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Case Notes

FEDERAL TORT CLAIMS ACT—FEDERAL PREEMPTION OF STATE LAW—COLLATERAL ESTOPPEL EFFECT OF NTSB DECISIONS—Federal Law has not Preempted State Law in Actions Against Air Control Personnel under the Federal Tort Claims Act, and Issues Involved in Such Actions may be Conclusively Established by Prior Decisions of the National Transportation Safety Board. *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978).

On December 22, 1972, plaintiff, a commercial pilot with instrument rating, made a solo flight in a Bellanca aircraft from Mineral Wells, Texas to Marion, Indiana, with an intermediate fuel stop at Flippen, Arkansas. Prior to his departure, plaintiff received a weather briefing from the Mineral Wells Federal Aviation Administration (FAA) Flight Service Station,[1] and filed a Visual Flight Rules[2] flight plan for the flight to Flippen. At Flippen, plaintiff again obtained weather information from a Flight Service Station and filed an Instrument Flight Rules[3] flight plan for the flight to Marion. During this segment of the flight, plaintiff maintained radio contact with various Flight Service Stations en route and received weather briefings.

As plaintiff neared the end of his trip, he requested and was granted clearance from the Grissom Air Force Base approach control[4] for his landing at Marion. Plaintiff was informed that the controller had no weather data for Marion and was given a summary of the conditions at Grissom.[5] No information was given plaintiff at

[1] Flight Service Stations provide, among other things, preflight weather briefings.

[2] Visual flight rules is abbreviated VFR and is commonly used to refer to flight in weather conditions that are equal to or greater than the minimum VFR requirements set out at 14 C.F.R. §§ 91.105-91.107 (1977).

[3] Instrument flight rules is abbreviated IFR and commonly refers to flight in weather conditions which do not meet the VFR standard. 14 C.F.R. §§ 91.115-91.129 (1977).

[4] Brief for Appellant 7 n.7, Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978) [hereinafter cited as Brief for Appellant].

[5] Air Force flight controllers are required by Air Force Manual 60-5 to follow the FAA regulations for air traffic controllers. FAA Handbook 7110.8B § 993

that time about the existence of icing conditions.[6] On plaintiff's second approach to Marion, the aircraft crashed 500 feet from the runway. The crash was caused by an accumulation of ice on the aircraft. The aircraft did not have deicing equipment, and its flight manual prohibited operation of the aircraft in "known icing conditions."

On August 10, 1973, the FAA suspended plaintiff's airman's certificate for thirty days. Plaintiff appealed this decision to an Administrative Law Judge of the National Transportation Safety Board (NTSB). The NTSB held a hearing on December 11, 1973, and found that plaintiff was aware of the possibility of icing conditions, and as such had violated FAA regulations by operating the craft in violation of its flight limitation.[7] The order reduced the FAA suspension to fifteen days. Plaintiff appealed this decision to the NTSB, which affirmed the suspension and later denied a petition to reconsider its decision. Plaintiff did not seek review of the decision in the United States Court of Appeals, although he was entitled to do so;[8] thus the suspension order became final.

Plaintiff brought an action against the United States under the Federal Tort Claims Act (FTCA) in the United States District Court for the Southern District of Illinois, claiming damages for personal injuries allegedly suffered as a proximate result of the negligent failure of FAA agents and Air Force personnel to advise him of icing conditions.[9] The court determined that the question as to whether plaintiff had violated FAA regulations had been adversely and conclusively resolved in the administrative hearing.[10] Since the court held Indiana law to be controlling, plaintiff's con-

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requires that an arriving aircraft be provided with information as to cloud ceiling and visibility at the airport of intended landing if the ceiling is lower than 1,000 feet or the visibility is less than three miles. The current conditions at Marion Airport were 300 foot ceiling, visibility one mile. Brief for Appellant, *supra* note 4, at 7. The alleged failure of the controller to provide plaintiff with this information thus violated FAA regulations.

[6] Brief for Appellant *supra* note 4, at 5.

[7] 14 C.F.R. § 91.31(a) (1977). The judge also found that plaintiff had violated section 91.9 by operating the craft in a "careless or reckless manner so as to endanger the property of another." *Id.*

[8] 49 U.S.C. § 1486(a) (1976) provides for appellate review of administrative orders.

[9] Bowen v. United States, No. 75-0009 (S.D. Ill. Oct. 14, 1976).

[10] *Id.*

tributory negligence barred his claim. Plaintiff then appealed this judgment to the United States Court of Appeals for the Seventh Circuit. *Held, affirmed*: Federal law has not preempted state law in actions against air control personnel under the FTCA, and issues involved in such actions may be conclusively established by prior decisions of the National Transportation Safety Board. *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978).

Two separate and distinct issues were raised on the appeal: whether federal or state law should govern the issue of negligence, and whether the doctrine of collateral estoppel applied to the opinion and order of the NTSB to prevent the district court from considering the issue of plaintiff's negligence. The issues will be considered separately.

I. Applicability of Federal Law

A. *The* Erie *Doctrine*

In 1842 the United States Supreme Court decided the landmark case of *Swift v. Tyson*,[11] ruling that general federal common law could be applied in diversity actions commenced in federal court.[12] In 1938, however, the case of *Erie R. Co. v. Tompkins*[13] was decided, overruling *Swift*, and holding that a federal court sitting in a diversity case must apply state law.[14] Writing for the majority, Justice Brandeis reasoned that this doctrine would lead to uniformity between state and federal court decisions and thus discourage interstate forum-shopping.[15] Unfortunately, this result was achieved at the price of sacrificing consistency among the various federal district courts. For this reason, some commentators have criticized the *Erie* doctrine as actually encouraging interstate forum-shopping.[16]

B. *Preemption of State Law in Federal Question Cases*

The *Erie* doctrine may have dealt the idea of general federal common law a serious blow, but the concept nonetheless retained

[11] 41 U.S. (16 Pet.) 1 (1842).

[12] *Id.* at 18-19.

[13] 304 U.S. 64 (1938).

[14] *Id.* at 78.

[15] *Id.* at 74-75.

[16] *See, e.g.*, Keeffe, *In Praise of Joseph Story, Swift v. Tyson, and the True National Common Law*, 18 Am. U.L. Rev. 316 (1968).

some vitality in cases arising under federal question jurisdiction.[17] In fact, the Supreme Court applied federal common law in a case decided on the same day as *Erie*, in an opinion also authored by Justice Brandeis.[18] The Court continued to recognize that some issues so directly affected the interests of the United States that federal common law must be applied rather than state law.[19]

In 1943 the Court decided *Clearfield Trust Co. v. United States*,[20] holding that the "rule of *Erie* . . . does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal law rather than local law."[21] The case involved the forgery of an endorsement on a check drawn on the United States Treasurer. The check was endorsed over to the Clearfield Trust Company, which collected payment from the United States. The district court, applying Pennsylvania law, held that a three year delay by the United States in giving notice of the forgery barred recovery. The Supreme Court reversed, reasoning that the constitutional function of the federal government in paying its debts could not be governed by the "vagaries of the laws of the several states."[22] Since Congress had not acted in this area to provide a statutory solution, the Court fashioned a rule of federal common law to fill the void. The *Clearfield Trust* rule thus limited the application of the *Erie* doctrine to those areas of the law in which no predominant right or obligation was created in the federal government by the constitution or by statute.

The Court took another step toward recognizing federal preemption of state law in 1947 with its decision in *Rice v. Santa Fe Elevator Corp.*[23] This case indicated that direct congressional or constitutional preemption of state law would not always be necessary

[17] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[18] Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). The case involved water rights in an interstate stream.

[19] In United States v. Allegheny County, 322 U.S. 174 (1944), a state attempted to assert its regulatory authority over the power of the federal government to set and carry out procurement policies. The Court refused to apply state law to restrict the exercise of a power expressly granted to the federal government by the Constitution. *Id.* at 182. Thus federal common law still applied when a constitutional right or obligation was to be defined or applied.

[20] 318 U.S. 363 (1943).

[21] *Id.* at 366.

[22] *Id.* at 367.

[23] 331 U.S. 218 (1947).

for the application of federal common law, as long as Congress, in a particular area, had manifested a purpose to supersede the police powers of the states by a

> scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be *assumed to preclude enforcement of the state laws* on the same subject.[24]

Such a system of federal regulations was instituted relative to the aviation industry by the Federal Aviation Act of 1958.[25] Congress has delegated broad regulatory powers over most significant areas of aviation, but no statutes or regulations currently govern damage suits arising from domestic air travel.[26] Traditionally, civil damage suits brought in federal court which arise from aviation mishaps have been held governed by the *Erie* doctrine.[27] Since federal regulation is preeminent in the field of aviation, however, it is not surprising that arguments for the application of a uniform federal law in this area have arisen. Most such arguments draw support from the statement of Justice Jackson in *Northwest Airlines v. Minnesota*:[28]

> Federal control [of air commerce] is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. . . . Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.[29]

Although Congress has considered legislation which would control civil damage suits arising from aviation activities, no such com-

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[24] *Id.* at 230 (emphasis added).

[25] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1976), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

[26] Damage suits arising out of international aviation activities are frequently controlled by treaty, convention, or protocol. Conklin, *Aviation—Doubt in the Courthouse: Is Federal Law Supreme or Not?* 1976 TRIAL LAW. GUIDE 476, 477 [hereinafter cited as Conklin].

[27] *See, e.g.*, Pearson v. Northeast Airlines, 307 F.2d 131, 133 (2d Cir. 1962).

[28] 322 U.S. 292 (1944).

[29] *Id.* at 303.

prehensive legislative program has been enacted.[30] In the absence of Congressional action, some commentators and many litigants have suggested that courts take the initiative and (following the rationale of *Clearfield Trust*) formulate and apply rules of federal common law to civil aviation damage suits.[31]

The most important case to date holding that federal law preempts the field of aviation is *Kohr v. Allegheny Airlines*.[32] This diversity suit involved multiple actions arising out of a mid-air collision involving a private aircraft and a commercial passenger aircraft. Two of the defendants in the consolidated action, Allegheny and the United States, agreed to a settlement formula, and then sued the remaining defendants for indemnity and contribution.[33] The trial judge, despite the diverse citizenship of the parties involved, applied the law of Indiana, the place where the collision occurred. The court of appeals reversed, creating a federal law of contribution and indemnity.[34] The court cited no precedents for its action but reasoned that the exclusive nature of federal aviation regulation and the need for consistency of result mandated such an outcome.[35] Oddly, the court made no attempt to reconcile its de-

[30] In 1968 and 1969, Senator Joseph D. Tydings of Maryland proposed such legislation, concentrating mainly upon the difficult conflict of laws problems which are prevalent in air crash litigation. *See* S. 3305, S. 3306, and S. 4089, 90th Cong., 2d Sess. (1968); and S. 961, 91st Cong., 1st Sess. (1969); *see generally* Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U. L. REV. 299 (1969). When Senator Tydings failed to win reelection to the Senate, however, his statutory scheme died in committee. No other comprehensive program of aviation legislation has since been considered.

