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LIABILITY AND DEFENSES—DEFENDANT'S VIEWPOINT

ARTHUR J. MOORE*

THIS article and the one by Donald M. Haskell are devoted to the subject of liability and defenses from the standpoint of the defendant. Regretfully, I will have more to say about liability than defenses. This is not pessimism on my part but merely the way the ball appears to be bouncing today.

The rules applicable to products liability are essentially the same in the aviation field as they are in any other field. The difference is, of course, that the factual problems may be more complicated and that the financial exposure can always be counted upon to be substantial. This, in turn, is why the better plaintiff's lawyers can be counted upon to be there and to be using all of their talent and imagination in an attempt to convince the courts that the applicable rules should be still further broadened and liberalized.

For some of the defendants, the exposure may be both substantial and in excess of policy limits. This may cause a particular defendant to make friends with the plaintiff or plaintiffs under circumstances under which such friendship would not normally be expected. Independent of policy limits, the fact that several defendants are generally in the picture may well lead to a variety of alliances and alignments, particularly if it is clear to all of them that one of them will lose without its being clear to them who the loser will be.

As you will have noted from the program, my subject includes negligence and breach of warranty as well as strict liability. Theoretically at least, negligence is still with us. Indeed, it sometimes amuses me, as a California lawyer, to think of the extent to which it is with us. Some thirty years ago, in the famous concurring opinion which started people thinking about strict liability, Mr. Justice

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Traynor forcefully argued that negligence was not enough protection for the plaintiff even with the help of *res ipsa loquitur.*[1]

Some twenty-seven years later, however, after strict liability had become the accepted approach in products cases, the Supreme Court of California unanimously held that the planitiff is entitled to insist upon (and the trial judge cannot deprive him of) instructions on negligence and *res ipsa* because, in certain cases at least, those instructions will do a better job for him than instructions on strict liability.[2]

The case I just mentioned involved a plaintiff who survived the crash of a broken ladder and was accordingly in a position to testify that he himself had done nothing to prevent *res ipsa* from being applicable. Needless to say, that approach would not be available (or not so readily available) to the pilot in a case in which no one survived the crash of an airplane.

It may be available, however, to some of his deceased passengers upon a preliminary showing that planes do not usually crash unless someone was negligent, coupled with a circumstantial showing that the particular passenger or passengers did not, or did not have the opportunity to, cause the crash.

If used alone, such an approach would not answer the question of who was to blame as between the pilot, the manufacturer, the maintenance company and whoever else may have been joined as a defendant. This, however, would not necessarily defeat the claims of California passengers since California is getting very close to the point (if, indeed, it has not reached the point) of shifting the burden of proof to the defendants in cases in which the plaintiff appears entitled to recover from someone and yet is not in a position to pin the blame upon this or that particular defendant.[3]

As far as warranties are concerned, I think that no mention need be made of implied warranties since strict liability is now the accepted way of doing the job which was once entrusted to such warranties. Express warranties, however, still seem to be with us, particularly those warranties which are found in advertisements or

[1] Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 462-63, 150 P.2d 456 (1944).

[2] Jimenez v. Sears Roebuck & Co., 4 Cal. 3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).

[3] Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Haft v. Lore Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

other literature which the manufacturer of an airplane puts out in an attempt to sell his product or educate its buyer.

This brings us to strict liability, to section 402(A) of the *Restatement of Torts* and to the question of the extent to which that section still restates the currently applicable rules.[4] The following is the text of that section and of the triple caveat which the American Law Institute added to the text in order to qualify or limit its scope:

402A. SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  (a) the seller is engaged in the business of selling such a product, and
  (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
  (a) the seller has exercised all possible care in the preparation and sale of his product, and
  (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Caveat:

The Institute expresses no opinions as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;
(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
(3) to the seller of a component part of a product to be assembled.

