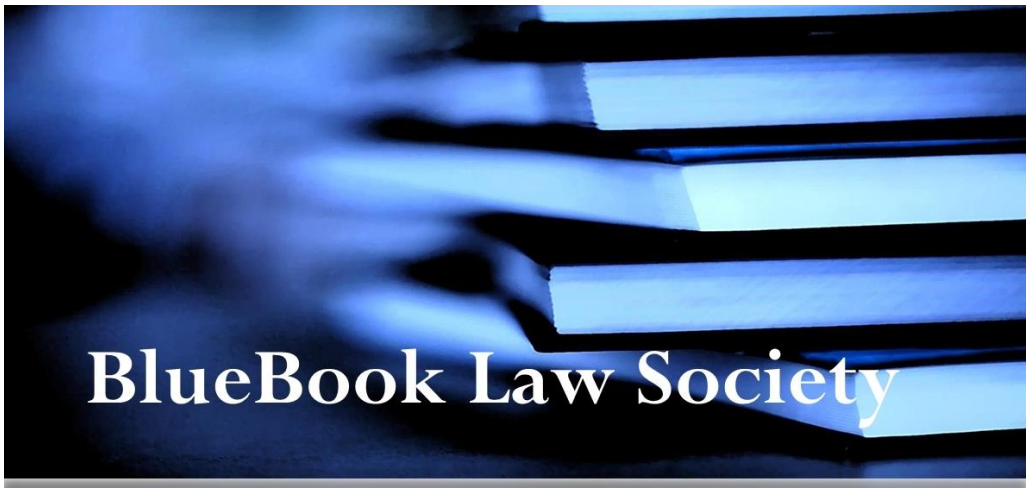

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A Catastrophic Pedestrian Accident in a Marked Crosswalk at an Uncontrolled Intersection—In a San Francisco Suburb

Attorneys: Rich Schoenberger, Doug Saeltzer; Firm: Walkup, Melodia, Kelly & Schoenberger
Verdict: $12.2 million dollars

When attorney Rich Schoenberger, of Walkup, Melodia, Kelly & Schoenberger sat down at his computer one long night in 2010, he was frustrated and discouraged. The case he and his firm had been working on for three years was slowly going nowhere and if something didn't change, his client—Emily Liou—would lose the case against Caltrans (California's Transit authority). If this happened, her parents would not have the money they desperately needed in order to take care of her for the rest of her life.

There are many varying characteristics of brilliant trial lawyers—of which Rich is one, being one of the very best in San Francisco, the Bay Area, and in fact, all of northern California—but the one thing they all have in common is a highly developed sense of intuition, and the

ability to rely on their gut instincts. Rich's instinct from years of practicing law told him that there was much more to this case than they were seeing. He was going to have to find out exactly what that was and then he was going to have to prove it. However, another common characteristic of brilliant trial lawyers is they don't like to lose—nor do they often—and Rich had resolutely decided that he was just not going to lose this case. Furthermore, his firm—Walkup, Melodia & Schoenberger—included some of the state's most highly respected and successful trial attorneys and they were all as equally committed. The quality of Emily's life simply depended on it. Losing was not an option.

The Accident at Ludeman Lane in Milbrae:

Unless you have been involved in a pedestrian accident, or you know someone who has, you have probably never pondered the dangers in simply crossing a street. The same probably could be said of Emily Liou, who on the night of March 28, 2006, at approximately 8 pm, was crossing El Camino Real (also known as State Route 82 or SR-82) at Ludeman Lane in Milbrae. Emily was a smart, engaging, responsible young woman—a senior at the local High School—with big dreams and a bright future. She had promised her father she would not be out late but would be home early enough to finish the day's homework assignment. Emily had almost successfully crossed the street on her way home when a driver hit her in what is known as a "marked" or designated crosswalk, in an uncontrolled intersection—those intersections without traffic signals or pedestrian activated controls. The driver who hit Emily was driving under the 35 mph speed limit and was not drinking, and she later testified that she had not seen Emily—who was wearing dark clothing—until it was too late. Emily was knocked violently to the ground and suffered massive brain damage. We will never know what ran through Emily's mind at that time, as she was catastrophically injured and has remained in a vegetative state ever since. As a result of that night, her life was irrevocably altered and most tragically shortened. Emily was only 17 years old at the time.