[31] *See, e.g.*, Note, *The Case For A Federal Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U.L. REV. 231 (1976); Keeffe & DeValerio, *Dallas, Dred Scott, and Eyrie Erie*, 38 J. AIR L. & COM. 107 (1972).

The first breakthrough in this area occurred in relation to the question of federal jurisdiction. In Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972), the court held that alleged violations of federal safety regulations created a federal cause of action. *Id.* at 615. Thus the court had pendant jurisdiction to hear the case even though the right of the plaintiff to recover might be governed by state law. *Id.* at 617. Not all federal courts adopted this approach, however, and the later case of D'Arcy v. Delta Airlines, 12 Av. Cas. 18,282 (S.D.N.Y. 1974), rejected it explicitly. Most subsequent discussions of the *Gabel* rule tend to limit its application to particular facts before the court in that case. *See, e.g.*, Sanz v. Renton Aviation, Inc., 511 F.2d 1027, 1029 (9th Cir. 1975).

[32] 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

[33] 504 F.2d at 402.

[34] *Id.* at 403.

[35] *Id.* at 404.

cision with the *Erie* doctrine. One commentator has remarked, "[t]he decision has little precedence and is best understood from the standpoint of the problems it solved in that case rather than as a vanguard for preemption."[36] Indeed, the *Kohr* case has stood virtually alone in advocating federal preemption of state aviation law. A recent district court opinion[37] applauded the logic and equity of the *Kohr* decision, but confined it to its peculiar facts.[38]

More recently, the Supreme Court, in *Miree v. DeKalb County*,[39] refused to extend the *Clearfield Trust* rule to a case involving the breach of an FAA contract concerning the use of land near an airport.[40] Although the Court could have seized the opportunity to hold that federal law has preempted the field of aviation, it reasoned that since no substantial rights or duties of the United States were at issue, there was no compelling reason to apply federal common law over state law.[41] While *Miree* left the *Kohr* opinion technically intact, it expressed a reluctance to expand the preemption doctrine.[42]

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[36] Conklin, *supra* note 26, at 486, citing Prewitt, *Federal Common Law of Aviation and the Erie Doctrine*, 40 J. AIR L. & COM. 653 (1974).

[37] Smith v. Cessna Aircraft Corp., 428 F. Supp. 1285 (N.D. Ill. 1977).

[38] In *Kohr*, a mid-air collision formed the basis of the action; the United States was a party to the litigation pursuant to the FTCA; the litigation had been subject to the supervision of the Judicial Panel created by the Multidistrict Litigation Act, 28 U.S.C. §§ 1407 *et seq.* (1976); and the interest of the state where the collision occurred was slight.

Even though the *Smith* court professed to approve of the decision in *Kohr*, it criticized the failure of the *Kohr* court to explain or distinguish the *Erie* doctrine. 428 F. Supp. at 1287 n.2.

[39] 433 U.S. 25 (1977).

[40] 433 U.S. at 30; *see generally* Note, *Government Contracts: Third Party Beneficiaries and the Expanding Body of Federal Common Law*, 31 U. MIA. L. REV. 1493 (1977).

[41] 433 U.S. at 30-31.

[42] *Id.* at 31. The Supreme Court has indicated, however, that federal law has preempted state law in regard to certain aspects of aviation. In City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), Justice Douglas (writing for a majority of five Justices) affirmed the decision of the Court of Appeals striking down a local ordinance which prohibited certain aircraft from taking off between 11 p.m. and 7 a.m. The Court held that federal legislation in the area of noise control (the Noise Control Act of 1972, 49 U.S.C. § 1431(b) (1976)) had indicated Congressional intent to create a pervasive scheme of federal regulation leaving no room for state or local supplementation, thus invoking the rule in *Rice, supra* note 17. Justice Rehnquist, in a dissenting opinion joined by three Justices, argued that there was no express provision in the Noise Control Act of 1972 or in the regulations promulgated thereunder affirmatively preempting local noise control ordinances.

City of Burbank may be distinguished from both *Miree* and *Kohr* in that the

Against this background, the court in *Bowen v. United States* declined to apply the preemption doctrine to create a federal comparative negligence standard in aviation damage suits.[43] Writing for a unanimous three-judge court, Judge Tone pointed out that since the preemption issue was not before the district court, the appellate court did not need to consider that aspect of the plaintiff's argument.[44] The court proceeded, however, to consider the argument, and rejected it for two reasons. First, the court distinguished *Kohr* on the basis that the *Kohr* court "did not have before it the question of whether the law referred to in the Federal Tort Claims Act, *viz.*, 'the law of the place where the act or omission occurred,' is federal or state law."[45] Moreover, the *Bowen* court observed that the Supreme Court, in the leading case of *Richards v. United States*,[46] held that the law of the state where the tortious act or omission occurred must be applied in actions arising under the FTCA.[47] To bolster his conclusion further, Judge Tone cited a footnote to the *Miree* opinion which indicated that state law still controls in aviation tort claims brought under the FTCA.[48]

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former involved a conflict between federal legislation and state action, whereas the latter two cases sought the application of federal common law to preempt state common law. *City of Burbank* does serve to indicate that federal law may, in an appropriate area, preempt state law where Congress has legislated specifically in that area.

[43] 570 F.2d at 1316-1317.

[44] Plaintiff had failed to raise this issue at trial. 570 F.2d at 1316, *citing* Youker v. Gulley, 536 F.2d 184, 186-187 (7th Cir. 1976).

[45] 570 F.2d at 1316. The Federal Tort Claims Act provides that the United States is liable for injuries caused by the negligence of its employees and agents in accordance with the law of the place where the tortious act occurred. 28 U.S.C. § 1346(b).

Another case arising out of the air crash in Kohr v. Allegheny Airlines was argued January 11, 1978, and is still under advisement at this writing. Kohr v. Allegheny Airlines and the United States, Nos. 76-2289 and 76-2290 (7th Cir., argued January 11, 1978).

[46] 369 U.S. 1 (1962).

[47] Choice of law questions are also to be resolved by resorting to state law. *Id.* at 10-15. This is an application of the "renvoi doctrine," providing an exception to the generally recognized rule that the law of the forum applies in determining choice of law rules. While this doctrine has largely been repudiated by the American courts which have considered it (*see, e.g.*, Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955)), the *Richards* case expressly recognizes it in actions under the FTCA. On the renvoi doctrine, *see generally*, Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 S. CAL. L. REV. 221 (1941).

[48] 570 F.2d at 1316, *quoting* 433 U.S. 25, 29 n.4 (1977): "There is no indica-

Instead of relying solely upon the language and judicial interpretation of the FTCA to dispose of the preemption issue, the court attempted to show that the federal interest involved in *Bowen* was insufficient to require application of the *Clearfield Trust* rule.[49] The court saw no significant conflict between the interest of the federal government in uniform regulation of aviation and the interest of the state in which the tortious activity occurred.[50] In the absence of such a conflict, the court was not compelled to extend the preemption doctrine beyond *Kohr*.[51]

After deciding that state law should control in the damage action against the government, the court went on to determine in which state the act or omission occurred. Judge Tone ruled out both the "place-of-impact" rule and "significant contacts" rule as contrary to the language of the FTCA.[52] In choosing to apply Indiana law, the court reasoned that "the acts or omissions in Indiana were not only the last in time but had a more significant causal relationship to the injury than those occurring in any other state."[53] The flight control personnel who were responsible for giving Bowen weather data on conditions at Marion and permission to land there were located in Indiana. Moreover, the crash occurred in that state, and arguably could have been prevented there. The court supported its conclusion with the general rule stated in *Restatement (Second) Conflict of Laws* that "the law of the state where the injury occurred will normally be applied, unless some other state has a 'more significant relationship' to the occurrence and the parties than that state."[54]

Having decided that Indiana law should be applied, it remained for the court to determine the Indiana choice-of-law rule. The district court held (erroneously, according to Judge Tone's opinion) that *lex loci delecti* was the prevalent rule in Indiana.[55] The error

tion that petitioners' tort claim against the United States will be affected by the resolution of this issue. Indeed, the Federal Tort Claims Act itself looks to state law in determining liability."

[49] 570 F.2d at 1317.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 1318. *See generally* Note, *Conflict of Laws—Wrongful Death—Significant Contacts vs. Lex Loci*, 34 J. AIR L. & COM. 114 (1968).

[53] *Id.* at 1318.

[54] *Id.* at 1318-1319 n.17.

[55] *Id.* at 1319.

was moot, however, in view of the fact that Indiana substantive law would be applied regardless of the applicable choice-of-law rule.[56]

II. THE COLLATERAL ESTOPPEL EFFECT OF THE AGENCY DETERMINATION

Traditionally, most courts have regarded collateral estoppel inapplicable to administrative determinations.[57] This view was gradually relaxed toward the middle of the twentieth century,[58] and the Supreme Court finally abandoned its prior position in *United States v. Utah Construction and Mining Co.*[59] In that case, a contractor was dissatisfied with a decision of the Advisory Board of Contract Appeals and brought a civil action against the United States. The Supreme Court held that the administrative board, acting in a judicial capacity, had allowed each party the opportunity to litigate fully the issues upon which the plaintiff's action depended and that collateral estoppel precluded relitigation of the same issues.[60] The Court went on to discuss the circumstances under which an administrative agency's findings would be binding upon the parties in a subsequent action at law: "When an administrative agency is acting in a judicial capacity and resolves issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[61]

Since the time of the *Utah Construction* decision, it has become evident that some administrative decisions can form the basis for the application of collateral estoppel.[62] Most state courts which have considered the issue recently have adopted the essential elements of the *Utah Construction* rule and will apply collateral estop-

[56] *Id.*

[57] In an early case on the subject, the Supreme Court stated unequivocally that "decisions of the executive department . . . cannot constitute res judicata. . . ." Pearson v. Williams, 202 U.S. 281, 285 (1906). State courts hesitated to hold otherwise, and federal courts continued to abide by the Supreme Court's enunciated principle, although commentators such as Professor Kenneth Culp Davis argued vigorously to the contrary. K. DAVIS, ADMINISTRATIVE LAW § 172 (1951).

[58] K. DAVIS, ADMINISTRATIVE LAW TREATISE 548 (1958).

[59] 384 U.S. 394 (1966).

[60] *Id.* at 422.