We all know that the question of whether the section applies to

[4] RESTATEMENT (SECOND) OF TORTS § 402(a) (1965).

harm done to persons other than users or consumers has already been answered in the affirmative.[5] This, however, may not be significant for our purposes since, statistically, plane crashes kill or injure far more users or consumers than bystanders. We also know that, at least in California and in those states which do or will follow California, the requirement that the defect render the product unreasonably dangerous has been eliminated.[6] As you will note, the court removed that requirement because it deemed it to place a "considerably greater burden" upon the plaintiff than that which it originally meant to place upon him or thought it was placing upon him when it brought strict liability into our law.[7]

Quite frankly, this is a change which scares me less than it seems to scare other defense-minded people. It may be true that a defendant will theoretically be better off if the plaintiff is required to prove not only that the product was defective but that the defect rendered it unreasonably dangerous. This will enable him to argue that the plaintiff has a double burden, that a defect is not enough and that the jury must additionally find that it caused an unreasonable danger.

Practically, however, there are very few cases in which, having found the product defective, the jury would return a verdict for the defendant because the defect did not render the product unreasonably dangerous. This would seem to be particularly true in the cases with which we are concerned in which the defect is alleged to have caused the plane to crash. If established, such a defect would seldom be found not to have been unreasonably dangerous. I realize of course that the requirement of unreasonable danger may have much more significance in a case in which the defect caused the injury without causing the accident and, to the extent that it was eliminated in that type of case (as it was in *Cronin*), the ruling is indeed regrettable.

On the issue of whether strict liability is applicable to the manufacturer of either a component part or a product which is expected to be processed or otherwise substantially changed before

[5] Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

[6] Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

[7] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

it reaches the user or consumer, the answer seems to be that it is. This, of course, is subject to the qualification that the defect is one for which the manufacturer is responsible as distinguished from a defect which is "added" to the product or component part after the manufacturer delivered it to whoever became responsible for processing it or changing it or incorporating it into something else.

As you will have noted, I have been using the word "defect" quite freely but without attempting to define it. From a defense standpoint, there are essentially two types of defects. The first one is the defect with which the defense lawyer can easily live because the applicable rules are settled. The second one is the defect with which he might prefer not to have to live because it may lead him into the land of brand new law which, so often, means brand new plaintiff's law.

On the one hand, I have identified the missing bolt, the missing weld or any number of other "one-shot" defects. Cases of that type are comparatively easy to defend. To begin with, the bolt was not missing at all and, in any event, it was removed by someone else long after the plane or the component part left the possession of the defendant and, finally, the fact it was missing in no way caused the accident.

The second type of defect is found in design cases and failure-to-warn cases and this, of course, is the field in which both hindsight and the art of controlling hindsight become all-important. Defective design cases and failure-to-warn cases have been with us for a long time. So long, however, as they were handled only in terms of negligence, the defendant could at least assume (or hope) that he would not be held liable without a finding that he knew or should have known (at the time the product left his hands) about the better or safer design which it is claimed he should have used or the danger which it claimed he should have warned against.

Now that strict liability is with us, the fear appears to be that liability can or will be imposed without a showing of actual or constructive knowledge and that the manufacturer will thus be at the mercy of whatever theory the plaintiff's expert may second-guess him with, years after the product was manufactured and sold. I have no doubt that this is where our friends of the plaintiff's bar would like to take us. I am not sure, however, that the law has gone this far as of today. Nor do I think that it will go this far to-

morrow or at any time in the future except, of course, at such time as no-fault becomes the accepted answer in the products or the aviation field. I am certainly not familiar with all the cases on the subject. Generally speaking, however, it would seem that the design and failure-to-warn cases which the defense has lost up to now have been cases in which the defendant knew or should have known.

In a jurisdiction as liberal as California, for example, the law still appears to require (in failure-to-warn cases brought on the theory of strict liability) that the plaintiff plead and prove that the defendant knew or should have known of the claimed defect or danger.[8]

Needless to say, there is a considerable difference (in terms of fairness) between holding the defendant liable without any showing of negligence in a case in which he failed to do that which he himself meant to do (as, for example, put in a screw of the right length at the right place) and holding him liable without such a showing in a case in which he failed to do that which someone else now says he should have done (for example, to adopt a design that no one had even thought of at the time he did his designing). I personally think this is a distinction which will continue to be material and which the courts will continue to respect.