Pedestrian Traffic Accidents in San Francisco and in the Surrounding Suburbs:

In California, being a pedestrian is particularly dangerous. According to the California DMV, pedestrian accidents account for only 3% of all traffic accidents, though they account for 23% of all traffic fatalities. The stark reality of these stats means that almost a quarter of the people killed in traffic accidents are pedestrians. This is considerably higher than the national average which hovers around 13-14%. Furthermore, San Francisco is one of the country's most dangerous cities for pedestrians, as is the entire Bay Area. The greatest numbers of pedestrian accidents in California occur in Bay Area cities. These areas are all connected by roads, highways, railroads, bridges, tunnels, and commuter railways which are all owned, operated, and maintained by the State of California Department of Transportation—otherwise known as Caltrans. While 11% of traffic deaths nationally involve pedestrians, 50% of traffic deaths in San Francisco [and Bay Area] involve people who are walking around on the city's streets. Furthermore, the majority of pedestrian deaths occur on what are known as "arterial" roadways that were specifically designed, planned, and engineered to enhance traffic flow. This means that they are generally built wide, straight, and flat—in other words—fast. One such arterial street is SR 82, also commonly referred to as El Camino Real, which is a heavily travelled road running from San Jose all the way down into San Francisco—following the length of the San Francisco Peninsula. Much of El Camino Real is highway, but the area running through Milbrae has approximately 25-26,000 cars travelling through it daily. The average speed is higher than 35 mph and there are 6 lanes of traffic—3 each on either side of a raised median, with left turning pockets on each side—therefore, basically an 8-lane highway. A number of roads intersect with El Camino Real in that area, but there are 4 particularly dangerous intersections all within 4/10ths of a mile from each other: Santa Helena, San Diego, Millwood, and Ludeman Lane. The worst of these is Ludeman Lane. This very short stretch has had an unusually high rate of pedestrian accidents. In the 10 years prior to Emily's accident in March 2006, there had been 3 pedestrian accidents—some including fatalities—at Ludeman Lane. The other 3 intersections had a similar number of pedestrian accidents during that same 10 year period. Ludeman Lane, however, was of particular

concern to neighborhood residents—many being afraid to use that intersection to cross that street. People who lived and worked near the intersection testified that it was dangerous and that they warned others not to use it. What made Ludeman and the other intersections so dangerous were their "marked crosswalks" or designated crosswalks at "uncontrolled intersections."

Pedestrian Accidents Lawsuits in San Francisco & in the Surrounding Suburbs

It might surprise you to learn that pedestrian traffic accidents are not easy to prove. In many of the accidents in San Francisco and surrounding areas, because of the sheer number of pedestrians, drivers try to blame the pedestrians for these accidents—claiming that a pedestrian's own negligence was to blame and therefore they are at fault for their own injury. The crosswalk laws in California require that drivers must always yield the right-of-way to pedestrians in a crosswalk, whether a marked crosswalk or an unmarked one. However, pedestrians might be distracted by cell phones, tablets, texting, or music. They may fail to use a crosswalk, cross illegally, fail to pay attention to traffic or oncoming vehicles etc., and generally not be aware and cautious regarding their own surroundings—basically, failing to exercise what is referred to legally as "due care" with regard to their own safety. Lawyers representing injured pedestrians—or their families for wrongful death lawsuits—try to prove that the driver was at fault. A good lawyer or law firm will go to great lengths to discover what really happened, who is to blame, and skillfully make their case in favor of their client's best interest and best possible outcome. This can be rather tricky in California however, because California is what is known as a "Comparative Fault" state. What this means essentially, is that that both driver and pedestrian can be found to be partly at fault, and therefore, whatever amount the jury awards as a verdict to a plaintiff is reduced by the percentage of fault directly attributed to that plaintiff—or injured party.

