

# Safety and the Law

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**In a way, many more people suffered needless injuries because of the way the courts interpret "due diligence."**

*by Larry Wilson*

I went up to one of my friends last week and said, "One of my back molars is really bugging me. I was wondering if you'd mind taking a look at it?"

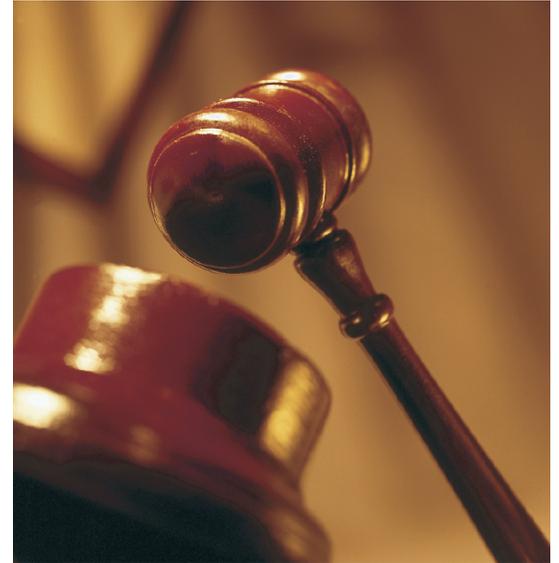
"Why are you asking me?" he said. "I'm not a dentist."

So I went to my dentist and said, "My shoulder is really hurting when I try to lift my arms over my head." He looked at me and said, "Why are you telling me? I'm not a doctor."

So I went to my doctor and said, "I'm not sure about the termination clause in our new distributor agreement--would you mind taking a look at it?" "Why me?" he asked. "Why don't you get a lawyer to look at it?"

So I went to a lawyer and said, "I'm not sure how this industrial accident could've been prevented. Would you mind taking a look at the investigation report?"

But (you guessed it), he didn't say, "Why are you asking me? I'm not a safety professional." No, he said, "I'll



"Have you been injured? Call me," says the park bench. "Have you been injured--auto or work? Call me," the billboard says. Some injury lawyers even have "800" numbers. The "I got hurt, so who do I sue?" mentality is spreading rapidly across North America. Somehow, the lawyers in Canada and the United States have decided that if hazards on your property were a contributing factor in an accidental injury, then you are responsible and other contributing factors are irrelevant.

**Lawyers and the legal system don't understand modern injury prevention - and they aren't bothering to learn.**

be happy to look at that report and tell you who's responsible--and you'll have to pay me a lot of money."

You wouldn't let a lawyer operate on you. You wouldn't let a lawyer design a bridge or skyscraper. You wouldn't even let a lawyer drill your tooth. So how on earth did lawyers become the definitive authority on accidental injury causation? Maybe more to the point, why did the safety profession let them?

For example, at a construction site in Fresno, Calif., a tile floor was being put in. The tiles were about an inch thick. When they quit for the day, the crew members were about half finished, so they put up a sign at the edge of where the tiles stopped. "Watch Your Step," it read. A lady--she wasn't supposed to be in the area--tripped on the 1-inch differential, sprained her ankle, and sued for \$60,000.

“Doesn’t the lady have any responsibility for paying attention to where she’s walking?” the owner of the construction company asks his lawyer.

“Of course she does,” says the lawyer. “But don’t bother fighting it--we’ll lose. Just pay her.”

And so my friend Frank, who owns the construction company, phoned me. “Can you believe this b.s.?” he

it’s the ski hill’s fault. And if you’re walking in the village and you slip and fall on this ice because you’re not paying attention, we don’t think it’s the restaurant’s fault, either.”

Although I didn’t like being talked to like a three-year-old, I had to admit he did have a point. Hazards are everywhere (gravity is, at least), and people who are paying attention negotiate hundreds, sometimes thousands of hazards every day with

However, if the inspector “writes you up” for guardrails or extension cords or, worse, fines you, how likely is it that you’ll spend your time and money trying to keep them happy before you tackle something that isn’t a legislative requirement--such as getting people to pay more attention? Of course people are going to attend to legal “compliance” issues before they take on something that isn’t legislated.

