Naturally, plaintiff attorneys focus on damages to make their clients whole. But they should also demand broader, nonmonetary results that make products and procedures safer and prevent future harm.

PAYING IT

By || **Patrick Malone**

Before they are hurt, plaintiffs harmed by others' negligence seldom set out to make their corners of the world safer, but safety is exactly what can happen if their attorneys work toward nonmonetary results.

On her second night working alone at an Allsup's convenience store in Hobbs, N.M., Elizabeth Garcia was kidnapped, raped, stabbed 56 times, and left to die in a field. The local sheriff had warned the New Mexico chain's owners that something like this would eventually happen, based on too many episodes of violence against employees.

In connection with a successful lawsuit against the chain, Albuquerque attorney Randi McGinn organized family members and friends to petition the state occupational safety board to change the rules for all-night convenience stores. After a series of hearings, it did; all-night convenience stores in New Mexico now must be staffed at night with at least two employees or provide a bullet-resistant enclosure for anyone working alone. No one has died in the decade since.

Eleven-year-old Joshua Murphy was sleeping peacefully on a houseboat floating on picturesque Lake Mead, Nev. His life ended after improper venting of the boat's gasoline-powered generator spread carbon monoxide into the sleeping quarters. As part of the settlement, the family's attorneys, Rick and Ken Friedman of Bremerton, Wash., persuaded the generator manufacturer to change its installation manual to promote safer vertical exhaust venting instead of venting to the rear or side of the boat.

Thanks to Rachael Martin, nurses at Medical City Dallas Hospital now must attend annual training programs on recognizing the signs of adverse drug reactions. Rachael died at age 13 from a drug reaction that, over days, attacked her muscles and kidneys as she recovered from surgery at the hospital. Her parents' attorney, Charla Aldous of Dallas, negotiated the training program term during the posttrial settlement.

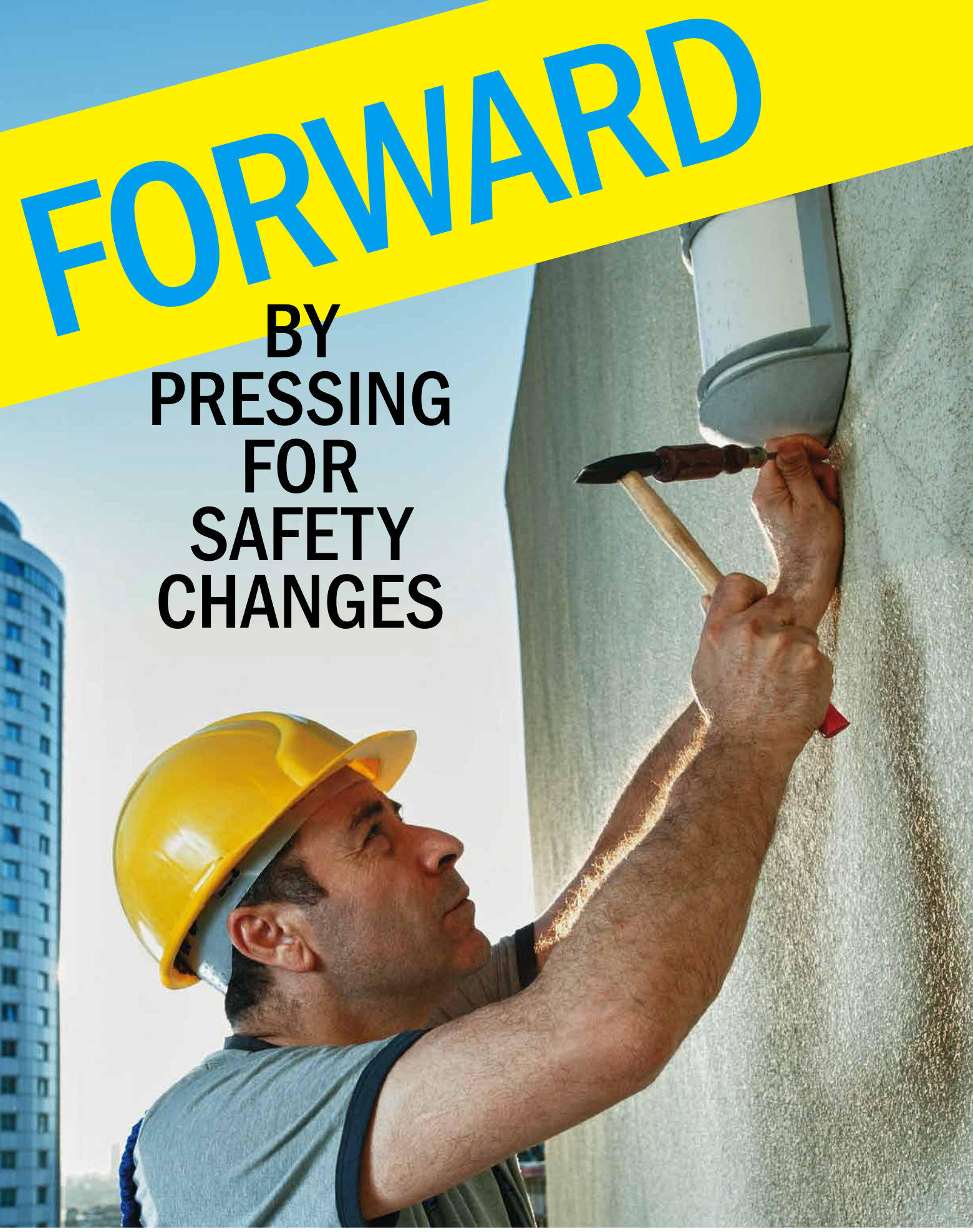
Elizabeth, Joshua, and Rachael will not become household names. But their stories could help shift the public's perception of the civil justice system if other attorneys focus on nonmonetary results and regularly resolve cases with that in mind.

