

Liability, Torts and the Killer Condom

There's a silver lining to the litigation cloud—but it too is tarnishable

Imagine it is 1995. A 15-year old girl marches with two men in pin-striped suits into a local school board meeting. She stands before the audience of parents and school officials and weeps that both she and one of her school-age lovers have AIDS, that she is pregnant, and that the baby she is carrying also has AIDS.

She reminds the audience how the school superintendent spoke in favor of passing out condoms to school children because the condom product would save students' lives by protecting them from AIDS. She notes that the school board endorsed condom distribution as a method of "safe sex." She identifies her sex education teacher as one who preached the virtues of condoms and who, in the interests of realism and sexual honesty, demonstrated how to put a condom on a banana.

She goes on to tell how the principal executed the board's policy by buying several gross of condoms from at least three condom manufacturers. She points out that the school nurse and guidance counselor distributed condoms indiscriminately without parental approval during lunch hour and study hall. She describes the days and times she obtained condoms from school personnel. Then, she introduces the two men in pin-striped suits who accompany her—trial attorneys

who are going to sue the school district and everyone involved for everything they own.

Will this girl and her attorneys win? Most certainly. On what grounds? Plenty. Just ask the trial lawyers. Promises of safety, which the consumer understood, desired, and expected. Promises that turned out to be false. Bad advice. Defective product manufacture. Defective product design. No warning of risks distributed with the product. Improper warning. Inadequate warning. Shortcomings in warning labels that did not mention all "reasonably foreseen" risks. Warning inadequately disseminated. Inaccurate, incomplete, and incorrect training in use.

Should this girl win? Absolutely. Why? Because those who extol school distribution of condoms to school children foster a false sense of security. They perpetuate the modern delusion that condoms, with an 80 percent effective rate, make for safe sex.

Over the last 15 years tort law has transformed previous notions of liability and contract law and helped distort America's sense of personal responsibility and justice. Criminals are recompensed for injuries incurred in the commission of a crime. Drivers, injured in road acci-

dents while speeding far in excess of legal speed limits and ignoring tire safety warnings, win large judgments against tire makers for their injuries. Tort awards for the one-in-five-million negative reaction to polio or pertussis vaccinations have exceeded annual revenues for the vaccines and continue to drive their prices sky-high.

Even so, tort litigation may cure us of a modern madness—the popular but deadly delusion that sex is safe with condoms. Soon trial lawyers will be seeking and winning large awards on behalf of AIDS-infected public school students given condoms by school officials who promised "safe sex" and protection from the HIV virus. The delusion of "safe sex" will be held up to scrutiny in the courtroom. The madness of passing out condoms will reap its own rewards in the form of tragic and wrongful deaths and commensurate tort awards.

Long before the counter-culture of the 1960s, condoms were viewed as a chancy method of birth control and protection from venereal disease. Gynecologists advised young women that condoms could be depended on only 80 percent of the time. Contraceptive research and development produced birth control pills, spermicides, and IUDs. The courts responded with legal abortion on demand.

By



Michael D. White is Managing Director of Financial Institutions Insurance Association and President of Michael White Associates, Bank Insurance Consultants, Radnor, PA. MWA@BankInsurance.Com

With the sexual revolution came unlimited sexual engagement, limited personal involvement, and the illusion of sex without consequence.

Then, in 1975, A. H. Robins, the maker of Dalkon Shield, lost the first in a series of tort trials that earned plaintiffs \$25 million in punitive damages by 1985. Next came liability lawsuits against Ortho Pharmaceutical's pill and Johnson & Johnson's Ortho-Gynol spermicidal cream. In the wake of mounting liability losses, insurance companies raised premiums, reduced coverage, and began withdrawing covers. Contraceptive manufacturers found it increasingly difficult to afford or obtain requisite insurance coverage.

Meanwhile, public school systems found themselves in court. Athletic injuries, sexual assaults, molestation cases, shootings, robberies, vandalism, and accidents resulted in huge awards by trial juries and costly settlements by defendants and their insurers. In the mid-1980s school districts saw their property and liability insurance premiums rise as much as tenfold. At the same time, counseling practitioners like clergymen, psychologists, and psychiatrists were held liable for their methods, analyses, advice, and effects.

Put it altogether and what do we have? Huge awards paid for injury, economic loss, pain and suffering, and punitive damages in cases involving product defect, defective product design, reactive vaccines, faulty contraceptives, and liable school districts, teachers, and counselors. Now comes a situation that can roll all these issues and defendants into one plaintiff case centering on the liability of school distribution of condoms to students.

This madness must end. Perhaps only when a few of our "condom-protected," AIDS-infected children and their trial attorneys win the first of many judgments against school districts, condom makers, and perhaps proselytizing celebrities—and the willing media—will the delusion

of "safe sex" and the madness of condom worship be cured.

Of course, those financial awards will be paid by all of us in the form of insurance company losses, higher insurance premiums, increased property taxes, and proposed school bond levies. But the highest price of public school free-condom policies will be paid by some of our children who lose their lives to AIDS—because adults who should have known better foolishly accepted the delusional standards of safety set by local school officials who felt more obliged to succumb to the political pressure of special interest groups than the reasonable and moral arguments of parents and other spiritual and community leaders.

So there is a silver lining to the dark cloud of liability claims on our tort system. It's just that, in this case, by the time we see it, the silver lining will be tarnished by the unnecessary deaths of some of our children—children misled by a fearful and dishonest educational system, a silent and complicit condom industry, pontificating broadcast networks, vocal media celebrities, and small but threatening special interest groups.

This article first appeared in *World*, September 4, 1993, p. 19. It was reprinted as "Suing Schools Over 'Safe Sex'" in *Pennsylvania Citizen*, November 1993, pp. 1-2.

"Liability, Torts, and the Killer Condom" — BankInsurance.Com, Internet Edition © 1999 Michael D. White