

Chapter 18

“Like Something Out of *The Exorcist*”

While lead levels in the paint of Mattel toys ignited most of the media frenzy, public fear, and congressional indignation in 2007, the company's magnetic toys were the more dangerous, such as Polly Pockets. The tiny magnets could be easily ingested by children, severely injuring them, or in the case of another company using similar magnets, causing death.

The hands and feet of the Polly Pockets dolls, which are several inches tall, are made of a bendable plastic and have tiny magnets embedded in them, as do the Polly Pockets soft rubberized fashion accessories, which have magnets glued to them. The dolls were originally distributed by a British company, Bluebird Toys, which was purchased by Mattel in 1998. Mattel redesigned the toy and introduced a collector brand called Fashion Polly!

The untold stories of some of the injured underscore the horrific toll toys such as Mattel's Polly Pockets, with their 1/8-inch-diameter

magnets, have taken—until they were redesigned again by Mattel in the wake of tragic incidents.

Seven-year-old Paige Kostrzewski was a huge fan of Polly Pockets, and so were all of Paige's friends in their blue-collar Indianapolis, Indiana, neighborhood. They carried the very-portable toys wherever they went and played with them in each other's homes.

Polly Pockets had a virtual cult following among the 6 to-8-year-old set, due to Mattel's heavy promotion. Paige's mother, Misty May, an hourly warehouse worker with a brood of four, usually picked up the latest Polly Pockets set for her daughter at her local Kmart. The cost was \$15 to \$20 a pop, a considerable wallop to her pocketbook, but worth it in order to keep her baby girl happily busy at play.

Monday, July 11, 2005, was payday for Misty May, and right after work, she went to the store and bought Polly Pocket! Quik-Clk Boutique, for Paige's collection of about a dozen Polly Pockets scenarios. This one had a "magic dressing room" to allow Polly to change quickly in to a new outfit.

Paige also was a Barbie collector—the basic doll now cost at least three times her original 1959 introductory price of \$3—and the previous Christmas, the child had found four new Barbie dolls gift wrapped under the tree. Mattel was a part of her young life, and therefore Paige Kostrzewski represented millions of little girls who were a new generation of Mattel toy loyalists. Mattel was a brand name their parents trusted. But that was before Paige almost died.

Two days after Paige got her new Polly Pockets, the child began acting strangely. "She just started running around and not acting herself, and by the next day she didn't want to eat," says Misty May.

She wasn't complaining of any pain or anything, she just wasn't feeling well. I called our doctor and was told that as long as she was keeping fluids down she was fine. I thought she had a cold or the flu coming on. But then, by Thursday evening and Friday, she wouldn't drink anything, and then late Friday and early Saturday she starting puking green stuff, like something out of *The Exorcist*. It was gross.

By Sunday morning, Paige had gotten worse, vomiting when she wasn't sleeping, and not eating or drinking. Frightened, Misty May put her very ill daughter in the car and took her to the emergency room at

Indianapolis's Wishard Memorial Hospital, a county facility. Misty May described her daughter's symptoms, but none of it made sense to the doctor on duty. "We thought maybe because she and her brother like to wrestle that maybe he kicked her too hard in the stomach," she says.

The ER doctor ordered an x-ray of Paige's stomach, and the results were shocking.

"The picture showed metal foreign objects in her body," says Misty May. "I was thinking that maybe she swallowed coins or something. I was freaking out. I asked Paige, and she said, 'No, Mom, I do not put coins in my mouth.'"

Paige was transferred from Wishard across the street to Riley Children's Hospital, considered one of the Midwest's top centers for pediatric care and research. Further emergency tests were conducted to determine the liquid she was throwing up. The findings were horrific. The child's intestines had been punctured, causing toxins from her bowels to seep through her body, which could cause other major organs to shut down and kill her.

"They told me flat out that Paige required emergency surgery or she was going to die," says Misty May. "I was actually freaking out. I couldn't think straight. I was trying to figure out what she could have swallowed to do this to her. Paige had the surgery within a couple hours of being at Riley. They moved four people out of the way to get her into the operating room for the surgery, which lasted almost three hours."

