



Three boys

“Support your troops” includes holding accountable those who design and manufacture defective equipment that maims and kills America’s finest

BY TOM BRANDI

As high school students in early post-9/11 America, three young boys took different paths but all ended up helping their fellow Americans.

Dave (names have been changed) chose the military and became one of the youngest ever in Special Forces and put his life on the line in war. Steve and Nick went to school and worked summers putting their lives on the line fighting forest fires. All three were young men of incredible potential. But their families never saw them grow into the wonderful men their potential foretold because all three died in transport helicopters.

This is a tale of pursuing two cases against manufacturers and maintenance facilities with two very different results.

Fighting nature

The forest-fire fighters, Steve and Nick, were in the wilderness in California for eight straight days under brutal conditions, working long hours attempting to

stop wildfires engulfing them on all sides, when word came they were moving out because of worsening weather conditions. They gathered at the exit point waiting as the helicopter ferried out two prior crews.

Finally their turn came, and along with several other weary firefighters they entered the helicopter, strapped themselves in, and began to relax for the first time in over a week. They were headed to some much needed rest, food and showers – a brief respite from their ordeal.

“Support Your Troops”

Dave was in an elite unit in a war zone. They helicoptered from their base to another location looking for some bad guys, who were not there. They spent the night, and the following day took off in a convoy of three helicopters to return to their base. As Dave and the others entered the relative safety of the helicopter, they were no doubt reassured they were flying in one of the best machines that those who contract with the military can supply. After all, doing your best for our

military and supplying them with the best equipment is an essential part of “Support Your Troops.”

Steve and Nick’s helicopter had recently been remodeled, with the finest craftsmanship and inspected by top flight maintenance personnel. At least that is what they likely thought.

Dave and his buddies were flying in a helicopter originally built for the Shah of Iran and remodeled by the manufacturers for the U.S. Army, with all of the latest bells and whistles. At least that is what they likely thought.

Crash

As Steve and Nick took off, they barely made it to a few hundred feet as the helicopter lost power, fought to maintain altitude and crashed into a fiery ball, consuming its occupants.

An hour or so into Dave’s flight they encountered some rain and snow, but it was nothing the helicopter had not encountered before and was well within the envelope of safety. Suddenly an engine



lost power and the pilots fought to keep the helicopter in the air. It ultimately crashed, killing eight occupants including Dave and severely injuring 14 others. There was no enemy activity in the area.

The families of these young men asked us to find out why their sons died and to hold accountable those responsible. Thus began a journey that revealed overloaded aircraft, charges of misrepresented weights, missing documents, computer problems, thousands of pages of discovery, numerous depositions, and a corporate policy that claimed to “support the troops” while using legal shields to avoid responsibility and shift the burden to the American people.

In our aviation work we look to the human components, the aircraft, and the environment to reveal the causes of the incident. Pilot conduct is examined, as well as the work by maintenance personnel, as we seek to rule in or out human error. We also look to the helicopter to see if there was a defect in manufacture leading to a failure that caused or contributed to the incident. And we look to the environment, e.g., weather, terrain, air traffic controllers’ improper routing, etc., to see if any of these factors led to the deaths.

Loss of engine power

Both of these cases involved loss of engine power with factually different causes, and legally different results. Factual investigation and discovery revealed Steve and Nick’s helicopter lost power due to a combination of being overloaded and the presence of contamination in the fuel control units reducing fuel flow to the engines, leading to a power loss. It was generally recognized the overweight condition of the aircraft had a crucial effect on the ability of the aircraft to sustain flight under reduced fuel flow conditions. The parties disputed the reasons for the aircraft being overweight, whether people mistakenly reported the improper weight or intentionally concealed it. Similarly, evidence showed a different size filter would have removed virtually all of the

contamination; a fuel filter in use in other aircraft, but for unexplained reasons, not in use here.