Caltrans and the Question of Liability:

The unusual aspect to this case, lie in the fact that Rich and his law partner, Doug Saeltzer, felt the primary fault of the accident should be directly attributed to Caltrans, not the driver, due to Caltrans placing the marked crosswalk at the uncontrolled intersection. By doing so, they had created a false sense of security for pedestrians and had masked a highly dangerous set of circumstances—particularly in view of how hilly the area surrounding Ludeman Lane was. Earlier that day, Rich's firm had conducted a mock jury in order to better evaluate the strengths and weaknesses of their case prior to trial. It did just that, as it became quite evident that the "jurors" were far from convinced that Caltrans was in any way responsible for the accident. Rich and Doug just weren't making their case, and Rich had gone home saying to himself, "This is crazy; here is an intersection with no controls whatsoever, and it is like a turkey shoot for pedestrians to get across." Furthermore, soon the case was going to trial, and it was going to be an extremely difficult case to win. That night, sitting at his desk, trying not to give in to his deep sense of frustration—Rich went online. In his words, "Miraculously, I found this study. It was a sidewalk study done in 2000, by the Federal Highway Administration. It was called, 'The Safety Effects of Marked v. Unmarked Crosswalks at Uncontrolled Locations'. It was executive summary with recommended guidelines and it was right in our wheelhouse, because Ludeman Lane, had exactly that—a marked crosswalk in an uncontrolled intersection. We had been trying to say that having a crosswalk is dangerous because it lulls pedestrians into this false sense of security, and then all of a sudden here was this study, and it revealed our exact argument in a way that enabled us to completely change our entire approach to the case—for it gave us everything we needed. That was the night everything changed."

The Study:

In 2002, The Federal Highway Administration (FHWA) commissioned a federal study that specifically examined crosswalk safety at uncontrolled intersections, and provided recommended guidelines. This crosswalk study was entitled, *Safety Effects of Marked Versus Unmarked Crosswalks at Uncontrolled Locations: Executive Summary and Recommended Guidelines.* Over a five year period, accident data from 1000 marked and 1000 unmarked crosswalks in 30 cities was analyzed. All of the sites in the study were

at uncontrolled intersections. The study found that on multi-lane roads with average daily traffic greater than 15,000 vehicles and speeds of 40 mph or higher, such as Ludeman Lane—painted white lines were not enough to reduce pedestrian accidents or crashes. Furthermore, marked crosswalks alone—without "traffic calming" devices—at uncontrolled intersections, would not lower pedestrian crash rates. In fact, marked crosswalks without traffic calming devices were found to have higher pedestrian crash rates than those sites with unmarked crosswalks. It was suggested that these intersections should be routinely monitored and that more substantial improvements were needed in order to ensure pedestrian safety.

The Trial:

The case had been ongoing for close to three years when Rich found the FHWA study. Trial was impending—and there were three main challenges that he faced:

1.) The Accident History at Ludeman Lane:

Prior to March 2006, there had been only four pedestrian accidents—three deaths and one injury—at the intersection of Ludeman Lane and El Camino Real, although approximately 90 million cars had passed through there during that time period. Therefore, the percentage of accidents that had happened with respect to the number of cars going though was infinitesimally small and there had not been a big history of problems at this intersection. However, there were three other intersections within a quarter of a mile from that intersection—Santa Helena, San Diego, and Millwood—and they all had similar numbers to Ludeman Lane. Rich had to get the judge to allow the injuries at those intersections as well, in order to prove that all of them were dangerous and that there was a systemic problem within Caltrans with regard to accessing and implementing pedestrian safety measures. That was a big challenge.