But here’s the problem--even though

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exclaimed over the phone. “We’ve got a sign, it’s only one inch, she isn’t even supposed to be in the area, and Pat (the company lawyer) is telling me, ‘Just pay her!’”

“Yes, I can believe it,” I said. “You live in California.”

“What’s that got to do with it?” he asked.

“Plenty,” I said. “It’s the original ‘I got hurt, so who do I sue?’ state.”

Now, compare that to a European country. For instance, several years ago I was skiing in Val D’Isere, France, for two weeks. One night as I walked down the main drag, I saw a man hacking ice away from the front door area of a fairly expensive restaurant. As I walked by, I said something about needing to get rid of the ice so you won’t get sued if somebody slips and falls. In the most condescending tone of voice, the man said, “No, I’m not doing this so we don’t get sued. I’m doing this so the water doesn’t get into the restaurant and ruin the floor.” Then, he asked me which part of America I’m from. “I’m from Canada,” I said.

“Same difference,” he said. Then he went on to say, “You see, now we’re in France. And, in this country, we look at things differently. You’re out here skiing on ice and snow. If you slip on some ice and fall down because you’re not paying attention, we don’t think

their eyes and mind alone. And as a result, they don’t get hurt. Why is it, then, that where we come from, inattention is rarely considered a relevant factor and the hazard is omnipotent? Don’t we all have a responsibility to pay attention to what we’re doing, where we’re walking, driving, etc.?

Why does occupational health and safety law all but ignore paying attention (eyes and mind on task)? Perhaps it’s because paying attention doesn’t fit into the legal model for accident causation. Or maybe the problem is that we can’t enforce or police eyes on task and mind on task very easily, so “let’s not bother” including it in the law. Let’s not worry about any training requirements around this, either. Let’s just go back to the hazards and what we can enforce.

Either way, this kind of thinking has cost many lives in Canada and the United States. Depending on whose statistics you check, approximately 50 percent of the work-related fatalities occur on the roads and highways. WCB and OSHA inspectors, busy checking for extension cords over walkways, don’t do anything about it. “Not our jurisdiction,” they say. But to ignore half of the work-related fatalities isn’t a small oversight. It almost makes some other rules and regulations lose their credibility.

most (good) safety professionals know that behavior and human error is much more important than anything else, in terms of injury causation, the lawyers have much more influence on executive and senior managers. “Don’t do what we tell you to do, and you’ll go to jail,” they say. “Do what we tell you to do, and we’ll reduce our injuries 50 to 90 percent,” says the safety pro. Guess who gets listened to? Not too surprisingly, it’s the lawyers. They win every time. But that doesn’t make them right.

### Why Can’t Zero Injuries Show Good Faith?

For example, a few years ago, an oriented strand board mill had a fatality three months after start-up. A man had stuck his head inside a pneumatic diverter gate without properly locking out the gate. Unfortunately, whatever was stopping the gate from closing gave way or finally came loose while his head was inside. There was no written lockout procedure, no training records. Corporate lawyers told the management group they had better be able to start showing some disciplinary records or termination notices for lockout violations to show “good faith” to the courts. Otherwise, they said, “You’re up the creek without a paddle.”

About seven months after start-up, the management group and safety committee decided to implement a behavior-based safety observation

process. I told the stakeholder group, and subsequently all of the employees, that bringing discipline into a peer-to-peer observation process would be “a definitive kiss of death.” Meaning that it wouldn’t just interfere with how successful they were, but, rather, that it would kill the process entirely in very (very) short order.

So with the assurance there’d be no discipline, the employees started making observations. They also put some “heart” or some real effort into the observations, as well. The steering committee was analyzing the data and posting the % safe graphs for everyone to see, and injuries started to decrease--until, about nine months later, they had the best injury rate in the whole company. But as the date for the court case concerning the fatality loomed closer, they still didn’t have discipline records. They didn’t have injuries, either, but that didn’t placate the lawyers at all. Once again, they told the managers about the prospects of hefty fines and possible jail time. All the while, I’m telling them not to--at least, not based on an observation between one worker and another.