Having made this encouraging statement, however, I must immediately take some of it back by pointing out that (i) the courts will undoubtedly go very far in allowing the jury to find that the defendant should have known (thus, severely limiting the "state of the art" defense), and (ii) they may well require him to take certain steps or give certain warnings in cases in which (after the product has left his possession) he discovers something which shows it to be less safe than he originally thought it was. Moreover, the courts will no doubt continue (in cases where a warning was given) to let the jury decide whether a better warning could have been given.

Noteworthy at this point are the following cases. In *Noel v. United Aircraft Corporation*,[9] the court imposed a "continuing duty" on the manufacturer of a propeller system to develop a safety device adaptable to all, rather than merely some, of the planes

[8] Oakes v. Geigy Agricultural Chem., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969).

[9] 342 F.2d 232 (3d Cir. 1964).

which used that system. As of the time of the accident, the safety device had been adapted to Lockheed Electras. As you all know, the crash involved a Constellation. The case was a negligence case and the issue of "continuing duty" was not the only issue which it raised. There can be no doubt however that, as an issue, it is eminently adaptable to strict liability cases and adoptable by strict liability lawyers.

In *Ault v. International Harvester Co.*,[10] a divided court recently considered and upheld the manufacturer's contention that evidence of subsequent changes should not be admissible in strict liability cases. Specifically, the court held that the plaintiff should not have been allowed to show, at the trial, that three years after the accident the defendant had shifted from aluminum to malleable iron in manufacturing its gear boxes. Unfortunately for the defense, however, the court recently granted a re-hearing and I am much afraid that it will now rule the other way.

In *Balido v. Improved Machinery, Inc.*,[11] the manufacturer repeatedly offered to install a safety device on a plastic molding press which was then owned by the plaintiff's employer and the employer repeatedly did nothing about it (perhaps because the manufacturer wanted him to pay for the installation). The court held that the repeated warnings were not necessarily enough and reversed the judgment of nonsuit which the trial judge had entered in favor of the defendant. The case may not be quite in point because the press, which was manufactured in New Hampshire, admittedly did not comply with certain California safety orders which were applicable at the time of manufacture and, in that sense, its design could be found to have been defective from the beginning. I would recommend, however, that we not delude ourselves into thinking that the case will be limited to those facts.

Similarly noteworthy, although not yet final, is a million-dollar plus Los Angeles Superior Court case[12] in which the jury was allowed to find against Ford on the theory that it should have warned the plaintiff to change his brake fluid more often because older brake fluid will boil faster than newer brake fluid, the contention being that the brake fluid boiled and caused a temporary brake

[10] 10 Cal. 3d 337, 515 P.2d 313, 110 Cal. Rptr. 369 (1974).

[11] 29 Cal. App.3d 633, 105 Cal. Rptr. 890 (1973).

[12] Hasson v. Ford Motor Co., No. 989523 (L.A. Super. Ct., —).

failure. For those of you who may be interested, I should add that, as I understand it, the defense was not that newer brake fluid is, in fact, a faster boiler but merely that the plaintiff missed a curve (with fully operative and non-boiling brakes) and ran his Lincoln off the mountain road.

Also worth mentioning is the case in which the State of California was recently stripped of its statutory immunity in connection with the design of a highway upon a showing that, under changed circumstances, the original design had become unsafe.[13]

Concededly, there is a difference between a single highway and two hundred thousand automobiles or two thousand airplanes. I am not prepared to say, however, that the concept of continuing duty will not be extended (in some appropriate form) to cover the manufacturer of the airplanes.

Needless to say, all is not yet lost. Contributory negligence is still a defense in negligence cases and assumption of the risk can still be invoked in both negligence and strict liability cases. A products case can still be won upon a showing of alteration or misuse although the defendant is now required to foresee and warn against more and more alterations and more and more misuses and, in the aviation field, this may well end up including a multitude of maintenance errors and pilot sins. Finally, proximate cause is still with us and, last but not least, a products case can still be won upon a showing of no defect.

[13] Baldwin v. State, 6 Cal. 3d 424, 421 P.2d 1121, 99 Cal. Rptr. (1972).

Notes