2.) The Issue of Liability—Getting the study admitted into evidence:

The FHWA study led Rich to other studies which cast light on the dangers of marked crosswalks at uncontrolled intersections. These studies, along with the FHWA study, were well known and discussed among traffic engineers across the country. Consequently, getting the FHWA study admitted into evidence was integral to the success of the case. The study would prove that Caltrans knew marked crosswalks at uncontrolled intersections such as Ludeman Lane, Santa Helena, San Diego, and Millwood were highly dangerous to pedestrians. Therefore, they should have inspected these four intersections more carefully, monitored them routinely, and taken action as a result of those inspections.

3.) Caltrans' Monitoring System—TASAS:

Rich needed to prove why Caltrans' own monitoring system that accumulates and monitors all accidents on California roads—TASAS—had not flagged Ludeman Lane as a problem area. TASAS stands for "Traffic Accident Surveillance and Accounting System," and is a computer database system that accumulates and monitors all the accidents on California roads. It gathers information with respect to how, when, and where accidents happen as well as how often at a given location. Every potential type of accident is identified and tracked in the TASAS system; however, Caltrans seemed oblivious to not only the number of pedestrian accidents that were happening at their intersections, but how inherently dangerous these intersections were. Rich had to dig deep and show the jury why this was so.

Key Revelations:

Caltrans's Employees:

Two of the key witnesses that Rich called to the stand were Caltrans' employees, The Senior Traffic Engineer, Ms. Yim, and the Traffic Field Investigator, Mr. Caldwell. During the trial, Rich repeatedly called into question Ms. Yim's job performance—had she done her job responsibly and fulfilled its requirements—but, first and foremost, was she even qualified for the position she held?

Caltrans' Monitoring System:
Rich felt it imperative that the jury understand how Caltran's computer monitoring system—TASAS—worked. Through testimonies, he clarified how TASAS accumulated data regarding every possible type of accident occurring on every differing type of roadway or intersection. Furthermore, he had explained how reports were generated identifying problem areas and what types of information was contained within those reports. What came to light however, was the fact that though pedestrian accidents were tracked by TASAS, along with all other types of accidents, they were never included or highlighted as a specific individual category within those reports. Therefore, pedestrian accident data was rendered essentially—invisible.

Lack of Pedestrian Counts:
Numbers that the FHWA study paid close attention to were pedestrian volume counts—the actual number of pedestrians crossing at individual intersections. However, Caltrans had no idea how many pedestrians were crossing at their intersections. They did not—as a matter of course—perform "pedestrian counts" or routinely monitor pedestrians.

The Wrong Numbers: Traffic Accident Rate v. Pedestrian Accident Rate:
Rich established through cross examination of both Ms. Yim and Mr. Caldwell that Caltrans arrived at their traffic accident rates by measuring the number of accidents that had occurred at an intersection as compared to the number of vehicles passing through that intersection. To simplify, the total number of accidents at an intersection—as a numerator, was placed over the total number of vehicles crossing through that intersection—otherwise the denominator—in order to arrive at a percentage. However, the study defined a pedestrian accident rate by measuring the number of pedestrian accidents that had occurred at an intersection as compared to the number of pedestrians crossing through that intersection. As Caltrans did not have those pedestrian crossing numbers, they compared pedestrian accidents to total number of **vehicles** crossing through an intersection, therefore, it would be impossible to arrive at a true pedestrian accident rate—as defined by the study.

Doing the Math:
Once Rich had established the importance of knowing the number of pedestrians crossing an intersection, and established how the study defined a pedestrian accident rate, and established that Caltrans did not in fact have those numbers for Ludeman Lane or any other intersection for that matter, he revealed that his firm had an official pedestrian count conducted at Ludeman. It was determined that Ludeman had a daily pedestrian count of 70 pedestrians crossing that intersection. Then Rich set about showing the court what the pedestrian accident rate was for Ludeman. The study had utilized a 10 year period of time as a measurement; so in calculating the pedestrian accident rate for Ludeman Lane, Rich did likewise. The shocking truth at the end of all these calculations was—based on pedestrian crossings of 70—that the pedestrian crash rate at Ludeman Lane for the ten years prior to March 2006, **was 21.6 times higher** than the pedestrian crash rate that led to the recommendation **not** to put marked crosswalks at uncontrolled intersections.

