of her special damages. However, the arbitrator found that she failed to sustain her burden of proof and made no award for those claims.

#### **Demand and offer:**

Plaintiff asked the arbitrator to award \$1,000,000. Defendant admitted liability and had offered \$135,000 in settlement.

The binding arbitration hearing consumed 4-1/2 days, and resulted in an award of \$135,000, defendant's offer.

## CHOLAKIAN & ASSOCIATES

5 Thomas Mellon Circle, Ste. 105  
San Francisco, California 94134  
Phone: 415-467-8200  
Fax: :415-467-8206  
www.lawyers.com/cholakian

### Sacramento Office

Pacific Business Center  
770 'L' Street, Suite 950  
Sacramento, CA 95814  
Telephone (916) 341-7560

### Fresno Office

Valley Oak Executive Suites  
516 W. Shaw Avenue, Suite 200  
Fresno, CA 93704

Memberships :  
Defense Research Institute (DRI)

International Association of  
Defense Counsel

Northern California Association  
of Defense Counsel

American Bar Association

San Mateo Bar Association

Bar Association of San Francisco

Alameda County Bar Association

San Francisco Trial Lawyers  
Association

California Trial Lawyers  
Association

National Association of  
Subrogation Professionals  
(NASP)  
Chair in California

Trucking Industry Defense  
Association (TIDA)

San Francisco Defense  
Association  
(President)



Cholakian & Associates is listed in Best's Insurance Directory, is AV rated by Martindale-Hubbell, and is retained defense counsel to a dozen major insurance companies doing business in California. This practice includes, though it is not limited to, the representation of carriers regarding commercial and personal lines claims as well as the defense of insureds involved in serious personal injury catastrophic trucking accident litigation, complex commercial litigation, product liability/fire subrogation matters and coverage litigation. This includes defense of matters involving allegations of construction defects, mold related claims, inter and intrastate trucking, commercial landlord/tenant, environmental liability, professional liability, including insurance agents, labor and employment law, officer's and director's liability, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

## UPCOMING EVENTS

### **San Francisco Defense Seminar Association Luncheon\*:**

### **Guest Speaker: The Honorable Carol A. Corrigan, Associate Justice of the California Supreme Court**

July 12, 2007—San Francisco, CA

Justice Corrigan will be speaking about her work on rewriting California Jury Instructions.

For more information about these events, please contact Maureen Liu at (415) 467-8200 ext. 200  
\*Kevin Cholakian is in his fifth term as President of DSA

**Kevin K. Cholakian** attended North Carolina School of the Arts in Winston-Salem, North Carolina his senior year of high school 1971-72 on a full scholarship. Mr. Cholakian then attended San Francisco Conservatory of Music on a Ford Foundation Scholarship from 1972-1974. He graduated magna cum laude with a B.A. in Philosophy from California State University, in 1977. From 1976 to 1978, he served as Chief Administrative Assistant to California State Senator Rose Ann Vuich (first woman elected to the California State Senate serving Central California). He received his law degree from the University of California, San Francisco Hastings College of the Law in 1981. At Hastings, he was Executive Editor of the Hastings Communications and Entertainment Law Journal. Mr. Cholakian began his legal career practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy (1981-1983) and McCutchen, Doyle, Brown & Enersen (Bingham-McCutchen) in San Francisco (1983-1987). He managed the defense practice at AV rated 30 attorney civil defense firm Kinder, Wuertel & Cholakian (1988 through 1999). He began Cholakian & Associates in January 2000 and has continued to specialize in high exposure personal injury defense, product liability/fire subrogation matters, construction defect, coverage and employment/housing discrimination matters. Mr. Cholakian regularly defends cases that have exposures in excess of \$1,000,000.00. Mr. Cholakian also specializes in the defense of commercial housing/environmental, landlord-tenant and ADA cases. He has tried and defended more than 20 cases with verdict exposure greater than \$100,000.

Mr. Cholakian is a member of the following organizations: Defense Research Institute (DRI), the International Association of Defense Counsel, the Northern California Association of Defense Counsel, the American Bar Association, the San Mateo Bar Association, Bar Association of San Francisco, the San Francisco Trial Lawyers Association, the California Trial Lawyers Association, National Association of Subrogation Professionals (San Francisco Chapter President) (NASP), and Trucking Industry Defense Association (TIDA). Mr. Cholakian is the current President of the San Francisco Defense Seminar Association, a 40 year old organization comprised of defense litigators. Mr. Cholakian sits on the Executive Committee of the Board of Governors of the City Club of San Francisco.