When the operation was over, the surgeon, Dr. Thomas Rouse, handed Misty May a bottle in which he had placed two tiny, but powerful, magnets that had got stuck in different parts of her daughter's intestine, causing two punctures.

The surgeon showed it to me, and I looked at him and I said, "I know exactly where they came from. They came from her Polly Pockets—out of the clothes of her Polly Pockets doll." I brought in the toy to show him the next morning. He was surprised, especially being that I had just bought the toy on Monday and she was sick by Wednesday.

Before the life-threatening event, Misty May had no concept that cute little Polly Pockets posed potentially fatal danger to her daughter, or any other child who played with the fast-selling toy.

Paige knew not to put things in her mouth or chew on things. The toy was new. I didn't think the magnets would fall out, or that they would fall out just like *that*. As soon as Paige woke up, I asked her what had happened. She told me she was putting the doll into the little boutique and that her hands were full so she stuck the outfits between her lips. I was like, Paige, if you swallowed these you should have come and told me the minute you swallowed them, and she said, "Mom, I didn't even know that I swallowed them."

Because of the accident, the child spent two weeks in the hospital, missed six weeks of the new school term, couldn't do any physical exertion, and the visible scar caused her embarrassment. She had to watch what she ate, and required an annual checkup. Her medical bill was \$31,786.69, paid by Medicaid because the family could ill afford health insurance.

Misty May tossed out all of the Mattel toys before Paige got home from the hospital, and since the incident has refused to purchase anything from Mattel, she says. She thought about what would have happened if her youngest, who was one year old at the time, had been the victim. "I thought, what if this happens to somebody else's kid, and what if they are too late in getting them to a hospital? I lost a child before and I couldn't imagine going through that again—or somebody else going through that."

It was at that point that she decided to talk to a lawyer. As it turned out, her aunt was a housekeeper for Gordon Tabor, a prominent Indianapolis attorney who specialized in product liability cases. He met with Misty May three or four days after Paige's surgery. Tabor conducted an investigation "questioning the safety of this product" and made his determination. "There was no doubt that those two magnets had come from the Polly Pockets product," he says. "Those magnets are small and powerful and when they attract they catch the bowel wall in between them. It shuts off circulation, and causes necroses of the bowel, resulting in a hole in the bowel."

Before taking any action involving Mattel, Tabor closely watched Paige's case because "there was a question after her dismissal from the hospital about what her permanent condition was going to be, and whether or not she would regain full bowel function."

Tabor says he soon learned that Polly Pockets wasn't the only product that used these or similar magnets.

We spent time going to Wal-Mart and Kmart looking at products off the shelf, buying products, bringing them back to our office, playing around with them, and doing our own in-house investigation. I have a granddaughter in Florida who was the same age as my client and I called my daughter and asked if she had ever heard of Polly Pockets, and she said, "Yes, Madeleine has two of them. All of her friends have these dolls. They are a very, very hot item." I told my daughter to take those products away from her. At that point, I felt we've got a product here that is exposing a lot of kids, so we've got to take some action.

He also contacted the Consumer Product Safety Commission to determine whether there had been any other similar cases of children swallowing magnets, from Polly Pockets or otherwise. His contact information and the issue he was asking about went into the commission's database.

There was one big problem facing Tabor in the Polly Pockets matter. Because of questionable tort reform in 1995, the Indiana product liability law didn't favor the consumer as it once did, a change that came about as a result of intense lobbying by big corporations and trade associations. "They dumped a ton of money into Indiana, and it sailed through," he explains. "We had great consumer law until this onslaught from all this money coming from out of state. The American Manufacturing Association threw a ton of money, and that brings in the toy manufacturers, the drug manufacturers, the whole shooting match."

Rather than pursuing what would have been a complicated legal procedure in Indiana because of the tort reform, Tabor retained a lawyer friend in California, who, by coincidence, had had dealings with an outside law firm that had represented Mattel in the past. He told him, "I think I've got a bear by the tail." Rather than file a lawsuit against Mattel, Tabor decided to have his co-counsel make contact with Mattel's lawyer and see where it went.