Answering the Questions
The jury had quite a few questions that needed to be answered in order to arrive at the truth. Why had Emily Liou's tragic accident happened? Had Ms. Yim been too inexperienced for her Senior Traffic Engineering position? Had she been derelict in her duties or had she followed the policies and procedures set in place by Caltrans all too well? Had she really known about the study and simply ignored it or did Caltrans fail to impress upon their own employees the importance of their own studies—failing simply to follow through with their own recommendations—or perhaps they were just giving lip service to the notion of pedestrian safety? There seemed to be a rather shocking, rampant, and flagrant failure to recognize pedestrians—as they were routinely overlooked or considered—with minimal effort ever made to obtain critical information regarding them.

Throughout the trial, and through skillful cross examination, Rich had been able to expose a fundamental flaw at the heart all of Caltrans' policies and procedures—their failure to recognize or even acknowledge pedestrians. He summarized by saying, "You can never adequately monitor pedestrian safety if you're not actually monitoring pedestrians." Furthermore, this flaw set in motion a lengthy chain reaction which ultimately led to the highly noticeable lack of improvements at marked crosswalks at uncontrolled intersections—creating subsequent injuries and fatalities. Failure to do pedestrian counts, failure to determine the number and types of pedestrian accidents, failure to monitor intersections for safety concerns, failure to conduct engineering studies in order to determine pedestrian accident rates, all suggested that Caltrans seemed rather unconcerned about the plight of pedestrians on their streets and roadways. It seemed quite evident that Caltrans knew of the FHWA Study, as they had incorporated sections of it within their own publication. It also seems entirely plausible that "Headquarters" failed to sufficiently impress upon their own engineers the importance of the study. It seemed glaringly obvious however, that Caltrans inexplicably failed to recognize that pedestrians and pedestrian data were integral and absolutely essential to the accuracy of all of their sophisticated mathematical formulas, computations and statistics. Consequently, this oversight had residual repercussions. Dangerous locations or intersections were not identified—for pedestrians. Critical reports were not generated nor distributed to Caltrans Engineers—for pedestrians. Accidents were not investigated and crucial safety measures were not identified—for pedestrians. As a result, it was virtually impossible to meet the established criteria necessary for obtaining funding approval for safety projects, which in turn, led to an utter failure to implement those life protecting safety measures—thereby ensuring the likelihood of future accidents, injuries and fatalities. There was basically a deep rooted, fatal flaw within Caltrans—as well as a gross miscalculation in judgment and a continual compounding of error that rendered pedestrian safety almost an impossibility—regardless of what Caltrans' publications, directives, or mouthpieces said to the contrary. Unacknowledged, this flaw would always dramatically distort the guidelines, priorities, policies, procedures and criteria they had in place—absolutely corrupting any necessary sequence of events—and inevitably, ultimately, and repeatedly produce tragic and catastrophic outcomes.

The Verdict:

On July 3, 2010, the Jury reached a verdict of $12.2 million for Emily. However, that amount was reduced by 20%—her degree of fault for the accident—the jury determination because she was wearing dark clothing and not exercising due care with regard to her own safety. The driver of the car was also found to be 30% at fault; Caltrans—it was determined—was 50% at fault due to placing a marked crosswalk at an uncontrolled intersection, completely failing to monitor pedestrian safety, or making any attempt whatsoever to study the safety risks of that intersection. Caltrans blamed Emily for the accident, and they blamed the driver, and refused to take any responsibility for their own intersection. The Jury just didn't see it that way. As a result of this stunning victory, Emily's parents were going to have the money they needed to take care of her for the rest of her life.

The outcome of this case was highly significant because it was one of the very first times that Caltrans had such a verdict against them for a pedestrian traffic accident. Because of this, Caltrans has had to rethink and re-evaluate the very serious issue of pedestrian safety. As a result of this trial, Rich and his law partner Doug were awarded the 2011 San Francisco Trial Lawyer of the Year Award.