

SETTING THE RECORD STRAIGHT



January 2007

Comments On “Rollover Economics”

Ted Frank recently authored “Rollover Economics: Arbitrary and Capricious Product Liability Regimes” for the American Enterprise Institute for Public Policy Research. In his essay, Frank misrepresents key details of a recent court decision, and attempts to use those misrepresentations to justify gutting California’s civil justice system. This paper was written to set the record straight.

Introduction

In January of 2002, Benetta Buell-Wilson (Mrs. Wilson, hereafter) was in an automobile accident while driving her 1997 four-door Ford Explorer. The accident was caused when Mrs. Wilson swerved to avoid a piece metal that fell off of the vehicle in front of her. Her Explorer rolled over, and the accident was described by the California Court of Appeal, Fourth Appellate District as follows:

“As the Explorer rolled, the roof’s pillars and rails crumpled, and the roof crushed down more than 10 inches, causing severe injuries to Mrs. Wilson. Inside the vehicle, she hung upside down from her seatbelt, in “crushing . . . unbelievable pain,” gasping for breath and feeling as if her life were fading away.”

Mrs. Wilson’s injuries were described by Frank as “catastrophic.” She no longer has any sensation in the lower half of her body, except for a painful burning sensation below her ribs. She will spend her remaining years imprisoned in a wheelchair. She cannot control her bladder and requires a catheter to urinate, and her feces must be “manually extracted.” In order to control her extreme pain, Mrs. Wilson is forced to use a strong pain reliever which affects her ability to talk and control her wheelchair – let alone drive a car.

Prior to her accident, Mr. and Mrs. Wilson enjoyed a happy and active marriage. Their joint hobbies included dancing, hiking, camping, martial arts, swimming, skiing, and volunteering with Boy and Girl Scouts. It is no longer possible for Mrs. Wilson to participate in those activities, and her husband and children have been transformed into her caretakers. Because their bedroom isn’t wheelchair accessible, Mrs. Wilson and her husband have been reduced to sleeping in their laundry room. Rather than spooning with his wife, Mr. Wilson turns his wife several times per night so she won’t get bedsores.

Buell-Wilson v. Ford Motor Co.

Mr. and Mrs. Wilson filed a lawsuit against Ford Motor Company and Drew Ford (the dealer from which they purchased the Explorer) on several grounds:

- **The Ford Explorer was defective because it was unstable and prone to rollovers;**
 - *The jury found 9 to 3 in favor of the Wilsons on this ground.*
- **The Ford Explorer was defective because its roof did not properly protect occupants in the event of a rollover.**
 - *The jury found 10 to 2 in favor of Ford on this ground.*
- **That neither Ford Motor Company nor Drew Ford warned the Wilsons of the defects.**
 - *The jury found 11 to 1 in favor of the Wilsons on this ground.*

The jury awarded the Wilson family a very large sum of money, due in part to punish Ford for knowingly selling a defective vehicle.

COMMENTS ON “ROLLOVER ECONOMICS”

The first paragraph to Frank’s essay attacks the size of the jury verdict in Mrs. Wilson’s case:

“It went generally unnoticed last November when the California Supreme Court refused to review an intermediate court’s decision in Buell-Wilson v. Ford Motor Co. But then again, it went generally unnoticed when a jury awarded an arbitrary \$368 million in damages in that case, when the trial judge reduced that verdict to an arbitrary \$150 million judgment, and when an intermediate appellate court reduced that figure to an arbitrary \$82.6 million (which, with interest, works out to over \$100 million). Products liability verdicts have become so run-of-the-mill that even nine-digit verdicts and their aftermath receive only local or specialty press coverage, with cursory national coverage. But Buell-Wilson demonstrates much that is wrong with the current liability regime, including the fact that the media is so jaded by litigation abuse that a \$368 million verdict is barely newsworthy.”

Later in Frank’s essay, he concedes that *all* awards of noneconomic damages are arbitrary by their very nature. That he would therefore attempt to use “arbitrary” as a pejorative in this passage is puzzling since even noneconomic damage awards he agrees with are arbitrary.

Even more puzzling is of what relevance the amount of media coverage this case received. Thousands of civil and criminal trials commence in this country every day, and only an infinitesimal percentage of those receive any media coverage whatsoever.

If Frank is implying that a nine-figure jury award for a product liability lawsuit is commonplace, he’s wrong. There was one such award in 2003, two such awards (*including this one*) in 2004, and only one such award in 2005. The figures aren’t in yet for 2006, but Lawyer’s Weekly (which tracks product liability verdicts) wrote, “The top ten jury verdicts of 2006 showed a significant drop in size from 2005...” The size of the top ten jury verdicts each year has been in steep decline for the past several years. Lawyer’s Weekly has attributed this trend to the tort “reform” movement, and the millions of dollars it spends to portray cases like Mrs. Wilson’s in a negative light.

