



The Gigantic Safety Disconnect

Every year since the Occupational Health and Safety Administration (OSHA) was created, there have been hundreds of personal injury lawsuits that identify hazardous workplace machinery conditions or hazardous facility circumstances. These lawsuits are third-party personal litigations against the manufacturer or the premises owner whose product or property was inherently dangerous. These hazards were the cause of crippling injury or death of workers.

In most circumstances, the worker's immediate employer was immune from liability, and it was not within his or her ability or authority to eliminate the hazard with safe design. The court records of depositions, exhibits and courtroom testimony of the plaintiffs' (injured) witnesses provide detailed facts of the hazard, its history and the mechanism of the mishap. Most important is that the plaintiff's expert witness testimony describes the available safe design necessary to prevent injuries that maim or kill.

It would be highly efficacious for OSHA to use this wealth of information to develop employer awareness of inherent unsafe equipment design defects and premise hazards. Further, U.S. manufacturers who market unsafe equipment to be used in the workplace should be considered responsible under OSHA for providing integrally safe equipment, machines or facilities to the American workplace. Next in line are the foreign manufacturers of unsafe equipment, machines or products used in the American workplace. Foreign equipment, machines or products should be banned entry into the United States on the basis of fair trade.

An important issue is that OSHA exercises little oversight of the equipment, machines or products that are used in the workplace, with a disproportionate emphasis on worker job practices. True worker safety is about removing hazards by incorporating safety in the design.

With a huge jury verdict award to the plaintiff for failure of the manufacturer to provide safe design, there is no need for more regulations. Safety is all about

a conduit of information about how safe design eliminates hazards. OSHA also needs to convey sources of safe design information derived from litigations, in addition to serving as an enforcer.

OSHA was formed by Public Law 91-596 on December 29, 1970. Section (2) (b) (1) states: "*by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at all places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions.*" This statement provides OSHA with ample authority to publicize safety advances identified by the justice system, without the need for additional regulations. The legal precedences for safe design achieved by our justice system need to be publicized by OSHA. A carrot goes a lot further than a stick, as the reference to safe design established in third-party litigation saves both lives and money.

It appears that OSHA has not kept up with the public's acceptance and purchase of safety features. For example, starting in the 1990s, a significant number of buyers of recreational vehicles (RVs) were including an add-on closed-circuit TV rearview mirror that provided the driver with a 100 percent rear view. Today, many of our SUV, pick-up and car purchases include rear-object radar that alerts the driver when someone or something is in the path of backing. Also catching public interest are anti-collision radar systems, along with many other driver safety aids. OSHA does not have to enact more mandatory regulations; instead, it needs to publicize how this technology can be used in the workplace. The Construction Safety Advisory Committee (CSAC) should advise the U.S. Assistant Secretary of Labor, OSHA and Mine Safety and Health Administration (MSHA) to take the bully pulpit and encourage voluntary use of available safety features.

When manufacturers of construction and mining equipment see the purchaser's interest in safety features, they will move forward and first provide them as



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an option. Then, the safety features will become standard equipment. The silent driver for including safety features as standard equipment will be a reduction in third-party liability claims when someone is killed or maimed for the lack of a safety feature.

In the 1970s, crane manufacturers voluntarily included “anti-two-blocking” devices to prevent breaking the hoist line when the hook assembly contacts the sheave on the boom tip. At that time, approximately 100 personal injury lawsuits had been filed for worker injuries when the hoist line broke as a result of the two-blocking mishaps. Crane manufacturers recognized that it is more profitable to include anti-two-blocking devices as a standard accessory than to litigate a defense that blamed the crane operator. It was crane manufacturers who provided load moment devices to prevent crane upset from the hazard of overload.

The reasons for this disconnect of OSHA from the realities of third-party personal injury litigation involving hazardous workplace circumstances go back to the early 1900s. Prior to 1912, there were no state workers compensation laws to provide medical care for injured workers. The courts were clogged with wrongful injury or death claims against negligent employers. To overcome this clumsy and costly process, individual states began to adopt European workers compensation laws that had been in effect since the mid-1800s. These new state laws were enacted to ensure prompt medical care for injured workers and economic security for workers’ families. These laws established protection for the employers from both simple and gross negligence. The underwriters, in an effort to provide marketable employer insurance, did not provide separate coverage for simple negligence and gross negligence. Had gross negligence

been made a separate risk, it would have provided exceedingly strong incentives for employers to ensure for a safe workplace.

By the 1960s, plaintiff attorneys began to develop legal precedents targeting unsafe machines or facilities provided by a third party. In 1912, the workplace was labor intensive. The 2016 workplace is machine intensive to reduce labor costs. Today, the issue of workplace safety is divided into two separate areas of employer and equipment manufacturer or facility owner safety responsibility. What is needed is a system safety approach that brings these two diverse safety issues together.

When worker compensation concepts were developed in 1910, industry relied on a large manual labor workforce. As automation increasingly dominates the modern workplace, the emphasis is shifting from worker training to the development of safe machinery and facility design.

The safety profession of the future will be a team effort of engineers and computer specialists who design, manufacture, operate and maintain complex automated systems. There are fewer workers in an automated workplace; the priority is to ensure reliable, failure-free machine performance. Safety will have a new image of a team effort of engineers and software specialists who develop reliable automated performance.

There will be many new jobs for niche specialists involving safe design, testing and evaluation, reliability criteria, maintenance and performance monitoring. All of these changes will involve a systems approach to safety that eliminates the “Gigantic Safety Disconnect.”

The automated workplace will outperform a government-regulated disconnect between OSHA and the justice system. ●