

15,000
expert witnesses.
Click here.

VerdictSearch.com
Complete research,
only a click or call away.
1-888-44-SEARCH

The NLJ Litigation Services Network

VerdictSearch.com

NLJExperts.com

NLJ.com

THE NATIONAL
LAW JOURNAL
BUSINESS

American
Lawyer
Media 

HOME

SUBSCRIBE

ADVERTISE

SUBMISSIONS

CONTACT US

ABOUT US

IN-HOUSE MONTHLY

Monday, June 24, 2002

How not to be sued

Lawn mower maker Toro moves quickly to mollify victims of accidents.

By Peter Aronson

STAFF REPORTER

After her son was killed when a sit-down mower he was riding fell down an embankment and rolled on top of him, Debbie Soles-Smith grew angry at the world. Then her anger became more directed, and she blamed the manufacturer of the mower, The Toro Co.

She and her ex-husband filed a wrongful-death suit blaming Toro's faulty design for the death of 17-year-old Cory.

Now, it's two years later--and Soles-Smith has nothing but wonderful things to say about Toro.

It's not because of the money Toro has offered: The amount for which the two sides have tentatively agreed to settle, \$500,000, is only one-third of what the family originally sought, Soles-Smith says.

What's so impressed Soles-Smith is how Toro, a Bloomington, Minn.-based company that manufactures and sells more than \$1.3 billion a year worth of outdoor maintenance equipment, reacted quickly to her loss with sympathy and understanding.

"From my perspective, Toro has been awesome," says Soles-Smith, a benefits administrator living in Jacksonville Beach, Fla. "Toro is very sincere. I think they are really supportive."

As happens with all its products liability claims, once Toro was notified of the accident a nonlawyer "product integrity specialist" contacted Soles-Smith's lawyer, expressed the company's condolences and said it wanted to investigate the accident immediately.

Soles-Smith later met with that person, Carol Kelly, and Toro's national mediation counsel, Miguel A. Olivella Jr.

"They expressed their condolences and said how sorry they were," she recalls. And Toro's sympathy has translated into action. Settlement talks are addressing Soles-Smith's concerns about the danger of the sit-down mowers, she says, which is more important to her than a monetary settlement.

Soles-Smith has become a participant in a Toro program that involves early intervention by Kelly or

another corporate integrity specialist, who both have authority to settle cases. If they are unable to resolve the matter, Olivella and Andrew Byers, Toro's corporate product integrity manager, offer mediation to the complaining party. Byers says there has been only one products liability case in two years in which mediation did not work. That case could be headed toward trial.

"Toro has shown considerable creativity and foresight in developing a multi-level process for addressing conflict," says Thomas Stipanovich, president and chief executive officer of the CPR Institute for Dispute Resolution. He thinks so much of Toro's approach that he has asked Byers, Olivella and Toro General Counsel Lawrence McIntyre to participate in CPR's summer program for corporate counsel in Seattle the week of June 24.

Although most sophisticated companies today participate in some type of mediation to resolve some of their products liability, commercial and employee disputes, Stipanovich and other alternative dispute resolution experts and in-house counsel say Toro was the first to establish a two-step national mediation program, which it did in 1991. It was also the first company to hire a full-time outside mediation counsel, they say. The 11-year-old program is still held up as a national model.

Tom Lindley, a partner in Seattle-based Perkins Coie's Portland, Ore., office who recently moderated a panel with Toro's McIntyre on it, says that he is now prepared to talk to several Perkins Coie clients about trying to adopt Toro's approach.

He says Toro's early intervention program could work well for such clients as wholesale food processors who sell to fast food chains; large wholesale suppliers such as those in the milk, wood and potato business; and defense contractors. "Toro seems to have truly been able to address the question, 'Who are our real customers and what is the best way to interface with them,'" he says.

78% cost reduction

Toro is unabashed in its enthusiasm for its program and keeps close tabs on its success. According to statistics for 1992 to 2000 for more than 900 products liability claims that referred to the program, Toro says it has cut its legal costs per claim (attorney fees and litigation expenses) by 78% from an average of \$47,252 to \$10,420. Toro also says its average resolution amount for the period was reduced by 70%, from \$68,368 for settlements and verdicts to \$20,248.

