

Parrying Torts: A Few Thoughts

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Some companies and individuals are victims. Malpractice lawyers make a good living suing them. It is not that the companies or the persons are slipshod or that anyone is evil. It is a condition of work in inherently dangerous environments. Is there anything that PR practitioners can do to defend companies with challenges like this?

No matter how hard one tries, there is and will be injury from unforeseen circumstances, and there will be dumb human actions that result in harm. Consider an example. Imagine a retailer that conducts transactions with approximately 500 million customers a year. (Before you object, there are retailers this size in the world.) Imagine that just .001 of these customers injure themselves in a store for any number of reasons. That's 500,000 injuries a year. Now, let's say the retailer works hard to prevent slips and falls, unsafe acts by customers, unsafe acts by employees and is able to get its accident ratio down an order of magnitude to .0001. That's still 50,000 injuries. Now let the retailer double down on safety training and store design and spend millions to up the safety equation again. The retailer reaches yet another order of magnitude at .00001. We are still talking 5,000 injuries annually in its stores.

Consider the following as well. A clothing retailer is less likely to have injuries than a retailer of home improvement products such as axes, saws, choppers and lawn mowers. You would expect that home improvement retailer to have more employee and customer injuries annually than Macy's. And, indeed, that is the case. Some businesses are dangerous. For example, farming, logging and commercial fishing have high accident rates. Yet, people choose to plow fields, cut trees and net fish with the knowledge that injury can happen. Any organization with large machinery has a built-in danger from tools that malfunction or are misused or otherwise fail. Yet, we could not drive autos or live in buildings or enjoy any modern advantages without that machinery and its danger.

It doesn't take mathematical ability to understand that a company in a high-risk environment will go broke before injuries could reach zero annually. Secondly, humans make mistakes, and there is no possible way any organization, no matter the business it is in, can consistently reach zero injuries. No matter how well employees are trained and how careful customers are, something can happen – a slip, equipment malfunction, a moment's inattention. If humans were robots programmed to a .000001 level of accuracy, there would still be 500 errors annually resulting in injury in the retailer example used above.

The necessary existence of injury is not a happy thought. No one wants to talk about it, but injury is a cost of doing business and of living. The world is a risky place and risk is an element of the human condition. In other words, risk is endemic, and injury arising from risk chronic.

Malpractice lawyers, depending on whether you accept the American Trial Lawyer Association's view (www.atla.org) or the perspective of the American Tort Reform Association, (www.atra.org) address unsafe conditions that organizations condone or, negatively, make money for themselves and clients from unavoidable accidents.

Is There a Defense?

The difficulty companies have defending themselves against lawsuits is that they start off with reputational burden that never lessens. They could provide hundreds of hours of safety training a year and implement detailed safety procedures, but let one mother and child be mowed down in a parking lot by an inattentive customer, and the company has an image disaster on its hands. A lawyer will contend that the company should have known that the configuration of this parking lot was defective and should have taken steps to make the lot safer. The lawyer will point to the grieving family and feed tidbits to inquiring reporters. Sympathy almost always rests with the individuals rather than companies. Fairness dictates that someone ought to pay something for what happened. Finally, it is easier to place blame on a faceless organization than a person. Tort lawyers know these biases well.

What then can a PR practitioner do to help protect the reputation of a company or individual with regard to safety and malpractice lawsuits? Regrettably, the answer is not much. There is no cure for an endemic condition. One can only alleviate it and use an organization's best efforts as a partial defense.

One point is fundamental. Communication about safety must be multi-pronged and done in concert with safety experts, trainers, lawyers, supervisors and executives. Safety is a culture integrated into work habits of individuals who comprise an organization and only through such integration can one claim that a company attends to the issue. Without this culture, a company lies open to discovery in pre-trial depositions and document collection. It only takes one "smoking e-mail or memo" to cost a company its case in a courtroom and such e-mails and memos can be used over and over again in torts, as they often are.

From a PR perspective, safety begins at the top. The CEO must be concerned about it, active in implementing safety procedures and a salesperson for safety principles. A PR practitioner can help the CEO develop messages to make safety topics more compelling, but the PR practitioner cannot substitute for the CEO as the chief spokesperson. Nor, for that matter, can the head of safety planning and training supplant the CEO's leadership on safety.

But even if the CEO is in the forefront of safety issues, the CEO, general counsel and PR practitioner should understand that it might do them little good in a courtroom. Trial lawyers make a living persuading juries. Even an improbable circumstance for an accident, and one with clear fault assigned to a customer or employee, can be interpreted into corporate negligence. There are no standards of reasonableness that necessarily apply to a jury making a decision whether a company is at fault or not. And with the injured victim in court or the grieving survivors, there is a natural tendency to want to compensate them.

Another psychology also enters, whether spoken or not. Companies are assumed to have deep pockets and can afford to compensate the injured. It is assumed to be equitable that organizations share their wealth for those hurt while helping increase that wealth. Alarms about the hidden taxation of litigation is largely lost to the public, such as the following paragraph from a report on the lawsuit industry in America, 2003 called "Trial Lawyers Inc."