When the NTSB investigates a crash, the family and its representatives are generally not allowed to inspect the aircraft or have input into the investigation while the representatives of the owner and manufacturers actively participate. For Steve and Nick, during the investigation, one of the parties took possession of the fuel control units and essential component parts were allegedly lost during shipment to the NTSB laboratory.

Ultimately the facts were revealed and this case settled, providing the families of Steve and Nick the reasons why their sons were lost to them.

A dispute over cause

In Dave’s case, there was a dispute over the facts surrounding the cause of the crash. The manufacturers denied any defects and insisted the plane crashed due to pilot error or the effect of weather, two reasons that allow them to escape liability and shift the burden of the deaths and injuries to the U.S. government. The families contended the rainfall was not unusual, the two other helicopters in the convoy experienced the same weather without any negative effects, and that the real cause was a known computer glitch that led to an engine shutdown.

Dave’s helicopter was not originally made in the U.S., nor was it made for the U.S. Army, but was assembled under a manufacturer’s license with parts from a foreign company. When the Shah of Iran could not take delivery because he was no longer living in Iran, it was later reconfigured and sold to the U.S. Army. Later the manufacturer approached the U.S. Army with the recommendation to use newly devised technology, and the Army agreed. There was no record that the Army insisted on any specific design or provided written specifications, but rather left the details to the manufacturer. In fact one essential computer-part manufacturer contract document provided:

Specific implementations used to describe the functional requirements throughout this document are for informational understanding only. Actual implementations used to meet these requirements will be at the discretion of the designer unless specifically stated otherwise.

During discovery numerous Army personnel repeatedly testified that the Army had no involvement in the design of the critical computer part that ultimately failed.

Immunity

We believe that members of the Armed Forces are entitled to the same protections as any other citizen, but trying to hold manufacturers accountable for injuries to service personnel is fraught with peril.

In this case, despite the fact there was no military combat activity, the defense brought a motion for summary judgment based on the combat activities’ doctrine which provides immunity to the government for negligence in combat activities. This motion was denied.

Several other motions were filed and ultimately the defense motion for summary judgment based on the Military Contractor Defense. To invoke the defense successfully, the contractor must establish three elements: “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” (See *Boyle v. United Technologies Corporation* (1988) 487 U.S. 500, 512.) The motion for summary judgment was successful despite the absence in the record of facts demonstrating the manufacturer built what the government designed, which is what we believe is the extent of this judicially created immunity. The end result is that the families of eight young men will never have their day in Court while manufacturers who provided a defective product from which they



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profited handsomely escape accountability.

I believe “Support your troops” includes providing them with appropriate equipment to do their jobs. I believe that “Support your troops” includes holding accountable those who design and manufacture defective equipment that takes the lives of America’s finest. Dave and the seven others who were killed agreed, by signing up to defend our nation, to be placed in harm’s way. They did not agree to sacrifice their lives so that a manufacturer could profit while supplying defective equipment and then escape responsibility for its defective products.

Our firm and countless other lawyers will continue to try to protect the men

and women who serve us and ensure they have the same opportunity and right to hold accountable manufacturers who injure, regardless of whether they are soldiers or citizens. Signing up to serve and protect America should not mean eliminating your right to hold accountable those who defectively manufacture items necessary to protect our service personnel. If a contractor truly built what the government told them to, with precision, and provided suitable warnings, and the government overruled them and insisted on what was later a defective product, then the contractor has a meritorious position. But supporting our troops should not mean allowing a company to blame the government for what is the company’s

fault, allowing the company to seek escape from responsibility. All of us owe our service men and women more than words, including providing safe products and a system to hold accountable those who fail in their duty to do so.



Brandi

Thomas J. Brandi represents people in consumer class actions, injury and wrongful death including aviation, dangerous roads, defective drugs, and unsafe products. He has 17 verdicts from \$1 million to \$1 billion, has tried cases

to verdict in 15 California Counties, and has received many other honors.