Achieving Nonmonetary Results

This approach is not limited to the occasional extraordinary case. "We've been requesting safety

FORWARD

BY PRESSING FOR SAFETY CHANGES



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changes for 25 years—ever since I realized that when someone's kid dies, they really don't want the money," said McGinn. "We now request changes in almost every case we take."

How are these results achieved? It starts with the plaintiff attorneys' awareness of how important nonmonetary safety changes are for their clients and the public at large. Law students learn how money damages deter future misconduct and promote safety, and that link usually engraves itself in the heart of every plaintiff lawyer. But that link is not obvious to the public, especially when tort "reformers" relentlessly pound the idea that lawsuits are about only money and individual greed.

Even defendants who agree to substantial settlements don't always understand the need to reform their dangerous practices unless plaintiff attorneys give them a strong nudge. Attorney Jason Itkin of Houston discovered this when he sued a company that provided transportation to handicapped adults. Itkin's client, a mentally challenged passenger, was raped by a driver who had a prior conviction for sexual assault. The company had no automatic background check policy for new hires. As part of the settlement, the company instituted such a policy and put the victim's mother on an advisory board to regularly review its safety practices—but only after plaintiff counsel's aggressive negotiating. Itkin said, "The negotiations over the safety changes were much more difficult than the negotiations over the monetary issues."

In my experience, confirmed by interviewing the attorneys surveyed for this article, the goal of explicit nonmonetary safety changes needs to become articulated in counsel's mind as soon as the case theory gels. Then, when settlement negotiations begin, the safety changes are already part of the plaintiff's initial demand and must stay on the negotiating table until the case is resolved. Don't treat a nonmonetary demand as an afterthought—introducing it late in the settlement discussion can be perceived as "moving the goalposts" and is a recipe for defeat.

Although negotiations become more complicated with these extra moving parts, they may put the plaintiff in a better position. A plaintiff who insists on significant safety reforms seizes the moral high ground in the mediator's eyes. Nonmonetary terms also can drive a wedge between the defendant and its insurer. When the focus expands beyond how much the insurer will pay, the defendant loses its bystander status in negotiations—the insurer will look to the defendant to place significant changes on the table.

MANY PLAINTIFF LAWYERS GIVE IN TO THE DEFENDANT'S SETTLEMENT TERMS, AND THE PROFESSION LOSES THE MORAL HIGH GROUND.

When the case is strong, you do not need the defendant's cooperation to achieve nonmonetary results. Philadelphia attorney Shanin Specter sued West Penn Power on behalf of the family of Carrie Goretzka, who was electrocuted by a fallen power line in her Pittsburgh backyard. He also filed an administrative complaint with the Pennsylvania Public Utility Commission, whose enforcement bureau recommended that West Penn Power be compelled to retrain their linemen, inspect all splices in their power lines with infrared imaging, and replace the defective lines.

In the right case, counsel can ask for injunctive relief in the complaint, and with a strong showing that others are at urgent risk of harm, can obtain expedited discovery and a quick hearing on whether the defendant should be preliminarily enjoined from further harmful conduct. This can dramatically propel the tortoise-like pace of an injury case.

Committing to Change

Any lawyer who has won nonmonetary safety changes knows that these results are emotionally satisfying for the client and professionally enhancing for the attorney and the plaintiff bar at large. The urgent question is: Why doesn't it happen more often? Why aren't plaintiff lawyers seeking safety changes in every case in which someone suffered a significant injury?

Every profession has innovations in best practices that are obvious in hindsight but took years to become ingrained in the professional culture. In medicine, both anesthesia and operating room antisepsis were introduced in the mid-19th century, but it took decades longer for antisepsis to become part of surgeons' daily practice. Medical writer Atul Gawande attributes the difference to simple self-interest and the lag time between conduct and outcome. Anesthesia made a dramatic difference in the

MORE ON NONMONETARY RESULTS

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operating room—no more teams of burly aides holding down screaming patients, and surgeons now had the leisure to slow down and work with precision. Antisepsis, on the other hand, required dipping one's hands into harsh carbolic acid, and the benefit of avoiding infection days later was quieter and less obvious.[1]

The same is true with safety changes in personal injury lawsuits. Compared to the tangible reality of a settlement check, nonmonetary results are less immediate and the benefit more diffuse.

Also, many defendants, with the complicity of plaintiff's counsel, insist on wrapping all lawsuit settlements in tight cocoons of secrecy. They lard settlement agreements with terms antithetical to safety changes: confidentiality of even the underlying facts, "nondisparagement" clauses that cow plaintiffs into absolute silence, and nonreporting requirements so that neither the plaintiff nor counsel can report the event to government authorities. Plaintiff attorneys can resist these terms on ethical grounds as violations of the Model Rules of Professional Conduct.[2] But many plaintiff lawyers give in to the defendant's settlement terms, and the profession loses the moral high ground.

Nonmonetary safety improvements can be achieved in everyday, routine matters. They are not just for the big, special case. Even a simple, written apology is within reach in most cases, and it's only a short step from an apology to a promise to take concrete action to do better next time.

So will the plaintiffs' bar "take justice back"[3]? The answer is in the hands of every plaintiff attorney. T

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Notes

1. Atul Gawande, *Slow Ideas*, New Yorker (July 29, 2013), www.newyorker.com/reporting/2013/07/29/130729fa_fact_gawande?currentPage=all.
2. *See* Patrick Malone & Jon Bauer, *Unethical Secret Settlements: Just Say No*, Trial 23 (Sept. 2010).
3. Take Justice Back is the American Association for Justice's grassroots campaign. Visit www.takejusticeback.com to learn more.