[61] *Id.*

[62] K. DAVIS, *supra* note 58, at 548.

pel when necessary to achieve a just result.[63] Thus it is not surprising that most of the cases refusing to apply the doctrine involve situations where justice requires that the parties be afforded the opportunity to relitigate key issues.[64]

Collateral estoppel will not operate if the issues, claims, and parties involved in the administrative proceeding differ from those in the court action.[65] Moreover, there must be a final decision on the merits, or the issues will be open to relitigation.[66] But perhaps the most difficult question surrounding the application of the *Utah Construction* rule has concerned what constitutes "an adequate opportunity" to litigate an issue at an administrative hearing. Normally, if the parties have had one opportunity to litigate an issue fully and equitably, further consideration of the issue will be precluded.[67] Even this principle, however, is not applied if manifestly unfair, as in a case where it is unforeseeable that an issue resolved in an ad-

[63] *See, e.g.*, Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control, 55 Cal.2d 728, 361 P.2d 712, 13 Cal. Rptr. 104 (1961); Evans v. Monaghan, 306 N.Y. 312, 118 N.E.2d 452 (1954); Note, *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation*, 46 GEO. WASH. U. L. REV. 65 (1977).

[64] For example, where a discharged worker sued his employer under the Civil Rights Act of 1964, alleging that his firing was racially motivated, a National Labor Relations Board ruling that he was fired for good cause did not collaterally estop the plaintiff from asserting otherwise. Tipler v. E. I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971). The court noted the difference in scope between the two proceedings, observing that "the Trial Examiner was only investigating a possible violation of the National Labor Relations Act. Consequently, he did not fully explore the racial aspects of the case. . . ." *Id.* at 129.

In some areas, Congress has stipulated by statute that administrative determinations may not estop consideration of an issue in a subsequent proceeding. *See, e.g.*, Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968). For example, a report of the NTSB is not admissible as evidence in a damage action. 49 U.S.C. § 1441(e) (1976). In an opinion interpreting this provision, the Circuit Court of Appeals for the District of Columbia summarized the reason for this policy:

> The rights of parties are to be determined by testimony adduced at the trial according to the rules of examination and cross-examination. It is quite clear that [49 U.S.C. § 1441(e)] reveals the intention to preserve the functions of court and jury uninfluenced by the findings of the Board or investigators.

Universal Airline, Inc. v. Eastern Air Lines, Inc., 188 F.2d 993, 1000 (D.C. Cir. 1951).

[65] K. DAVIS, *supra* note 58 at 548.

[66] *Id.* at 365.

[67] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 2, 1975). Plaintiff did have the right to judicial review of the NTSB decision. *See* note 8 *supra.*

ministrative proceeding would arise in the context of a later action.[68] If a party's failure to litigate more vigorously in the first action is attributable to this lack of foreseeability, there is some authority that collateral estoppel should not apply.[69]

The trend today is markedly in favor of applying collateral estoppel to administrative determinations in the absence of compelling evidence that injustice would result. At the core of this trend is the policy of encouraging final disposition of disputed issues; thus second chances are not awarded lightly.

Applying these considerations to the facts of *Bowen*, two questions were presented to the court. First, did the NTSB hearing establish that plaintiff was negligent? Second, if so, may that finding form the basis for collateral estoppel? Affirmative answers to both questions would require an affirmance of the summary judgment for defendant granted by the district court.

Judge Tone began his analysis of the first question by noting that Indiana had incorporated federal air safety regulations by statute.[70] The court then observed that, under Indiana law, negligence is established by violation of a safety statute.[71] Thus, Bowen's negligence was conclusively established in the NTSB proceeding, a fact which would bar his recovery under Indiana law.[72]

The only remaining question before the court was the suitability of the NTSB decision as a basis for collateral estoppel. Turning first to the general prerequisites for the application of the doctrine, the court listed eight requirements: a suit and an adversary proceeding; a final judgment; a decision on the merits; this decision rendered by a court of competent jurisdiction; identity of parties; identity of subject matter or issues; capacity of parties; and mutuality of estoppel.[73] Aside from the fact that the first decision was by an agency instead of a court, Judge Tone found all the essential elements present.[74]

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[68] RESTATEMENT (SECOND) OF JUDGMENTS § 68.1, comment i (Tent. Draft No. 3, 1976).

[69] Lewis v. International Business Mach. Corp., 393 F. Supp. 305 (D. Ore. 1974).

[70] IND. CODE § 8-21-4-8 (1976).

[71] Larkins v. Kohlmeyer, 229 Ind. 391, 398, 98 N.E.2d 896, 900 (1951).

[72] Huey v. Milligan, 242 Ind. 93, 97, 175 N.E.2d 698, 700 (1961).

[73] Amann v. Tankersley, 149 Ind. App. 501, 509, 273 N.E.2d 772, 777 (1971).

[74] 570 F.2d at 1320.

The court next examined the circumstances under which Indiana applies the doctrine of collateral estoppel to an administrative determination. Since no Indiana decision could be found which dealt directly with this question, the court chose

> the rule that appears best to effectuate the policies that underlie the rule. Here the underlying policy, *viz.*, that one fair opportunity to litigate an issue is enough, is best served by the rule that issue preclusion applies to a final administrative determination of an issue properly before an agency acting in a judicial capacity when both parties were aware of the possible significance of the issue in later proceedings and were afforded a fair opportunity to litigate the issue and obtain judicial review.[75]

The court first noted that the NTSB had acted in a judicial capacity in its hearing.[76] Next, the court responded to Bowen's contention that the difference between the evidentiary rules of the NTSB and federal courts required religitation of the negligence issue in the interest of fairness. While conceding that hearsay evidence was admitted and that plaintiff's opportunity for discovery was limited in the agency hearing,[77] the court was unable to agree that these factors precluded a "full and fair opportunity in the administrative proceeding to litigate the fact issues that were controlling in both proceedings."[78]

Bowen next argued that since reports of the NTSB are not to be considered in a subsequent suit for damages, collateral estoppel cannot be based upon the NTSB determination.[79] The court answered this contention by refusing to equate a "report" in 49 U.S.C. section 1441(e) with an order pursuant to 49 U.S.C. section 1429,[80] holding that section 1441(e) is inapplicable to license suspension appeals.[81]

Finally, the court considered Bowen's argument that he would have litigated more fully and forcefully in the administrative hear-

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[75] *Id.* at 1322.

[76] *Id.*

[77] These practices are proper in a hearing before the NTSB. *See* 49 C.F.R. § 821 (1977).

[78] 570 F.2d at 1322.

[79] 49 U.S.C. § 1441(e) (1976); *see* note 64 *supra.*

[80] 49 U.S.C. § 1429 provides for the suspension of a pilot's license by the NTSB.

[81] 570 F.2d at 1320 n.23.

ing had he foreseen that he would be bound by that determination in a later proceeding.[82] If this were the case, it would be unfair to preclude a reexamination of the factual issues tending to establish his negligence. Noting that Bowen had retained counsel and vigorously contested the suspension of his license, the court dismissed this contention, and affirmed the action of the district court.[83]

III. CONCLUSION

The opinion of the court in *Bowen* is significant. It confirms, along with *Miree*,[84] that the doctrine of federal preemption of aviation law is still of limited application, and that there is little or no movement among courts to extend it. This extension appears even less likely in cases which arise under the FTCA in light of the long-standing interpretation of that statute as referring courts to state law only. The most that can be said at present is that courts will extend the federal preemption doctrine only when a serious conflict between federal and state law arises, and then only if there is a substantial federal interest in the uniformity of the law on the issue in question.

The collateral estoppel issue was a more difficult one in *Bowen*, and a slight alteration of the facts could have resulted in a different decision. Had it appeared that Bowen actually had considered the NTSB proceeding as unimportant, the court might have allowed him an opportunity to relitigate the issue. Moreover, if Bowen could have demonstrated to the court that the procedural rules of the NTSB denied him an opportunity to establish that he did not violate the FAA regulations in question, the court would have been hard pressed to deny him another chance to demonstrate that he was free from negligence. The only principle which can be stated with certainty on this aspect of the case is that the decisions of the NTSB will be used as a basis for collateral estoppel in a subsequent damage action unless the plaintiff can prove to the satisfaction

[82] This argument was based largely on Lewis v. International Business Machines. *See* note 69 *supra*.

[83] The facts in *Lewis* are somewhat parallel to those in *Bowen* on this point. As such, it is entirely conceivable that if Bowen actually had been less than energetic in contesting the license suspension, the case might well have come within the *Lewis* exception to the *Utah Construction* rule. Moreover, *Bowen* might well have preferred to accept the license suspension through a plea of *nolo contendere* and thus avoid the use of collateral estoppel in subsequent litigation.

[84] *See* note 39 *supra*.

of the court that he was denied an opportunity to present his side of the issue. How difficult this will be to prove will become apparent only as future cases are decided. At the present, however, adverse determinations by the NTSB are likely to present litigants with an obstacle which, if not insurmountable, is nonetheless formidable.

Peter E. Graves

PRODUCTS LIABILITY—STRICT PRODUCTS LIABILITY IN ADMIRALTY—Strict Liability in Tort Applies in Products Liability Suits in Admiralty and the Principles of Comparative Fault Apply in Such Actions. *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

In 1969 the fishing vessel *Enterprise*, owned by Pan-Alaska Fisheries, Inc., caught fire and ultimately sank while on its maiden voyage after being rebuilt. The fire began in the engine room, probably the result of a malfunction of one or more oil filters installed on the marine engine. The engine had been manufactured by Caterpillar, sold by its dealer, N.C. Marine, and installed on the *Enterprise* by the rebuilder, Marine Construction & Design Company (Marco).[1] Pan-Alaska sought recovery for the loss of the *Enterprise* in federal court under the court's admiralty jurisdiction,[2] bringing claims in both strict liability and negligence against Caterpillar, N.C. Marine, and Marco.[3] The trial court held strict liability inapplicable under the facts of the case[4] and found only N.C. Marine liable on

[1] Caterpillar had discovered that the factory-installed filter could not be safely used on the D343 marine engine and had mailed a letter to its dealers, including N.C. Marine, advising that the filter should be replaced with another model. N.C. Marine delivered a D343 engine for installation in the *Enterprise* nine days after the letter was mailed. N.C. Marine had not changed the filter nor did it warn Marco or Pan-Alaska of any hazards connected with the filters.

[2] 28 U.S.C. § 1333 (1976).

[3] No negligence claim was brought against Marco. Pan-Alaska also alleged breach of implied sales warranty against Marco and N.C. Marine and breach of implied warranty of workmanlike service and breach of contract against Marco. Brief for Appellant at 6, Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129 (9th Cir. 1977).

[4] "On this issue of strict products liability, the trial court found that 'under

the negligence theory. After an additional finding of contributory negligence by Pan-Alaska and the *Enterprise* crew, the trial court rendered a judgment for Pan-Alaska of one-half the cost of the *Enterprise* according to the admiralty rule of equally-divided damages.[5] On appeal the case was remanded in light of *United States v. Reliable Transfer Co.*,[6] which had adopted a rule of pure comparative fault in maritime law.