It probably comes as no big surprise that they listened to the lawyers instead of me. They found an observation where a minor lockout violation was observed and discussed. The manager then used that observation as the basis for a formal disciplinary letter that went in the two employees’ files. The lawyers were happy, but the employees weren’t, to say the least. Within a week, all observations on all shifts had stopped. Within months, the injury rate started climbing back up. The managers eventually got off with a fine that the company paid, but the injury rate stayed at a very unenviable rate for years, during which time many people were severely (some permanently) injured.

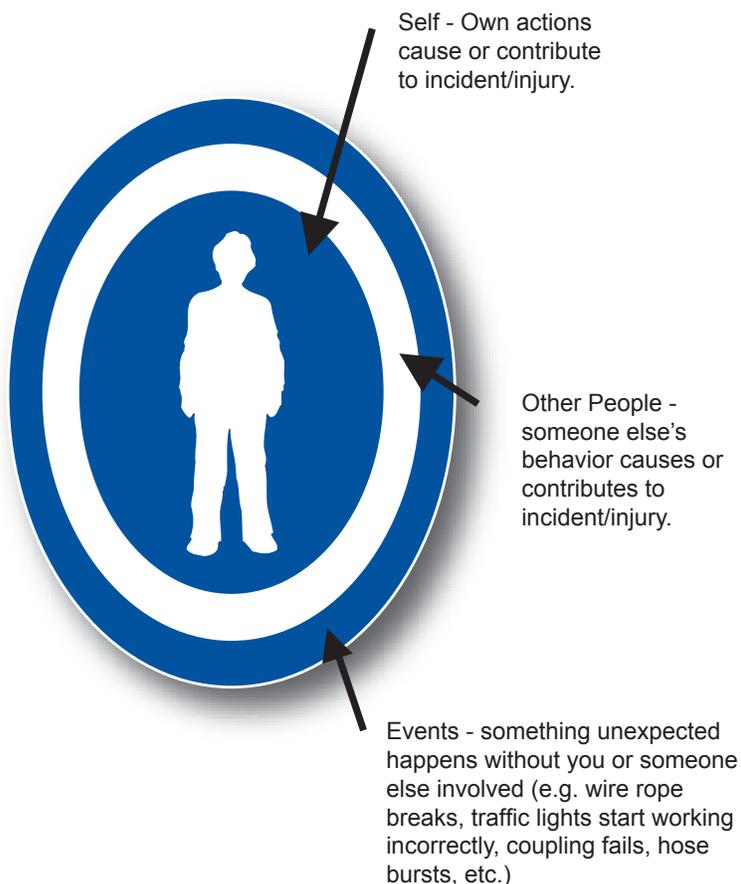
In a way, many more people suffered needless injuries because of the way the courts interpret “due diligence.” Why can’t zero recordable injuries for a whole year show “good faith”? Why don’t records of people being observed working safely count? Because the lawyers and the courts are hardly conversant with advanced methodologies to reduce accidents. They’re as old school as it gets.

## Moving Forward

There are two main problems in terms of lawyers and the legal system when it comes to accidental injuries. The second has just been discussed: They don’t understand modern injury prevention--and they aren’t bothering to learn. The first, and by far the most important, is that they are rapidly convincing people in Canada and the United States they aren’t really responsible for their own injuries--that someone else or something else (which would ultimately be owned by somebody) is really to blame.

Unfortunately, that is the antithesis of reality, because more than 90 percent of the time, it is our own errors and mistakes that initiate the chain reaction that eventually causes near-misses, first aids, minor injuries, major injuries, and fatalities. Actually, if you go down the risk pyramid to include cuts, bruises, bumps, and scrapes, it’s more than 98 percent! If you’re skeptical of the percentages just mentioned, try this exercise: Get a group of about 50 people together and tell them, “As we all know, something ‘unexpected’ or unplanned always has to happen for someone to experience an accidental acute injury.” Then, show them a slide (Figure 1) that shows the three sources of unexpected events, not including acts of God. Now, ask the group, “How many of you have been hurt because the equipment broke or failed or did something unexpectedly?” NOTE: You will not likely get more than one or two hands in the air from a group of 50.