Although these figures could not be independently verified, none of the half-dozen or so plaintiffs' counsel or ADR experts interviewed would dispute those results. Plaintiffs' counsel wondered why more companies have not adopted Toro's approach.

Jim Bruckner of Bruckner/Fowles in Lincoln, Neb., who represented two burn victims who recently settled a case with Toro, says he had not seen a company act as responsibly as Toro in his 44 years of practicing law. His two clients suffered second- and third-degree burns over about 20% of their bodies when the lawn mower being operated by one of them ignited on refueling. The accident took place in August 2001 and was settled in April.

Toro had a huge legal incentive to settle the case because there had been a recall of 34,000 mowers for the refueling problem. Nonetheless, Bruckner says, "To settle a case like this in eight months from the time it happened, is extremely unique. I think it is the most rational thing they can do, particularly from the standpoint of their shareholders."

The two people most responsible for starting Toro's program are Byers and James J. Seifert, now the general counsel for Minneapolis-based The Tennant Co., a manufacturer of street sweepers and floor scrubbers.

Seifert was hired by Toro in 1990, in part, to explore ADR options because Toro's aggressive litigation

policy was causing annual "double-digit increases in litigation costs and insurance premiums," Seifert says. He realized that mediation was the best approach because, he says, it was "a no-risk way for the parties to get together and have a structured negotiation where both sides can agree on the facts. And once you agree on the facts, a resolution usually follows."

Seifert hired Olivella after he successfully settled a difficult case for Toro for less than \$10,000. It involved a lawn mower accident in which a teenager's foot was severed. It was surgically reattached.

As Toro's national mediation counsel, Olivella, 47, a partner at Katz, Kutter, Alderman, Bryant & Yon in Tallahassee, Fla., works under a two-year contract. That gives him enough job security and income to allow him to forgo all other clients on behalf of Toro, he says.

Olivella works closely with Byers, who has been Toro's corporate product integrity manager for 14 years. Byers, 54, was a college English professor and a Fulbright scholar before becoming national customer service manager for Boise Cascade Corp., the timber and wood products company.

"At Boise, I learned we would have much more success face to face with people who had some kind of problem with our product—who had an issue, a complaint or a claim," says.

Byers has carried over this approach to Toro, where he reports to GC McIntyre and oversees the two corporate product integrity specialists, Kelly and Helen Gotzian, who are both trained as paralegals.

Either Kelly or Gotzian responds to each of the roughly 70 personal injury products liability complaints made to Toro each year—whether it comes directly from the customer or lawyer via a phone call or letter, or through a lawsuit. Kelly or Gotzian conduct an investigation by meeting with the customer and the lawyer and by interviewing witnesses and examining the machine used in the accident.

Expert advice

They are always accompanied by a Toro engineer who is an expert on whatever machine was involved.

Byers says that Kelly and Gotzian resolve about two-thirds of all cases—meaning two out of three products liability complaints at Toro don't even get to Olivella and mediation.

Once Olivella gets involved, he contacts opposing counsel and suggests that they hire a mediator to resolve the matter. These cases usually involve the most serious injuries and the most money.

Soles-Smith's wrongful death claim went through two mediation sessions before the two sides tentatively agreed on the settlement.

Soles-Smith's attorney, Norwood "Woody" Wilner, who is a battle-hardened plaintiff's counsel, having litigated extensively against the tobacco industry, says that Toro's approach is refreshing and helped get his negotiations to this stage.

"I told [Toro] from the start that I think it made a difference to my client that you came down and expressed condolences and took the matter seriously and seemed genuinely concerned," says Wilner of Jacksonville, Fla.'s Spohrer & Wilner.

Soles-Smith says her initial anger about her son's death transformed her into an advocate for lawn mower safety.

Although Wilner still needs to make a formal proposal on nonmonetary issues to Toro, Soles-Smith says, everything Toro has done so far leads her to believe that the company will help in her safety

drive. She says Toro has proposed establishing a safety advisory counsel and has asked her to participate.

"It appears they are willing to work with us in what I feel I need to do in Cory's memory and that is to prevent anyone else from having to go through this."

Copyright © 2002 NLP IP Company. All rights reserved.
Please review our terms and conditions of use.