On remand, N.C. Marine was held one-third responsible for the loss of the *Enterprise* and Pan-Alaska two-thirds responsible.[7] Pan-Alaska sought review of the district court's findings on the strict liability and contributory negligence issues in the Ninth Circuit Court of Appeals. *Held, vacated and remanded*: Strict liability in tort applies in products liability suits in admiralty and the principles of comparative fault apply in such actions. *Pan-Alaska Fisheries Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

Admiralty: Its Relation to Aviation Tort Law

The Constitution provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction."[8] Original jurisdiction of claims under maritime law is vested in the federal district courts but qualified by the famous "saving to

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the particular facts of this case the doctrine of strict liability is not applicable. Even if the doctrine were applicable, it would not have increased the liability of N. C. Marine nor would it have made any other defendant liable.'" 565 F.2d at 1134 (quoting from trial court record at 367).

[5] The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1855). This landmark case established an American maritime rule of equally-divided damages in collision cases. The Court based its holding on the well-settled rule in English admiralty at that time. Despite the fact that comparative fault principles were later adopted in personal injury cases, equally-divided damages remained the rule in property damage cases until 1975.

[6] 421 U.S. 397 (1975). *Reliable Transfer* involved the stranding of a vessel on a sand bar as a result of negligence by the crew and an inoperative navigational aid maintained by the Coast Guard. The Court considered only the validity of the divided damages rule established by *The Schooner Catharine*, and replaced that rule by a rule of pure comparative fault in property damage cases. *Id.* at 411.

[7] The district court emphasized that it was allocating damages based on culpability, not causation. Had causation been the deciding factor, the court pointed out, the plaintiff would have collected only $1,000 rather than approximately $70,000. The damage caused by the engine fire could have been limited to the $1,000 amount had the plaintiff not been negligent. Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 402 F. Supp. 1187 (W.D. Wash. 1975).

[8] U.S. CONST. art. III, § 2.

suitors" clause.[9] The result has been to grant the federal courts in admiralty exclusive jurisdiction of maritime in rem actions not recognized at common law.[10] In personam maritime claims may be brought in either state or federal courts.[11] If a claim is brought before a federal court sitting in law, rather than in admiralty, some independent ground of federal jurisdiction must be invoked.[12] In all cases federal maritime substantive law governs, although state law may be used to supplement or even occasionally modify the general maritime law.[13]

[9] 28 U.S.C. § 1333(1) (1976). That section provides "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." The language has been held to include statutory modifications of the common law which are not in conflict with substantive maritime law. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924).

[10] Madruga v. Superior Court, 346 U.S. 556 (1954): The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 570-72 (1866).

[11] Red Cross Line v. Atlantic Fruit Co., 264 U.S. at 123; Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 192 (2d Cir. 1955).

[12] Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[13] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). State law was used to fill the "gaps" in the general maritime law. One glaring gap was in the area of wrongful death. Admiralty law, like the common law, recognized no action for wrongful death. The Death on the High Seas Act, 46 U.S.C. §§ 761-68 (1976), provided for wrongful-death actions on the high seas, beyond state territorial waters, but maritime law provided no remedy when the death occurred in state waters. Thus the courts "borrowed" state wrongful-death statutes for maritime deaths in state waters. This often produced incongruous results. Many state wrongful-death acts treat contributory negligence as a complete bar to recovery, while in maritime personal injury cases rules of comparative fault apply and contributory negligence only mitigates recovery. Thus a party's negligence would be a total bar or only a partial bar depending on whether the injuries proved fatal. The wrongful-death anomaly was eliminated in 1970 with the Supreme Court's decision in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). This landmark decision discarded 85 years of precedent in overruling The Harrisburg, 119 U.S. 199 (1886), the case which had established that maritime law provided no cause of action for wrongful death. The unanimous decision found that an action does lie under general maritime law for death caused by violation of maritime duties. The *Moragne* decision has been widely applied since 1970 in both marine and aviation death cases. *See* Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970) (aviation death in state waters); Barnette v. Butler Aviation Int'l, Inc., 89 Misc.2d 350, 391 N.Y.S.2d 348 (1977) (death of American serviceman in crash of military aircraft in Vietnam); Neal v. Butler Aviation Int'l, Inc., 422 F. Supp. 850 (E.D.N.Y. 1976) (death of serviceman in Vietnam).

For further discussion of the role of state courts in maritime law, see generally Still v. Dixon, 337 So. 2d 1033 (Fla. Dist. Ct. App. 1976); Craig & Alexander, *Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests and Teapots*, 37 J. AIR L. & COM. 3, 19-24 (1971); *and* Annot., 39 A.L.R.3d 196 (1971).

With the advent of air travel in the early part of the twentieth century there was a considerable body of opinion that the "ocean" of air, and hence all air flight, should fall under admiralty jurisdiction.[14] The theory never received general acceptance, and from the beginning Congress and the courts generally emphasized the differences between aircraft flight and maritime activities.[15] Admiralty jurisdiction, nevertheless, has been held applicable to airplanes in certain circumstances.

The first major inroad came in the extension of admiralty jurisdiction to land-based aircraft in wrongful-death actions arising from aircraft crashes at sea. In 1920 Congress passed the Death on the High Seas Act (DOHSA),[16] creating a statutory action for maritime wrongful death. The wording of DOHSA was broad and made no specific reference to surface vessels.[17] The first aviation case brought under DOHSA was *Choy v. Pan-American Airways Co.*,[18] where death was caused by the crash of a seaplane on a trans-Pacific flight. The court held that DOHSA was applicable in such a case.[19] Since *Choy*, although actions under DOHSA have been

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[14] Wilson v. Transocean Airlines, Inc., 121 F. Supp. 85, 91 n.23 (N.D. Cal. 1954).

[15] "[T]he navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft." 49 U.S.C. § 1509(a) (1976). Aircraft are generally not considered "vessels" in maritime law. The Crawford Bros. No. 2, 215 F. 269, 271 (W.D. Wash. 1914). Aircraft crewmen are not considered "seamen." Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 848-52 (D.V.I. 1977). Airplanes are not subject to maritime rules regarding burden of proof. Georger v. United States, 1949 U.S. Av. Rep. 113, 115 (E.D. Va. 1949). Aircraft owners cannot limit their liability for crashes at sea as marine vessel owners can. Hubschman v. Antilles Airboats, Inc., 440 F. Supp. at 845-46; Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939).

[16] 46 U.S.C. §§ 761-68 (1976). DOHSA was passed to fill the void in maritime law demonstrated by the Supreme Court's decision in *The Harrisburg*. *See* note 13 *supra*.

[17] "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from a shore of any State . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the excluive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." Death on the High Seas Act, 46 U.S.C. § 761 (1976).

[18] 1941 A.M.C. 483 (S.D.N.Y. 1941).

[19] "The Federal courts took jurisdiction of such cases because the literal pro-

held cognizable only in admiralty,[20] many actions for wrongful death have been brought under DOHSA for aircraft crashes into the high seas.[21] Today it is considered settled that this specific statute gives federal admiralty courts jurisdiction of such wrongful-death actions.[22]

Once the right of action under DOHSA was established, the courts began to expand admiralty jurisdiction over aircraft torts. In *D'Aleman v. Pan American World Airways, Inc.*,[23] the court upheld a claim under DOHSA although there was no aircraft crash and the death occurred on land. The occurrence of the tortious act over the high seas was held sufficient to bring the claim within admiralty jurisdiction.[24] A few courts then took the next step and allowed actions for personal injuries occurring on or over the high seas in aircraft.[25] Personal injury actions clearly do not arise under DOHSA, and the courts sought to justify the decision by relying

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visions of that statute appeared to be clearly applicable." Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 262 (1972).

[20] Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 686 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); *see* Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 271 n.20 (1972). *Contra*, Choy v. Pan-American Airways Co., 1941 A.M.C. 483 (S.D.N.Y. 1941).

[21] Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir.), *cert. denied*, 358 U.S. 838 (1958); Higa v. Transocean Airlines, 230 F.2d 780 (9th Cir. 1955), *dismissed*, 352 U.S. 802 (1956), Lavello v. Danko, 175 F. Supp. 92 (S.D.N.Y. 1959); Lacey v. L.W. Wiggins Airways, Inc., 95 F. Supp. 916 (D. Mass. 1951); Wyman v. Pan-American Airways, Inc., 181 Misc. 963, 966, 43 N.Y.S.2d 420, 423, *aff'd*, 267 App. Div. 947, 48 N.Y.S.2d 459, *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944).

[22] Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. at 263-64.

[23] 259 F.2d 493 (2d Cir. 1958).

[24] In *D'Aleman*, a passenger on a flight from Puerto Rico to New York went into shock when the pilot was forced to feather one of the engines and make an unscheduled landing. He died four days later in New York. In upholding a claim under DOHSA the court said,

> The law would indeed be static if a passenger on a ship were protected by the Act and another passenger in the identical location three thousand feet above in a plane were not. Nor should the plane have to crash into the sea to bring the death within the Act any more than a ship should have to sink as a prerequisite.

Id. at 495.

[25] Horton v. J & J Aircraft, Inc., 257 F. Supp. 120 (S.D. Fla. 1966) (personal injuries caused by plane crash in Atlantic); Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874 (W.D. Pa. 1965) (personal injuries suffered when airplane jolted violently in the air on trans-Atlantic flight); Bergeron v. Aero Associates, Inc., 213 F. Supp. 936 (E.D. La. 1963) (personal injuries in helicopter crash near drilling rig).

on *D'Aleman* and an expanded view of admiralty jurisdiction generally.[26] Another court, in *Weinstein v. Eastern Airlines, Inc.*,[27] invoked admiralty jurisdiction for an airplane crash occurring *within* one marine league of shore.[28] A few other courts followed the *Weinstein* court's lead into general maritime law.[29] These seemingly small steps were in fact giant leaps. The courts had progressed far beyond the jurisdiction conferred by the literal wording of the Death on the High Seas Act and placed aviation torts within admiralty jurisdiction based solely on the locality of the tort.

Finally, in 1972 the Supreme Court addressed the question of the application of federal admiralty jurisdiction to aviation tort claims. *Executive Jet Aviation, Inc. v. City of Cleveland*[30] involved a jet aircraft which struck a flock of seagulls on takeoff and crashed into Lake Erie a short distance from the airport. The Supreme Court denied that admiralty jurisdiction applied in such a case and established two requirements for an aviation tort to fall within admiralty jurisdiction. First, the wrong must occur over navigable waters;[31] and second, there must be a significant relationship to traditional maritime activity.[32] The Court was not prepared to say that

[26] In *Notarian*, the court emphasized that the decisive factor in *D'Aleman* was the occurrence of the cause of action in a maritime environment. The method of travel into the area should not be determinative. The court then proceeded to employ a new and expanded definition of maritime jurisdiction: "Generally admiralty and maritime jurisdiction extends to all things done upon and relating to the sea and waters navigable therefrom, to transactions relating to commerce and navigation, to damages for injury upon the sea, and to all maritime contracts, torts and injuries. 1 Am. Jur., Admiralty, § 9, pg. 550." Notarian v. Trans World Airlines, Inc., 244 F. Supp. 874, at 877 (W.D. Pa. 1965).