Now, ask them, “Other than sports or contact sports, how many of you have been seriously hurt (stitches or worse) because the other guy did something unexpectedly?” NOTE: You will probably get three to seven hands in the air for this question, but rarely will anyone who just had their hand up for the “other guy” have more than one example. What’s left over, obviously, is the self area. And because most adults have experienced three to seven serious acute injuries (broken bones, torn ligaments, concussions, etc.) and 8-12 minor serious injuries (stitches, sprains, strains, etc.), this means more



**Figure 1**

than 90 percent of the serious injuries were initiated in the “self area” (Figure 1).

Here’s where it gets really interesting. Ask them, “If we moved down the risk pyramid to include every accidental bump, bruise, cut, or scrape, what percentage of your total acute injuries would have been initiated in the self area?” NOTE: Most groups will freely admit that 98, maybe even 99 percent were not initiated by the equipment or the other guy.

Given that you’re never trying to make a mistake such as “eyes not on task,” “mind not on task,” “moving into or being in the line-of-fire,” or “somehow losing your balance, traction or grip,” it’s always unexpected. So, for more than 98 percent of all total accidental acute injuries anywhere (at work, at home or on the road), it was something we did or didn’t do (such as not looking first) that triggered or initiated the chain reaction that got us hurt. More than 98 percent of the time--we hurt ourselves! And yet, we’ve got lawyers everywhere telling us to hire them so they can sue somebody for us.

That’s the last thing people need to hear. What they need to hear is how to prevent the injury in the first place. They need to learn that rushing, frustration, fatigue, and complacency cause or contribute to more than 99 percent of those four critical errors. Once you make the error, obviously it’s too late. But because the state comes before the error, it’s possible to teach people to “self-trigger” on the state to reduce the risk of making one or more of those critical errors that can put them into contact with some potentially hazardous energy. There

are three other critical error reduction techniques they also need to learn, as well (Figure 2). NOTE: More than 1,000,000 people in 25 countries have used these techniques to significantly decrease acute injuries; they do work.

#### How to Get Started

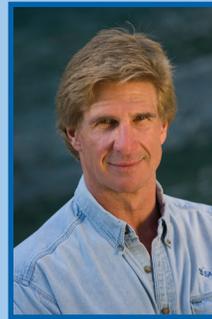
What can you do? It’s a bit of a stretch to ask you to overthrow the entire system. And while many legal compliance issues and training requirements won’t reduce very many injuries, they’re not going to hurt anybody, either. But to ignore what you know in your heart about human error and behavior--well, that is eventually going to result in some or a lot of your people getting hurt. And to back down from senior managers and executives who say, “But we’re not required by law to do anything about that--so why do we have to? Our lawyers aren’t telling us that we have to do any of this stuff!”--tell them to go get their tooth filled by a lawyer next time.

#### Critical Error Reduction Techniques (CERT)

1. *Self-trigger on the state (or amount of hazardous energy) so you don’t make a critical error.*
2. *Analyze close calls and small errors (to prevent agonizing over big ones).*
3. *Look at others for the patterns that increase the risk of injury.*
4. *Work on habits.*

Figure 2

#### About the Author



Larry Wilson



Larry Wilson is a frequent speaker at health & safety conferences across Canada, the United States and Internationally.

His entertaining anecdotes and stories come from nearly 20 years of assisting over 2,000 companies with Observation and Feedback Processes and Advanced Safety Awareness Training. His presentations include Keynote sessions with some of the largest Health & Safety Conferences in North America.

On the road 150 to 200 days per year, he has more practical experience (more companies, more places, more industries) than anyone else in the field. Perhaps what is most significant is that he has made over 2,000 plant and field observations in nearly every industry.

In Larry’s “spare” time he manages the Health & Safety Team at Electrolab and contributes articles to Health & Safety publications like Occupational Health & Safety, OHS Canada and Industrial Safety & Hygiene News.

As the Author of SafeStart: An Advanced Safety Awareness Training Program, Larry has compiled all his years of experiences into a common sense approach to working safely on and off the job which has benefited more than 600,000 employees to date.

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