It was now the summer of 2006, almost a year since Paige Kostorzewski had swallowed the magnets that could have killed her, when an attorney

for Mattel arrived in Indianapolis to interview the child, her mother, and the surgeon in Tabor's offices—where also on display was the Polly Pockets in question, with the two destructive magnets.

While it was unusual for Tabor, who'd been in practice for almost four decades, to allow a probable defendant's attorney to have an informal interview with a client, he felt, "I had nothing to lose because there wasn't any question that the magnets caused the injury. I had no fear. Mattel wouldn't be sending a high-powered lawyer halfway across the country before a lawsuit is even filed unless they had a concern over this product."

Tabor "absolutely" believed that Mattel in 2006 was hoping to keep the whole matter quiet, reach an amicable settlement without a lawsuit, and avoid the attendant national publicity that could hurt Polly Pockets sales and place a dark cloud over the company.

"Mattel had to figure that at some point the Feds were going to get involved, and so was the media," Tabor says.

As a human being, you have to keep in the back of your mind that the product is potentially harmful to many, many others. As a lawyer, you have to take care of your client first, and then you have to put on your white hat. We weren't going to settle the case without a representation by Mattel that they were going to take action of a curative nature with the toy.

Mattel negotiated for several more months before a confidential settlement was quietly reached.

Misty May says it wasn't until May 2007—a couple of months before the summer of toy terror began—that she received the settlement check. While she was under orders not to disclose the amount, she says that Paige will "get to go to college and buy a house and a car." But she also had to pay her medical bills out of the settlement, reimbursing Medicaid, plus paying reduced attorney fees.

What are her feelings about Mattel?

"Polly Pockets should have been recalled when my daughter had her surgery and almost lost her life," she maintains. "I don't care for Mattel because of the stuff my daughter had to go through, and Mattel made us feel like they didn't give a crap."

Once the case was settled, Tabor says he learned that the magnet problem was the result of a Mattel design flaw rather than a Chinese manufacturing quality control issue. "Mattel drew up all the specifications," he notes.

As did Misty May, he came away with a bad taste concerning the biggest toy company in the world. "I'm very disappointed in Mattel," he declares.

In early 2006, when Mattel had information of my case, I know damn good and well that they had their research and development people looking at these magnets. But did they comply with the federal requirements of reporting to the Consumer Product Safety Commission so CPSC could get out an immediate warning to the public? I don't believe so. I never saw it. I have to fault Mattel for that.

After notice of my case, the magnet problem was to be taken care of. There was to be a voluntary recall. These products were supposed to be taken off the market. Mattel knows they had the same design, the same magnet, in other toys in addition to Polly Pockets, and they sort of got the information out piecemeal, a PR campaign—don't slam the public with a whole bunch of information, just give them a little here, a little there.

Do I think Mattel was a good corporate citizen? Hell, no, particularly in light of who the consumers were—young children. There is an additional moral responsibility to the manufacturer of a product that is being utilized by children. They are more susceptible to incurring the wrath from a dangerous product than an adult would be. There was a special moral responsibility, in addition to whatever federal regulations apply to them, for Mattel to respond promptly. I don't think they did.

Shortly after the secret settlement with Paige Kostrzewski was finalized, just before Thanksgiving 2006, Mattel and the CPSC recalled 4.4 million Polly Pockets products after at least three children, including Paige, suffered serious injuries from swallowing the magnets. By then, the agency charged with keeping Americans safe from dangerous products knew of some 170 cases of the small magnets coming out

of the recalled toys. But the agency had no idea how many others—hundreds? thousands?—might have swallowed the magnets, suffered symptoms, but luckily escaped injury. The CPSC, which would come under intense congressional and media scrutiny in 2007, noted that the Polly Pockets recall did not include sets then currently on store shelves because of a redesign by Mattel.

At the time, Ed Mierzwinski, consumer program director for the U.S. Public Interest Research Group, a nonprofit consumer advocacy group in Washington, said Mattel needed better safeguards. “They should have never allowed it to happen in the first place. They have a responsibility to avoid recalls.”

Little did he and the rest of the world know that the worst was still to come.