[27] 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963).

[28] DOHSA provides only for claims for deaths occurring outside one marine league (approximately three miles).

[29] Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970). The case is significant because it applies the judicially-created maritime wrongful-death action from *Moragne* (*see* note 13 *supra*) to airplane crashes within state waters. *See also* Harris v. United Air Lines, Inc., 275 F. Supp. 431, 432 (S.D. Iowa 1967).

[30] 409 U.S. 249 (1972).

[31] *Id.* at 268. This is the traditional test for admiralty tort jurisdiction. *Id.* at 253. *See also* Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971); Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13,902) (C.C. Me. 1813). In the case of aircraft, the place of injury has been held to be the place of the wrong. Thus, negligent repairs on land which result in injuries over the water could invoke tort jurisdiction. Wilson v. Transocean Airlines, Inc., 121 F. Supp. 85, 92 (N.D. Cal. 1954); Lacey v. L.W. Wiggins Airways, Inc., 95 F. Supp. 916, 918 (D. Mass. 1951).

[32] 409 U.S. at 268.

no aviation torts could meet these requirements. In fact, it indicated that an aircraft on a transoceanic flight might bear a significant relationship to traditional maritime activity because it would be performing a function traditionally performed by waterborne vessels.[33] Similarly, light aircraft spotting schools of fish might meet the requirements.[34]

While ostensibly the *Executive Jet* decision narrowed the coverage of admiralty jurisdiction by establishing the two-pronged test and specifically excluding aviation tort claims arising from flights by land-based aircraft between points within the continental United States, its effect was to broaden the scope of coverage by giving official sanction to aviation tort claims under general maritime law. Death actions can now be brought, once the two-pronged test is met, under either the Death on the High Seas Act or the general maritime death action as interpreted by the *Moragne* decision.[35] Personal injury claims on aircraft are cognizable in admiralty once the maritime locality and nexus requirements are met.[36] Even property damage suits involving aviation torts have been tried in admiralty.[37] The question of just how far the courts will extend maritime law into aviation remains unanswered, but the courts have had little difficulty finding a relation to traditional maritime activity in most flights over open water. It seems *Executive Jet* only succeeded in excluding from admiralty jurisdiction the occasional airplane crash into an inland lake or river, while bringing a wide range of other claims into maritime law.[38]

Strict Products Liability in Admiralty

Throughout the evolution of products liability law the admiralty

[33] *Id.* at 271.

[34] *Id.* at 271 n.22. This is the fact situation in Hornsby v. Fish Meal Co., 431 F.2d 865 (5th Cir. 1970).

[35] *See* Higginbotham v. Mobil Oil Corp., 545 F.2d 422 (5th Cir.), *cert. denied*, 434 U.S. 830 (1977); Roberts v. United States, 498 F.2d 520 (9th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Renner v. Rockwell Int'l Corp., 403 F. Supp. 849 (C.D. Cal. 1975). *See also* note 13 *supra.*

[36] *See* Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828 (D.V.I. 1977); Hark v. Antilles Airboats, Inc., 355 F. Supp. 683 (D.V.I. 1973).

[37] *See* T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855 (9th Cir.), *cert. denied*, 421 U.S. 1000 (1975).

[38] For a discussion of what constitutes a sufficient relationship to traditional maritime activity to support federal jurisdiction in aviation tort cases, *see* Annot., 30 A.L.R. Fed. 759 (1976).

courts generally remained aloof, taking no part in its development. Federal maritime law is derived primarily from statutes and historical admiralty principles, as interpreted by the federal courts. The law, however, remains flexible, adapting by judicial decision to changing social and economic patterns. Thus, when a rule of law is "so widely accepted as to be construed as a part of the general law of torts,"[39] it may be incorporated into admiralty if harmonious with the rest of admiralty law.[40] Often this incorporation proceeds slowly with the admiralty courts waiting until the rule of law is accepted by a clear majority of state supreme courts.[41] It was not until 1945, almost thirty years after *MacPherson v. Buick Motor Co.*,[42] that products liability based on negligence was incorporated into maritime law in *Sieracki v. Seas Shipping Co.*[43]

The development of products liability posed special problems in admiralty. During the years following the *MacPherson* decision the courts at law sought ways to impose liability on a seller or manufacturer in the absence of negligence.[44] Numerous ingenious devices were found to support strict liability. Among the most popular was the device of a warranty running with the product from manufacturer to consumer, analogous to a covenant running with the land.[45] Although essentially a tort concept, this warranty carried so many contractual connotations that the courts faced nu-

[39] Sieracki v. Seas Shipping Co., 149 F.2d 98, 100 (3d Cir. 1945), *aff'd*, 328 U.S. 85 (1946).

[40] *Id.*; *accord* Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 636 (8th Cir. 1972); Streatch v. Associated Container Transp., Ltd., 388 F. Supp. 935, 936 (C.D. Cal. 1975).

[41] Noel v. United Aircraft Corp., 204 F. Supp. 929, 939 (D. Del. 1962).

[42] 217 N.Y. 382, 111 N.E. 1050 (1916). Prior to 1916, the general view of the law had been that the original seller of goods was not liable for damages caused by their defects to anyone except his immediate buyer. Judge Cardozo's opinion in *MacPherson* established a negligence theory of products liability which found immediate acceptance in courts at law.

[43] 149 F.2d 98 (3d Cir. 1945), *aff'd*, 328 U.S. 85 (1946). This was an action for personal injuries by a longshoreman injured when the shackle supporting a boom broke during loading operations. Drawing strong parallels to *MacPherson*, the court concluded that although the shackle was supplied by a component manufacturer, the manufacturer of the boom assembly had negligently failed to inspect that part.

[44] The early cases dealt with strict liability for food and drink, a special responsibility at common law. *See* R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 26 (1951); W. PROSSER, LAW OF TORTS 653 (4th ed. 1971) [hereinafter cited as PROSSER].

[45] Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

merous problems.[46] These problems, coupled with severe criticism of the warranty concept,[47] led to the emergence of a products liability action free from contract implications—strict liability in tort.[48] In 1965 the American Law Institute adopted a new section, 402A, in the Second Restatement of Torts which discarded the term warranty as the basis of liability.[49] This strict liability concept experienced explosive development and rapid acceptance by the state courts,[50] and the old notion of implied warranty fell into disfavor.[51]

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[46] Contract defenses, such as disclaimer, failure to notify of breach, and lack of privity, were particularly frustrating to courts anxious to impose liability on the manufacturer for injury to the consumer. Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 44 (Alas. 1976); In Re Alamo Chem. Transp. Co., 320 F. Supp. 631, 636 (S.D. Tex. 1970).

[47] All this is pernicious and unnecessary. No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is "only by some violent pounding and twisting" that "warranty" can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without any illusory contract mask.

Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1134 (1960).

[48] Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), was the landmark case discarding the warranty theory and adopting strict liability in tort. *See also* PROSSER, *supra* note 44, at 656-58.

[49] 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 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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[50] By 1971 two-thirds of the state courts accepted and applied strict liability in tort. PROSSER, *supra* note 44 at 658. *See* Note, 44 J. AIR L. & COM. 207, 208 n.5 (1978).

[51] Implied warranty remains as an alternative basis of liability. The extension by some states of the seller's warranty to all persons who may foreseeably be expected to be injured and the adoption by other states of provisions that liability cannot be disclaimed have made warranty a more attractive alternative action. *Id.* at 658.

The original warranty concept was particularly unfortunate in admiralty. For a contract to be maritime and thus fall within admiralty jurisdiction, it must depend on, assist, or further transportation on navigable waters.[52] Neither the place where the contract is made nor the place of performance is conclusive in determining its maritime nature. The warranty as articulated by the courts in the strict liability actions was simply not a maritime contract. The contractual implications of the implied warranty led some courts to hold that admiralty jurisdiction was improper for such actions.[53]

Most courts nevertheless recognized the implied warranty as a tort action and the theory gained limited recognition in admiralty. The first admiralty case to impose strict liability successfully, in the form of implied warranty, against a manufacturer was *Middlleton v. United Aircraft Corp.*,[54] in which the pilot of a helicopter was killed when his aircraft crashed into the Gulf of Mexico. The action was brought by the decedent's representative under the Death on the High Seas Act for breach of an implied warranty. The court concluded that breach of an implied warranty was included in the DOHSA phrase "wrongful act, neglect or default."[55] Noting that privity was not a requirement for recovery in negligence cases or implied warranty cases involving food, the court took "one logical step forward" and held that recovery against a manufacturer on a breach of warranty theory without a privity requirement was appropriate in the case before it.[56]

The *Middlleton* case received little attention at the time, but was criticized two years later in the next major case, *Noel v. United Aircraft Corp.*[57] The *Noel* case, like *Middlleton*, involved as action

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[52] Union Fish Co. v. Erickson, 248 U.S. 308 (1919); The Steamer Eclipse Braithwaite, 135 U.S. 599 (1890); Grant v. Poillon, 61 U.S. (20 How.) 162 (1857).

[53] Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940 (1963). For a discusion of the tort-contract jurisdictional delineation in admiralty see In Re Alamo Chem. Transp. Co., 320 F. Supp 631, 635-38 (S.D. Tex. 1970).

[54] 204 F. Supp. 856 (S.D.N.Y. 1960).

[55] 46 U.S.C. § 761 (1976). *See* note 17 *supra.*

[56] Middlleton v. United Aircraft Corp., 204 F. Supp. 856, 859 (S.D.N.Y. 1960). It should be noted that the *Middlleton* court recognized the implied warranty as a pure tort action.

[57] "While the decision, being in admiralty, is entitled to respect, the failure of the Court to recognize and dispose of a number of valid arguments against the

under DOHSA for a death in a plane crash on the high seas. *Noel*, however, involved an additional complication—the decedent was a passenger on a commercial air carrier. In refusing to recognize a cause of action in admiralty against a parts manufacturer based on breach of an implied warranty of fitness, the court pointed out that in admiralty law the right of injured passengers to recovery has historically been limited to negligence theories.[58] The court concluded that the rule of implied warranty was neither so widely accepted as to be a part of the general law of torts nor was it harmonious with the existing admiralty law.[59]

For the next few years the federal district courts in admiralty faced a series of cases brought under breach of implied warranty, with some courts following *Noel*[60] and others following *Middleton*.[61] In 1965 the Seventh Circuit Court of Appeals imposed liability in admiralty on the basis of implied warranty but made no reference to maritime law or admiralty jurisdiction in the matter.[62] The Second Circuit Court of Appeals in 1968 affirmed a lower court holding that the doctrine of implied warranty was applicable in admiralty. The court, in a case involving a helicopter crash in the Gulf of Mexico, justified its decision on the basis of wide accept-

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result there reached detracts from its weight." 204 F. Supp. 929, 937 (D. Del. 1962).