While \$368 million dollars is a large amount of money, it’s still smaller than the \$400 million retirement package former Exxon CEO Lee Raymond received. And he not only has control of his bowels and bladder, but he probably doesn’t sleep on the laundry room floor, either. Mr. Raymond’s generous bonus package is supposedly justified because of the over 40 years he spent at Exxon. Mrs. Wilson will likely spend the next 30 years of her life in constant pain, yet because the verdict was reduced twice, she will receive about 25% of what Mr. Raymond received.

Frank complains that the media didn’t pay enough attention to Mrs. Wilson’s case. Perhaps Frank should write a letter to his local media outlets to request changes to their programming. Instead, he’s advocating vicious changes to the civil justice system that would punish people like Mrs. Wilson and reward companies that knowingly release defective products.

Of course, if the media *had* given more coverage to Mrs. Wilson’s case, the general public would be more likely to spot the gross misrepresentations Frank has made about her case and its implications to the civil justice system; perhaps Frank should write a letter of thanks to his local media outlets.

Do Consumers Want Defective Vehicles?

The jury in Mrs. Wilson's case found Ford to be responsible for her accident. Frank however, ignores Ford's conduct and attempts to turn trial lawyers into villains:

The SUV is thus more likely to tip and roll over than a conventional vehicle... To date, politicians and regulators have elected to permit consumers to choose whether they wish to have an SUV's off-road features, even though doing so means poorer highway performance and gas mileage. The plaintiffs' bar, however, has turned to the courts and has sought for years to punish automakers for providing what consumers want.

Technically, the *plaintiffs' bar* hasn't turned to the courts; as much as Frank may enjoy vilifying the plaintiffs' bar, he forgets that behind every plaintiff's attorney is an injured plaintiff. Frank resorts to one of the most common tactics of tort "reformers" – attempting to persuade the public that greedy lawyers are the only people who benefit from a robust civil justice system.

Frank accuses the trial bar of suing auto manufacturers for providing automobiles that consumers want. I wonder if Mrs. Wilson "wanted" to have a car that would paralyze her in case of a rollover – or if she really wanted a *safe* car that would *protect her* in case of a rollover. I suspect the latter.

The Evidence That Was Excluded From Trial

One of the complaints that Frank raises is that Ford was not permitted to introduce relevant evidence of the Explorer's crashworthiness and rollover rates. One type of evidence that Ford was not permitted to introduce was found by the court to be clearly irrelevant:

"Ford... was going to compare the Explorer's rollover performance to a variety of dissimilar vehicles, including Greyhound buses and passenger cars."

You don't have to be an automotive engineer to Ford was trying to compare apples and oranges.

To be fair, the rollover performance of Greyhound buses isn't the only evidence that Ford wasn't permitted to present to the jury. It attempted to introduce evidence of how well the Explorer fared in rollovers compared to other SUV's. In much of the country, a manufacturer may introduce evidence that its product conformed to industry customs and standards. In California, however, a manufacturer may not. California has strong consumer protection laws that deem a product to be defective if it fails to perform as an ordinary consumer would expect it to. Thus, how well other SUV's perform in similar crashes would not be dispositive of whether the Explorer was defective under California law.

One would expect that Ford would have been familiar with California's laws of evidence, after the 1981 California case of *Grimshaw v. Ford Motor Co.* In that case, Ford was sued over defects in the Ford Pinto. Ford tried to persuade the jury that the Pinto wasn't defective by comparing its safety record to other

similar cars. The strategy backfired then just as it did in this case, and the *Grimshaw* jury returned a nine-figure verdict against Ford. Who was it that said those who don't learn from history are doomed to repeat it?

The point of Frank's essay is that a Federal law should be created that preempts state product liability laws like California's. Franks proposed national legislation would allow defendants to introduce the type of evidence that was excluded in this trial.

However, even if Frank's proposed legislation had been enacted prior to this case, Ford *still* wouldn't have been permitted to introduce its evidence. Frank omitted this crucial passage of the *Buell-Wilson* decision from his essay:

*"Even if the comparative rollover data were not inadmissible as a matter of law as improper industry and custom evidence, **it would still be inadmissible as unreliable and misleading.** Ford's statistics from which the comparative rollover rate testimony would flow were drawn from two databases, FARS (Federal Accident Reporting System), and a state database tracking state accident information. FARS only included fatal rollover accidents **and did not compare the relative stability of vehicles; included all vehicle types, not just SUV's;** and did not track the cause of the rollovers or the resulting injuries. The state database encompassed accidents from only 10 states, did not include the two most populous states, California and Texas, and did not detail causes of the rollovers."* (Emphasis added.)

Frank's dishonest attempt to blame California's strong consumer protection laws for the exclusion of Ford's unreliable and misleading evidence renders Frank's entire essay unreliable and misleading.