The impact of predatory litigation is staggering. Asbestos litigation has driven 67 companies bankrupt, including many that never made or installed asbestos, costing tens of thousands of jobs and soaking billions of dollars in potential investment capital. Moreover, the negative social costs of Trial Lawyers, Inc. can be measured in more than just dollars and cents. In 2002, a dozen states experienced medical emergencies because doctors and hospitals could no longer afford malpractice insurance.

A final difficulty for corporations defending themselves against injury lawsuits is the role of trial lawyers. For all of their abuses, they provide a legitimate and needed way to address injustice, individual and organizational malfeasance that self-regulated groups, legislators and regulators have not. The cost of litigation is so great (one estimate is \$200 billion annually in the U.S.) that companies are forced to address safety. On the other hand, litigation has unsavory aspects with ambulance-chasing lawyers and novel theses for negligence that hardly correlate with reality. One might compare malpractice lawyers to buzzards – hideous-looking creatures that provide essential service in nature by cleaning up carrion. A lawsuit is often the venue of last resort for the injured who cannot get justice in any other way. That it also serves as a lucrative way to make a living through specious lawsuits is regrettable.

Tactical Communications Considerations

In light of what has been written, one might be tempted to give up from a public relations perspective. Consign litigation to the lawyers and say as little as possible. Some companies do just this, but it is not clear that it is optimum. There is at least a chance of preserving corporate reputation and building some sympathy with the public and potential jurors by attacking the issue. Today, understanding is lacking and a balanced perspective missing.

Here then are considerations and tactics one might use to explain how a company strives for safety.

- **Document everything the company is doing in safety and be prepared to use your facts with the media in defense of company actions.** How many hours of the year does the company spend on safety training. How many employees are dedicated to the planning and implementation of safety-related issues? How many accidents has the company had and what is the trend over recent years? What is the CEO's thinking about safety and how has that been transmitted to employees? What are the safety measures in place? Where are the safety measures being taken? Why does the company put an emphasis on safety? How does the company's safety systems and procedures work?
- **Document how the company communicates about safety in the workplace.** For example take photos of signs, of training courses, of actual training on the shop floor and in the retail aisle. Have this ready for media use.
- **Document how accidents occur and the proportion of responsibility.** This is done anyway for occupational health reporting. Collect these figures and summarize them to help defend against complaints in the media..
- **Document industry accident rates and have them ready for media inquiries.** In the US, the Occupational Health and Safety Administration (OSHA), inspects companies for safety violations and tracks statistics for injuries suffered in the workplace. OSHA figures are a credible source to have on hand.
- **Answer reporters' questions as fully as possible consistent with litigation.** Stonewalling a reporter is never good, and it can be fatal if a trial lawyer is feeding the journalist the litigant's version of events and the sad story of the person who was hurt. Maintaining silence before weeping widows looks heartless and doesn't help a company's reputation.
- **Establish a prior understanding with counsel on how the company is going to respond to safety-related questions and lawsuits.** A lawyer is trained for courtroom combat. Public relations practitioners are trained to engage the media. While some lawyers are skilled at the feeding the media, many are not. The lawyer should not dictate PR policy anymore than the PR practitioner should dictate how a case should proceed at trial. Where the two cross in communications, there should be well-defined rules – what the PR person can say and not say and what the lawyer can say and not say in public. There is nothing to be gained from having an adversarial relationship with defense counsel. Each needs the other and it is up to the CEO and senior executives to see that a beneficial relationship is created between the PR practitioner and lawyer.
- **Expose fraud.** When a litigant is clearly engaged in fraud, the organization should communicate that broadly to both internal and external audiences. First of all, this protects the organization's reputation and secondly, it serves as a deterrent to other individuals who might attempt to sue the company.

Agreements to soft-peddle misbehavior on the part of attorneys and their clients is of no help to the company's reputation..

- **Openness, whenever possible.** Explain safety principles, devices, procedures and training to the media as a part of general media education about the organization. This will not be easy. The topic is boring until the day an accident happens. But once an accident happens, allegations and rumor might make it too late to get a safety message out without making it sound self-serving. Any level of understanding one can achieve before an injury occurs is better than none. If the company is at fault, it should "fess up" quickly and state how it is going to prevent similar accidents and injuries in the future. This is might discomfit lawyers assigned to defend the company, but what is lost in the courtroom is gained in reputation.
- **Use tools at hand.** TV cameras used for security also can help companies and communicators understand how an accident occurred and help dampen speculation and unfair allegations. If a camera records an accident, examine it closely and depending on the incident, consider releasing it to the media. It was a security camera in a grocery store that caught an individual attempting to tamper with Pepsi-Cola and the company used the video to kill allegations that its product was contaminated. General Motors was able to use video from NBC's own "Dateline" expose of its trucks' gas tanks to show that an expert who produced the accident had faked it. If there is clear and indisputable evidence that the organization was not at fault, it should be used to defend the organization before the trial lawyer has a chance to publish the litigant's interpretation of events.

Summary

Even though there is no guaranteed way to protect organizations and individuals from injury lawsuits, there are ways of protecting reputation that should be considered part of a planned PR approach. It is far better to address safety issues before they arise than to scramble for a position while lawyers and reporters are waiting in the lobby. And, never forget that lawyers are trained communicators. The good ones know how to work with the media as well as you do, and they are assiduous in doing so because it helps them precondition public perception and ultimately, juries. Even though you might lose most of the time while defending against injury suits, the occasional win is better than no win at all.

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