[58] *Id.* at 934.

[59] *Id.* at 939. In addition to holding that negligence was the traditional theory for recovery for passengers on common carriers, the court seemed concerned that strict liability would be used to circumvent the provisions of the Warsaw Convention which limits liability of air carriers but provides no protection to manufacturers. *Id.* at 940. It was also unclear that an airplane passenger fell within the protected class defined by early warranty cases, or that the implied warranty would be compatible with the already existing strict liability doctrine of unseaworthiness which provided protection to seamen. *Id.*

[60] Jennings v. Goodyear Aircraft Corp., 227 F. Supp. 246 (D. Del. 1964) (death in a blimp crash).

[61] Montgomery v. Goodyear Tire and Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964), *aff'd*, *sub nom*, Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777 (2d Cir.), *cert. denied*, 393 U.S. 841 (1968) (death in a blimp crash); In Re Marine Sulphur Transp. Corp., 312 F. Supp. 1081 (S.D.N.Y. 1970) *aff'd*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972) (shipbuilder in wrongful death case); Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966) (injury suit by member of Navy against a component part manufacturer, bypassing immune government manufacturer).

[62] McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965).

ance of implied warranty in air disasters occurring over land.[63] In 1969 the Sixth Circuit Court of Appeals recognized implied warranty actions in *Schaeffer v. Michigan-Ohio Navigation Co.*,[64] a case which also involved a contributorily negligent plaintiff.

The movement in admiralty from strict liability actions under implied warranty to actions under Section 402A began in 1969.[65] Then in 1972, in *Lindsay v. McDonnell Douglas Aircraft Corp.*,[66] the Eighth Circuit Court of Appeals became the first appellate court to incorporate strict liability as expressed in Section 402A into federal maritime law stating that "the doctrine of strict liability in tort has been accepted and adopted by a sufficient number of states so that it is now . . . a part of tort case law that should be embraced by federal maritime law. This also fulfills one of the primary goals of maritime law, uniformity."[67] The court further explained that Section 402A "is the best expression of the doctrine as it is generally applied."[68]

The *Lindsay* case concerned the crash of a U.S. Navy jet during a training mission over the Gulf of Mexico. Although no wreckage was recovered, the court indicated that if it could be established that the plane was on fire prior to the crash, then that evidence might be used to infer the existence of a defect. The plaintiff was not required to prove a specific defect.[69] This could be significant

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[63] Krause v. Sud-Aviation, Societe Nationale de Constr. Aeronautiques, 301 F. Supp. 513 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 428 (2d Cir. 1969).

[64] 416 F.2d 217 (6th Cir. 1969).

[65] Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969). Lanson Soileau was killed when a crane manufactured by the defendant toppled from its base and fell into the Gulf of Mexico. The court determined that the manufacturer would be liable to Soileau's widow and children under both Louisiana's wrongful-death statute and the Death on the High Seas Act. In the course of this determination the court adopted the cause of action framed by section 402A as "a uniform statement of the rule [of strict liability] now so generally accepted in the States as to permit it to be incorporated into federal maritime law." *Id.* at 127.

[66] 460 F.2d 631 (8th Cir. 1972).

[67] *Id.* at 637.

[68] *Id.* at 636.

[69] "Here we do not think it was incumbent upon the plaintiff to prove a specific defect. . . . [A] fire would strongly indicate a malfunction in the aircraft itself resulting from some defect in either manufacture, material, or design." *Id.* at 637. Note that on remand to the district court the fact-finder determined that the airplane was not on fire when it hit the water and concluded that the plaintiff had not established the existence of a defect. Lindsay v. McDonnell Douglas Air-

in admiralty actions where an aircraft or vessel is lost as a result of the accident and the plaintiff has no concrete evidence to bring to trial.[70]

Although other courts have followed the *Lindsay* court in applying strict liability in admiralty cases,[71] the issue is by no means settled. Twice the Fifth Circuit Court of Appeals has reserved the question.[72] By late 1977 only four federal appellate courts had incorporated either implied warranty or strict liability in tort into maritime law.[73]

The Pan-Alaska Case

Against this background of uncertainty as to the position of strict liability in admiralty, the Ninth Circuit made its decision in *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*[74] There was no uncertainty in the court's decision, however: "We hold that strict products liability actions have become sufficiently well-established to justify being incorporated into the law of admiralty."[75] In justifying its decision the court quoted extensively from *Lindsay*, but made no mention of *Noel v. United Aircraft Corp.* or the objections to strict liability voiced in that case.[76] Like the *Lindsay*

craft Corp., 352 F. Supp. 633 (E.D. Mo. 1972), *aff'd*, 485 F.2d 1288 (8th Cir. 1973).

[70] *See* Higginbotham v. Mobil Oil Corp., 545 F.2d 422 (5th Cir.), *cert. denied*, 434 U.S. 830 (1977), for an interesting discussion of causation, circumstantial evidence, and the relation of strict liability to res ipsa loquitur in such cases.

[71] Fernandez v. Chios Shipping Co., 542 F.2d 145 (2d Cir. 1976); Heiman v. Boatel Co., Inc., [1976] Prod. Liab. Rep. (CCH) ¶ 7570 (E.D. Ark.), *aff'd sub nom.*, Heiman v. Medlin Marine, Inc., 534 F.2d 332 (8th Cir. 1976); Streatch v. Associated Container Transp., Ltd., 388 F. Supp. 935 (C.D. Cal. 1975).

[72] Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 426 n.5 (5th Cir.), *cert. denied*, 434 U.S. 830 (1977); Williams v. Brasea, 497 F.2d 67, 78 (5th Cir. 1974). *See also* Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 846 (D.V.I. 1977). The reservation by the Fifth Circuit Court is particularly significant as the Fifth Circuit encompasses the Gulf Coast states where a large number of admiralty claims arise.

[73] The Courts of Appeals of the Second, Sixth, and Seventh Circuits had incorporated implied warranty actions. Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217 (6th Cir. 1969); Krause v. Sud-Aviation, Societe Nationale de Constr. Aeronautiques, 413 F.2d 428 (2d Cir. 1969) (affirming a lower court incorporation); McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965). Only the Eighth Circuit had adopted strict liability in tort as defined by Section 402A. Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972).

[74] 565 F.2d 1129 (9th Cir. 1977).

[75] *Id.* at 1134.

[76] *See* note 59 *supra*, and accompanying text.

court, the *Pan-Alaska* court also adopted Section 402A as the best and most widely accepted expression of the theory of strict products liability.[77]

The early part of the opinion reads like many other products liability cases—holding the manufacturer, dealer, and retailer all subject to liability because they are integral parts of the producing and marketing enterprise. It also reiterated the principle that a manufacturer cannot delegate his duty to have his products delivered to the ultimate purchaser free from dangerous defects.[78] Had the *Pan-Alaska* court stopped at this point the decision would still have been significant because of the further recognition of strict liability in admiralty. The court, however, chose to confront an additional issue, the allocation or apportionment of the liability among "strictly liable" defendants and a contributorily negligent plaintiff.[79] Despite the proliferation of defendants and defenses the court felt that traditional maritime law, in the guise of comparative fault, offered a simple solution.[80]

Although admiralty has been a follower in the field of products liability, it has always been a leader in the area of comparative fault. While the courts at law grappled with the inequities of contributory negligence, inventing makeshift defenses, admiralty routinely applied some form of division of liability.[81] At a time when

[77] 565 F.2d at 1135.

[78] *Id.* at 1136.

[79] *Id.*

[80] When the court concluded that strict liability applied, the following situation existed: Caterpillar and Marco were held strictly liable; N.C. Marine was held strictly liable and negligent; and Pan-Alaska was held negligent prior to the voyage and was held vicariously liable for the negligence of the crew both before and after the fire (*see* note 92 *infra*). Thus the allocation of liability, normally a relatively simple task, became a complex problem. The problem can become even more complex when questions of indemnity and contribution are included. *See* George & Walkowiak, *Blame and Reparation in Pure Comparative Negligence: The Multi-Party Action*, 8 SW. U.L. REV. 1 (1976).

[81] Admiralty law derived by descent from the civil law and most civil law jurisdictions quite uniformly apportion damages. In contrast, the common law courts, until recently, have been extremely unwilling to permit any division, citing as reasons the indivisibility of a single injury, the lack of definite bases for apportionment, and bias or unreliability of the jury called on to make the division. Adherence to tradition and reluctance to adopt new concepts with new problems no doubt also played a part. Yet increasing dissatisfaction with the all-or-nothing concepts of negligence, its defenses of contributory negligence and assumption of risk, and doctrines such as the last clear chance eventually led to the acceptance of comparative fault principles. Beginning in 1910 with Mississippi, a few states

contributory negligence would have been a complete bar to recovery in civil actions, maritime law followed a rule of equally-divided damages in collision cases.[82] This rule gave way to comparative fault in property damage cases in 1975 in *United States v. Reliable Transfer Co.*[83] A rule of comparative fault also has long been applied in personal injury actions in admiralty.[84]

In light of admiralty's heritage in comparative fault it is not surprising that the *Pan-Alaska* court should apply those same principles with respect to strict liability actions. The numerous criticisms directed at the merger of the two doctrines were summarily dismissed. The primary criticism currently being advanced by judges and legal scholars is that no valid comparison can be made between the plaintiff's negligent conduct and the strict liability of the manufacturer.[85] This criticism seems to have its origins in the early strict liability cases based heavily on public policy considerations, cases which characterized the manufacturer as an insurer of his product against defects. Several courts have adopted this reasoning and refused to apply comparative fault principles in strict liability cases.[86]

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adopted comparative negligence statutes: Wisconsin and Nebraska in 1913; South Dakota in 1941; Arkansas in 1957; Maine in 1964. Then in the late 1960's the concept gained popularity, and by the end of 1977 more than thirty states had adopted comparative negligence in one form or another. Daly v. General Motors Corp., 144 Cal. Rptr. 380, 575 P.2d 1162, 1170 (1978); Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts, 2d*, 42 INS. COUNS. J. 39, 44 (1975). Where admiralty has traditionally used pure comparative fault, many states have preferred to retain some vestiges of the old common law concepts by completely barring recovery when the plaintiff's fault exceeds some designated amount (49% or 50% of the total fault, or "slight" as opposed to defendant's "gross" negligence). For more detailed discussion of the history of comparative fault see PROSSER, *supra* note 44, at 43-45.

