

A Product Safety Lawyer's Apology

By Robert J. Stoney

I am the lawyer joke – the ambulance chaser – the one the shark won't bite out of "professional courtesy." My chosen profession is frequently accused of trading on people's tragedies and clogging the cog-wheels of free enterprise.

I sleep well at night.

My job is to hold corporations responsible when their dangerous products unnecessarily injure or kill innocent people.

Americans live in a relatively safe world. When you bite into a fast-food hamburger, you can be pretty sure that you won't bite into a piece of floor tile. When your child falls off her bicycle, it is a good bet that her helmet won't shatter. When you step on the brake, your car is likely to stop – and unlikely to explode. These things are true because corporate America has taken a strong interest in product safety.

The civil justice system, and the trial lawyers who practice tort law, play a critical role in encouraging corporations to focus on safety, which in turn helps maintain the high level of product safety in America.

The people who run corporations are not evil, or even amoral. They contribute substantially to America's prosperity and tradition of innovation. They advance cultural ventures, charitable giving, and community development. The people who lead America's corporations run the spectrum from very good to very flawed, just like every other cross-section of America.

But corporations themselves are at their core purely competitive and amoral. They succeed or fail – live or die—based entirely on how well they outperform their competitors. Their sole measure of success is profits. Charitable giving, community and cultural involvement are tolerated by the market because they enhance brand name or offer tax advantages, not out of some moral imperative.

Roger L. Martin, Dean of the Rotman School of Management at the University of Toronto summed up the corporate dilemma: "[E]xecutives who wish to make their organizations better corporate citizens face significant obstacles. If they undertake costly initiatives that their rivals don't embrace, they risk eroding their competitive position. . ."

"*Working Knowledge*," The Harvard Business School Journal, April 22, 2002.

Because safety features cost money, as soon as one manufacturer shaves costs by sacrificing safety, his competitors will be pressured to follow suit. The potential result is a race to the bottom.

The Problem of Marketing

Corporate apologists argue that the free-market alone will advance product safety. They assert that if a dangerous product injures people, consumers will reject it in the marketplace. Instead, they will migrate to safer alternatives, which the market will develop in response to consumer demand.

Unfortunately, the marketplace is ineffective in disseminating facts about product safety. It is fundamentally impossible for consumers to learn and to process sufficient market information to make informed decisions about product safety based on past incidents. How well a bike helmet withstands impact forces or how many brain injuries have been sustained while wearing such a helmet are not readily available facts. In addition, aggressive marketing can mask flaws in its products.

Compounding the problem is that consumers tend to be "price sensitive," and given a choice, will generally buy the cheaper of two products – particularly if they are unaware of a product's safety history. Ignorance of the facts and unrealistic risk assessment, combined with the powerful influence of marketing programs, conspire to erode the market's ability to encourage safer products.

The power of marketing as a corrosive force against safety concerns is illustrated by the success of cigarette manufacturers, who quite efficiently killed millions of Americans throughout four decades of a cynical and misleading marketing campaign until the civil justice system caught up with them. (Perhaps not, as tobacco companies have more than doubled the amount spent on marketing annually to over \$15 billion since the 1998 tobacco settlement (source: The Campaign for Tobacco-Free Kids) Anti-cigarette campaigns, with a budget a fraction as big, are no match for big tobacco.

Civil Justice Increases Safety

The civil justice system is the only effective way to bring safety to the bottom line. From the well-known Ford Pinto gas tanks (*Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. App. 1981)), to hundreds of less publicized products, history is full of stories of unreasonably dangerous products sold with impunity until product safety lawsuits forced change. A few examples illustrate the point.

In the 1970s, textile manufacturers were well aware that children's pajamas were highly flammable and that many children were severely burned or killed each year. The industry refused to treat the clothing with fire retardant chemicals because it would cost money and put them at a competitive disadvantage to do so. It took a series of lawsuits to bring safety to

the bottom line of this industry. *See, e.g., Gryc v. Dayton Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980), *cert. denied* 101 S. Ct. 320 (1980).

In the 1980s, babies were dying in bed. They were strangling on the defectively designed headboard of their own cribs. The only ones aware of the defect were the grieving parents and the manufacture. Although the manufacturer had stopped making the crib, it decided against notifying owners of the danger for fear of adverse publicity. Only after being sued did it notify purchasers and recall the product. *See Crusan v. Bassett Furniture Co.*, Cal. Sacramento Super. Ct., June 11, 1986.

The manufacturer of a birth control product called the Dalkon Shield became aware that women were dying because the device allowed bacteria to bypass the body's immune systems. It suppressed test results and misled health officials until a series of lawsuits forced it to withdraw this deadly product from the marketplace. *See, e.g., Teuton v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987).

The largest manufacturer acetaminophen knew for years that a person taking this analgesic after drinking alcohol risked liver damage. Not only did the company instruct its marketers to suppress this knowledge, it marketed the product a hangover remedy. Only after a multi-million dollar jury award to a man whose liver was destroyed, did the company begin to warn customers of this danger. *See Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995).

Civil Justice Is Good for the Economy

Products liability laws are an asset to our economy, not a drag on it. American innovation and productivity are second to none in the world and historically have led developments in transportation, science, information technology, aerospace, and engineering. The civil justice system has played an important role in the growth of that economy, by prodding businesses to produce and sell the best possible products. As noted by Professor Mark Hager of American University,

“...because of their superior reputation for safety, due in part to the efforts of product liability...[our products] have a superior reputation in the international marketplace. It would be a grave risk to our international competitiveness to toy with the tort system that helps bring about that competitive advantage.”

The “Litigation Crisis” is Just More Cynical Marketing

Those who see a “crisis” within our civil justice system ignore that juries are made up of ordinary citizens with ordinary common sense, and there are

lawyers on both sides of every case. Assuming that most cases result in a fair outcome, the real “economic impact” of our tort system is caused by those who cause the injuries through their neglect, not the people who are injured or the lawyers who represent them. A corporation paying for the damage caused by its product is merely compensating a victim for a real loss.

Despite vocal concern raised about a tort “crisis,” there is no evidence to support such concern. Indeed, the number of personal injury cases in America decreased by nearly 32% between 1992 and 2001. The number of product liability cases decreased by 76% in that same time period (source: Bureau of Justice Statistics, U.S. Dept. of Justice, 2004 “Civil Trial Cases and Verdicts in Large Counties, 2001”). The size of personal injury verdicts also decreased by over 50% (median inflation-adjusted payout down 56.3%) (Id.). The boogie man of “litigation lottery” is also a myth. In 2001, the median jury award in a personal injury lawsuit was a princely \$28,000. (Id.)

Hug a Products Safety Lawyer Today

Without product liability laws, safety necessarily takes a back seat to profits. The next time your anti-lock brakes stop you on an icy road; the guard on your power saw protects your hand; or the child-proof medicine cap thwarts your three-year old, give a nod to the products liability laws that have kept America strong and that have brought safety to the bottom line.

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