The U.S. Court System Benefits U.S. Defendants

Perhaps the most fatuous argument that Frank makes in "Rollover Economics" is that American manufacturers suffer a legal disadvantage because their internal documents are in English. Frank writes:

"It is also far cheaper to go after a American manufacturer, whose memos and e-mails and depositions will be in English, than it is to go after a foreign manufacturer, whose Swedish memos or German e-mails or Japanese depositions will require expensive and time-consuming translations that make discovery far less feasible"

Just this month, Motor Trend voted the new Camry the Car of the Year. The Camry has been the bestselling car in America for eight out of the last nine years, and is one of only a handful of cars in the past three decades to sell more than 400,000 units in the U.S. in a single year. Total U.S. sales of the Camry are approaching seven million. The great success of the Camry is apropos to Frank's contention because the car was designed in Michigan and built in Kentucky. It's a safe bet that few of Toyota's Michigan or Kentucky workers can read and write Japanese.

The Camry isn't Toyota's only American success story. Another top-seller of Toyota's is the Avalon, which is referred to internally as Toyota's "Most American" car. It too was designed and built in America, with roughly 75% of its parts also being designed or manufactured in America. (Peter 2005)

More and more Asian manufacturers (Honda, Hyundai, and Kia, for example) are joining Toyota and building design centers and factories in the U.S., and staffing those facilities with workers who write their emails and memos only in English. Additional evidence that U.S. manufacturers *aren't* disadvantaged by the U.S. court system comes from none other than Frank himself, who cites "*The Home Court Advantage in International Corporate Litigation*." Frank cited that study" but one wonders if he actually read it, as it concluded:

"[T]he probability of a foreign firm being sued is actually higher than the probability of a U.S. firm being sued."

"[F]oreign firms are disadvantaged in U.S. Courts..."

"U.S. defendant firms are less likely to lose than a foreign firm..."

Frank's own evidence contradicts his proposition that "American manufacturers are at a unique disadvantage because of the state of American products liability."

Noneconomic damages

Frank also argues that the U.S. needs to set rigid caps for noneconomic damages. He writes:

"Let us concede without debate that Ms. Buell-Wilson's injuries were catastrophic, and that placing a "fair" money value for compensating such injuries would stymie the deepest philosophical thinkers. But therein lies the problem inherent in noneconomic damages: juries and the judicial system are being asked to measure the immeasurable. Any result is essentially arbitrary; consistency is impossible."

If neither juries nor judges can "measure the immeasurable," one wonders why Frank believes politicians can; he believes that legislatures should place *arbitrary* limits on the amount of noneconomic damages judges or juries can award.

If, as Frank suggests, arbitrary awards are innately wrong simply because they are arbitrary, then *arbitrary* damage caps must also be wrong. His advocacy of *arbitrary* damage caps isn't even a case of "two wrongs making a right," but of replacing one wrong with another.

For lack of a better word, Frank's suggestion is just plain wrong.

How Accurate Is Our Jury System?

Next, Frank attacks the jury system for having less than 100% accuracy:

“A manufacturer can win thirteen cases in a row, but if the fourteenth jury votes 9 to 3 to award tens or hundreds of millions of dollars, the first thirteen juries’ decisions are effectively mooted. Ford won thirteen out of fourteen cases, but the mean case cost it \$7 million in damages. Ford’s shareholders will hardly take solace to be told by reform opponents that the jury system got it right 93 percent of the time.”

Frank’s concern for Ford’s shareholders in the face of Mrs. Wilson’s injuries is worth noting.

I am not familiar with the other thirteen cases Frank references, so I cannot speculate as to whether those juries made the right decisions. But Ford’s own lawyer offered evidence that perhaps Frank has it backwards, and the jury system may only get it right 7% of the time:

*“It’s impossible not to be angry at Ford, Ford Motor Company, for what decisions that in marketing and selling this Ford Explorer **it knowingly put a defective product out on the market [sic] and caused the family tragedy that you see before you now.** . . . We are sorry. We are sorry that we let you down. **The engineers are sorry that they let the rest of the company down.**”
(Emphasis added.)*

Frank argues that the jury awarded too much money to Mrs. Wilson, and he may be right; the award was reduced two times. But Ford’s own attorney proved that Frank is wrong to argue that Mrs. Wilson should have received nothing.

Conclusion

There may indeed be cases in which the legal system failed and an innocent company was punished. *Buell-Wilson v. Ford Motor Co.* is not such a case. I have attempted to set the record straight, but I invite you to read the 65-page decision and draw your own conclusions as to how accurate Frank’s essay is.

Justinian Lane (Justinian@corpreform.com) is the publisher of Corpreform.com and is a regular contributor to TortDeform.com. His opinions regarding the civil justice system are his own, and he was not compensated in any manner by any party for the preparation of this article.

WORKS CITED

Bhattacharya, Utpal. "The Home Court Advantage in." *Journal of Law and Economics*, 2006, Forthcoming.

Buell-Wilson v. Ford Motor Co. 141 Cal. App. 4th 525 (2006)

Frank, Ted. "Rollover Economics: Arbitrary and Capricious Product Liability Regimes." *Liability Outlook No. 1*, 2007.

Peter, John. "Camry extra large: Toyota's "Most American" sedan finds its rightful place at the head of the family table." *Automotive Industries*, March 2005.