[82] The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1855); *see* Weyerhauser S.S. Co. v. United States, 372 U.S. 597, 603 (1963).

[83] 421 U.S. 397 (1975).

[84] *See, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953). *See also* Merchant Marine (Jones) Act, 46 U.S.C. § 688 (1976); Death on the High Seas Act, 46 U.S.C. § 766 (1976).

[85] "[T]he focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product, rather than on the conduct of either the manufacturer or of the person injured. . . ." Daly v. General Motors Corp., 575 P.2d 1162, 1179, 144 Cal. Rptr. 380, 403 (1978) (dissenting opinion of J. Mosk).

[86] Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976); Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974); Kinard v. Coats Co., 553 P.2d 835, 837 (Colo. App. 1976).

A current trend, however, reflected in the decision of the *Pan-Alaska* court, considers strict liability to have at least some elements of fault.[87] The focus is on the manufacturer's conduct in putting the product on the market.[88] "[W]e feel that a common denominator has been reached [through applying the term 'comparative fault' to encompass all the parties' conduct] to compare the

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[87] "Fault" in this context should not be equated with negligence. As Judge Wisdom of the Fifth Circuit said,

> Delicts (torts) do not have to depend on negligence. In the Civil Code, as in the common law, there are a number of instances of strict delictual liability when the law conclusively presumes fault notwithstanding the fact that the party liable did not will the damage and was not personally negligent.

Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 30-31 (5th Cir. 1963). *See also* Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969). The public policy justifications for strict liability voiced in Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), and countless other cases have tended to draw attention away from the manufacturer's conduct and focus solely on the existence of a defect. The exact nature of the cause of action created by Section 402A was of little practical importance until the arrival of comparative fault. Then the courts were forced to decide whether Section 402A creates a cause of action for an implied warranty divested of the contractual problems of notice, privity, and disclaimer, or whether it creates, in essence, a cause of action for negligence divested of the scienter requirement and of the plaintiff's burden of proving the specific negligent acts of the manufacturer. The former theory focuses on the defective nature of the product while the latter focuses on the manufacturer's conduct. Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d*, 42 INS. COUNS. J. 39, 39-44 (1975). The courts adopting the implied warranty concept, with its emphasis on the defect, have had difficulty reconciling the 402A action with comparative fault. Kinard v. Coats Co., 553 P.2d 835, 837 (Colo. App. 1976); Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974). *See also* Daly v. General Motors Corp., 575 P.2d 1162, 1179, 144 Cal. Rptr. 380, 402 (1978) (dissenting opinion of J. Mosk). In contrast, courts viewing Section 402A as a fault-based action, or as a type of negligence per se, have readily embraced comparative fault. Here the blameworthy conduct of both plaintiff and defendant can be easily compared. Hagenbuch v. Snap-On-Tools Corp., 339 F. Supp. 676 (D.N.H. 1972); Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). Thus it is reasonable to expect that the growing popularity of comparative fault will foster a corresponding growth in the acceptance of Section 402A actions as fault-based. It should be pointed out that another approach has been taken to find a common ground for comparison in strict liability-comparative fault cases—comparative causation. Comparative causation may prove to be the most practical and workable solution to the comparison dilemma. *See* General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974); *see also* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976).

[88] Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602 (D. Idaho 1976). *See* note 87 *supra.*

manufacturer's conduct in manufacturing and selling a defective product and the plaintiff's unreasonable conduct which is a contributing cause to his own injuries."[89] The court, in reaching its decision, also seemed to give some weight to the fact that admiralty courts had been applying comparative fault principles in actions based in unseaworthiness, a form of strict liability, for some years with little difficulty.[90]

The next major problem confronting the court was to decide what conduct of the parties should be compared in determining liability. The court rejected a wide array of possible defenses which ranged from the emergency doctrine to the "thin-skulled plaintiff" rule and decided that *all* the plaintiff's negligent conduct should be considered in assessing the defendant's liability.[91] At the trial in the district court it had been determined that Pan-Alaska and the crew of the *Enterprise* were negligent in several respects, both before and during the fire.[92] Appellant, Pan-Alaska, sought to distinguish between the negligence which went to the cause of the fire and that which went to the aggravation of damage once the fire began, saying that only that conduct which contributed to the cause of the fire

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[89] 565 F.2d at 1139.

[90] *Id.* at 1138.

[91] Although these defenses were argued and briefed extensively by both parties, the court did not address them specifically but simply held that *all* the plaintiff's conduct should be considered. *Id.* at 1139.

[92] The trial court found the *Enterprise* crew and Pan-Alaska negligent for the following reasons:

> (1) The engineer was negligent in leaving the engine room before operating the engine at full-speed-ahead without observing the engine and the filters operate under the higher fuel pressures generated under those conditions.
> (2) The engineer was particularly negligent in not observing the engine under full load conditions when he knew or should have known that the fuel supply was contaminated.
> (3) The crew was negligent in failing to find out that a switch outside the engine room controlled the blower which was forcing air into the engine room.
> (4) The crew was negligent in not stuffing the air ducts to stop the engine and stop the flow of air into the fire.
> (5) The crew was negligent in not cutting the wires leading to the blower.
> (6) Pan-Alaska was negligent in not equipping the *Enterprise* with a means of shutting off the engine from outside the engine room.
> (7) Pan-Alaska was negligent in not training the crew in firefighting techniques.

Id. at 1133.

could properly be called contributory negligence.[93] The court rejected this distinction, saying, "[W]e hold that *all* of plaintiff's conduct contributing to the cause of his loss or injury can be compared to the defendant's liability regardless of the labels attached to that conduct."[94] The *Pan-Alaska* court even includes failure to discover the defect as negligence which could be used to mitigate damages. Assumption of risk would apparently also serve only to mitigate damages and would not be a complete bar to recovery.

At the close of the opinion the court summarized its holdings on defenses to strict liability, reiterating the equitable principles which have been the hallmark of comparative fault in admiralty:

> [W]e find that any label . . . which either allows plaintiff to recover full damages, even though he was partially at fault, or which totally bars his recovery, even though the defendant was partially at fault, is not consistent with comparative fault principles and is therefore rejected . . . .
>
> Such "all-or-nothing" defenses are inequitable in their operation because they fail to distribute responsibility in proportion to fault and place upon one party the entire burden of a loss for which two are, by hypothesis, responsible. If, for example, the user's conduct in failing to discover or guard against the product's defect is highly irresponsible and the product's defect slight, it offends our sense of justice and fair play to impose the whole loss on the manufacturer in the name of imposing the burden of defective products on manufacturers as one of the costs of doing business. There is no reason why other consumers and society in general should bear that portion of the burden attributable to the plaintiff's own blameworthy conduct.[95]

Pan-Alaska and the Future

The *Pan-Alaska* case marks the coming of age of strict liability in admiralty. The unequivocal, even eager, acceptance of the doctrine by the court should have immediate effects on the acceptance

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[93] Reply Brief for Appellant at 12-18, Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129 (9th Cir. 1977).

[94] *Id.* at 1139. Admittedly the statement is somewhat ambiguous because of the term "contributing to the cause of his loss." This could mean conduct contributing to the cause of the fire, in which case that conduct which aggravated the damages would be excluded. It is clear, however, in light of the briefs and the remainder of the opinion that the court meant all conduct contributing to the loss.

[95] 565 F.2d at 1139-40.

of strict liability by other admiralty courts.[96] Unfortunately, the court did not deal with the questions raised in the *Noel* decision.[97] Whether a court will allow strict liability to be used to bypass the Warsaw Convention limitations of liability in the crash of an air carrier is still undecided. In *Reed v. Wiser*[98] the Second Circuit Court of Appeals refused to allow circumvention of the Convention by a suit against airline corporate officials. Although a manufacturer can clearly be distinguished from a corporate officer, the underlying principles are the same. In both cases a plaintiff would be undermining the purposes of the Convention. It has been suggested that manufacturers should be afforded the same protection under the treaty that airlines enjoy, and that a system of comparative fault should be incorporated into the Warsaw Convention.[99] Under the present system, however, the incorporation of strict liability into admiralty might encourage litigation against aircraft manufacturers.

The comparative fault decisions in the *Pan-Alaska* case should have even greater effects in the future. The courts at law have continually looked to the maritime law for guidance in the area of comparative fault, and no doubt they will give some attention to the decisions made in this case. Yet perhaps the court here, in its adoption of this purest form of "comparative fault," which essentially compares all blameworthy conduct of plaintiff and defendant, has taken a simplistic approach to the problem. The appellate courts have often said that the "problem [of applying comparative

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[96] It is interesting to note that the strict liability issue was only one of many issues briefed by the parties. The district court's statement regarding the strict liability question seemed to indicate rejection of the action under the *facts* of the case rather than as a legal theory in admiralty: "Under the particular facts of this case the doctrine of strict liability is not applicable." *Id.* at 1134. Also, the addition of Caterpillar and Marco as strictly liable defendants would make little practical difference in the case as an earlier court decision had already ruled that Caterpillar and Marco were entitled to indemnity from N.C. Marine based on contract and Washington indemnity law. Brief of Defendant on Remand, Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., No. 369-72C2 (W.D. Wash., filed July 20, 1978). The conclusion must be that the court saw its opportunity to make a statement of the law and took it.

[97] *See* note 59 *supra*, and accompanying text.

[98] 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

[99] *Hearings on Aviation Protocols Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 125 (1977) (statement of William F. Kennedy).

fault principles to strict liability] is more apparent than real."[100] Yet these courts seldom define a common element for comparison, such as fault or cause, to be employed by the trial court in its determinations. The California Supreme Court attempted at least to provide some guidance in this area, but it still left it to the lower courts to provide a "case-by-case evolution of the principles" which they espoused.[101] Had the *Pan-Alaska* court provided explicit guidance in the application of the new principles adopted in the case, perhaps the lower court on remand could have successfully applied them.[102]

The *Pan-Alaska* court's determination that *all* conduct should be considered in comparative fault should provide some simplification of the doctrine. Out go all the labels, fancy defenses, and doctrines. It remains only for the factfinder to weigh all of the conduct of the plaintiff and the defendant and then determine liability. In practice this is probably what happens anyway, with a judge seizing on legal concepts to explain his decision and a jury reaching the same result with less finesse.

There is little doubt that the principles adopted by the *Pan-Alaska* court provide an equitable solution to the strict liability-comparative fault dilemma. Other appellate courts are already arriving at similar solutions. The future of these rules, however, remains in the hands of the trial courts where all legal principles must ultimately prove their worth.

Jean Bishop

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[100] Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42, 45 (Alas. 1976); *see also*, Daly v. General Motors Corp., 575 P.2d 1162, 1167, 144 Cal. Rptr. 380, 385 (1978).

[101] Daly v. General Motors Corp., 144 Cal. Rptr. at 393, 575 P.2d at 1175.

[102] The Pan-Alaska case is a striking example of the problems involved in a strict liability-comparative fault case. On remand Judge Solomon looked at the parties with all their "faults" (*see* notes 80 and 92 *supra*) and fell back on the United States Supreme Court's holding in *Reliable Transfer*: "[L]iability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible to fairly measure the comparative degree of their fault." United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975). Judge Solomon allocated the damages 50% to the plaintiff and 50% to the three defendants, knowing that N.C. Marine would have to indemnify both Caterpillar and Marco. Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., No. 369-72C2 (W.D. Wash., *filed* July 20, 1978). Amazingly enough, this returned the parties to their original position prior to the last two appeals.

WARSAW CONVENTION—INDEPENDENT CAUSE OF ACTION —Article 17 of the Warsaw Convention Creates an Independent Cause of Action for Wrongful Death. *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3482 (U.S. Jan. 15, 1979) (No. 78-129).

On June 18, 1972, Hilde Benjamins was a passenger on a British European Airways (BEA) flight from London to Brussels that stalled shortly after takeoff and crashed into a field, killing all 112 passengers. Hilde Benjamins and her husband, the plaintiff in this action, were both Dutch citizens permanently residing in California. Her ticket which had been purchased in Los Angeles clearly provided for "international transportation" within the meaning of Article 1 of the Warsaw Convention;[1] therefore the international Convention was applicable to the incident.

Plaintiff brought suit for wrongful death and baggage loss in the District Court for the Eastern District of New York against BEA and Hawker Siddeley Aviation, the designer and manufacturer of the aircraft. Both defendants were British corporations with their principal places of business in the United Kingdom. Benjamins pleaded two bases of federal jurisdiction, claiming a violation of the Alien Tort Claims Act[2] and claiming a federal question "arising under" a treaty of the United States.[3] The defendants were alleged to be liable under Article 17 and Article 18(1) of the Warsaw Convention,[4] but District Judge Weinstein dismissed the complaint

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, done Oct. 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as the Convention].

The Warsaw Convention applies to "all international transportation . . . by aircraft for hire" defined as any transportation "in which . . . the place of departure and the place of destination . . . are situated . . . within the territories of two . . . Contracting Parties . . . . " Convention, art. 1.

[2] "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1976).

[3] 28 U.S.C. § 1331 (1976).

[4] Article 17 of the Convention provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18(1) provides: "The carrier shall be liable for damage sustained in

for lack of subject matter jurisdiction. This dismissal was based on Second Circuit precedent[5] that the Warsaw Convention does not create a cause of action, but only establishes conditions for a cause of action created by domestic law. The suit, therefore, was held not to "arise" under a treaty of the United States.

On appeal, the Second Circuit Court of Appeals held that the Alien Tort Claims Act provided no basis for jurisdiction because the complaint did not allege a violation of the law of nations or any treaty of the United States.[6] The court did, however, consider the question of whether the Warsaw Convention itself creates a cause of action to be ripe for reexamination. *Held, reversed, and remanded*: Article 17 of the Warsaw Convention creates an independent cause of action for wrongful death. *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3482 (U.S. Jan. 15, 1979) (No. 78-129).

In 1929, the nations involved in the then infant international air transport industry perceived a need to establish a regime of law to increase stability and uniformity. From a diplomatic conference in Warsaw, Poland, emerged a convention, the purpose of which was "to limit international air carriers' potential liability and to facilitate recovery by injured passengers."[7] The Convention became effective in 1933 and the United States became a High Contracting Party in 1934.

There is persuasive evidence from the 1929 Warsaw Conference, and in the flood of writing surrounding the Convention, that the

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the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air."

[5] Judge Weinstein cited Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972) *aff'd*, 485 F.2d 1240 (2d Cir. 1973); Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954); and Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

[6] Judge Lumbard, writing for the Second Circuit panel, reasoned that the Warsaw Convention does not seek to outlaw air accidents but to set forth terms of recovery of damages; therefore airlines do not "violate" the Convention when a crash occurs. Only when an airline fails to compensate a victim adjudged to be an appropriate recipient of damages is there a violation of the treaty. Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3092 (U.S. July 24, 1978) (No. 78-129).

[7] Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238 (S.D.N.Y. 1975); *see also* Pierre v. Eastern Air Lines, Inc., 152 F. Supp. 486 (D.N.J. 1957).

drafters assumed that the Convention created a private right of action against air carriers.[8] In Article 17, the Convention drafters used the following language: "[T]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger. . . ."[9] G. Nathan Calkins, Jr., head of the United States delegation to the 1955 conference to amend the Convention,[10] concluded that "the evidence is over-whelming that the conference reaffirmed the theory throughout that the convention would establish a system of liability complete in itself."[11] In 1952, one New York court interpreted Article 17 as clearly creating a private cause of action, suggesting that, "if the Convention did not create a cause of action in Article 17 it is difficult to understand just what Article 17 did do."[12] This interpretation, however, was made without reference to an earlier New York case[13] holding that the Convention created "no new substantive rights."[14]

The view that no independent cause of action exists under the Convention is primarily attributable to two Second Circuit cases decided in the 1950's,[15] which until *Benjamins* have generally been regarded as expressing current United States law.[16] In *Komlos v.*

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[8] Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967). "The conclusion that Warsaw created an independent self-contained cause of action seemed to follow from the structure of the Convention." *Id.* at 517-518.

[9] Warsaw Convention, Oct. 12, 1929, art. 17, 49 Stat. 3000, T.S. No. 876.

[10] *Conference on Private Air Law*, The Hague, September 28, 1955, ICAO Doc. 7631.

[11] Calkins, *The Cause of Action Under the Warsaw Convention* (pt. 1), 26 J. AIR L. & COM. 217, 227 (1959).

[12] Salamon v. Koninklijke Luchtvaart Maatschappij, N.V., 107 N.Y.S.2d 768, 773 (Sup. Ct. 1951), *aff'd mem.*, 281 App. Div. 965, 120 N.Y.S.2d 917 (1st Dept. 1953) (negligence action on the death of an airline passenger). The complaint was found sufficient to state a cause of action under the Warsaw Convention, which overrides and supplants any contrary local law.

[13] Wyman v. Pan American Airways, Inc., 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. N.Y. County), *aff'd*, 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dept. 1943), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785, ___ N.Y.S. ___ (1944), *cert. denied*, 324 U.S. 882 (1945).

[14] 181 Misc. at 966, 43 N.Y.S.2d at 423.

[15] Komlos v. Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

[16] *See* Boyle, *The Guatemala Protocol to the Warsaw Convention*, 6 CAL. W. INT'L L.J. 41, 74 (1975).

Compagnie Nationale Air France,[17] defendant airline in the wrongful death action claimed that the Convention created a cause of action based on the contract of carriage and that, consequently, plaintiff could not bring an action based on domestic tort law. The district judge in *Komlos* could have ruled more narrowly that the Convention's cause of action operates in addition to, not to the exclusion of, claims in tort subject to the Convention limitations.[18] Instead, he held that the Convention creates no cause of action at all.[19] This view was affirmed by the appellate court,[20] and the decision was later the basis for the Second Circuit Court of Appeals' opinion in *Noel v. Linea Aeropostal Venezolana*,[21] a civil action arising out of a foreign airliner's accident over the high seas.

Both *Noel* and *Komlos* relied upon a letter written by then Secretary of State Cordell Hull to President Roosevelt in 1934 explaining the effect of the Warsaw Convention.[22] The Secretary of State indicated that the effect of Article 17 was to create only a presumption of liability of the air carrier, leaving it to the domestic law to provide a right of action.[23] Secretary Hull's letter was used to explain the Convention's meaning to the United States Senate when ratification was considered; therefore the *Noel* and *Komlos* courts assumed that this interpretation expressed Congressional intent. While some scholars insisted that the *Noel* and *Komlos* pronouncements were in opposition to the intent of the drafters and

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[17] 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954).

[18] Calkins, *supra* note 11, at 328. *See also* note 24 *infra*.

[19] Komlos v. Air France, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954).

[20] 209 F.2d 436 (2d Cir. 1953).

[21] 247 F.2d 677 (2d Cir. 1957). In reaching its decision that the Convention did not create a cause of action, the *Noel* court stated, "[I]n any event we agree with our prior decision in *Komlos v. Compagnie Nationale Air France*, which impliedly agreed with Judge Leibell's decision in the district court that the Convention did not create an independent right of action." (Citations omitted). *Id.* at 679.

[22] Letter to President Roosevelt from Sec. of State Cordell Hull, Mar. 31, 1934, 1934 U.S. Av. Rep. 240.

[23] *Id.* at 243. "The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier."

the spirit and purpose of the Convention,[24] the Second Circuit had twice denied the existence of an independent cause of action, and certiorari had been twice denied by the Supreme Court. Thus the rule in *Noel* held firm.[25]

Courts outside the Second Circuit have accepted the *Noel* interpretation, denying that the Convention creates any independent rights of action against air carriers. In *Hepp v. United Airlines, Inc.*,[26] a Colorado court accepted *Noel* as controlling and denied that any new rights were created by the Convention. The Ninth Circuit also accepted the *Noel* rule in *Maugnie v. Compagnie Nationale Air France*.[27] In construing whether "disembarking" as used in Article 17 encompassed injuries sustained in a corridor between the air carrier's gate and the main terminal, the Ninth Circuit noted

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[24] "The Warsaw Convention established, whether one might wish it or not, the rule of contractual liability of the carrier . . . " Georgiades, *Quelques Reflexions sur L'Affrètement des Aeronefs et le Projet de Convention de Tokyo*, 2 REVUE FRANÇAISE DE DROIT AERIEN (1959), *quoted in* Calkins, *supra* note 11, at 217.

Calkins, in criticizing Judge Leibell's holding that the Convention creates no cause of action said:

> 1. The discussion of Judge Leibell in the *Komlos* case regarding the Warsaw Convention was largely unnecessary to its disposition, since the Convention does not preclude an action founded on the wrongful death act of the place where the accident occurred. 2. The discussion of Judge Leibell, referred to above, is not supported by the legislative history of the Convention, and is contrary to its basic philosophy, which is to impose the liability rules set out therein as terms of specific contracts of carriage.

Calkins, *The Cause of Action Under the Warsaw Convention* (pt. 2), 26 J. AIR L. & COM. 323, 342 (1959).

[25] In Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238, 1251-1252 (S.D.N.Y. 1975), a passenger brought an action against a foreign air carrier to recover for bodily injury and mental anguish allegedly caused by the hijacking of one of defendant's airplanes. The court held that mental injuries were comprehended by article 17 and should be compensable if the otherwise applicable substantive law provides an appropriate cause of action. While acknowledging that an independent cause of action under the Convention might serve the Convention's purpose to facilitate recovery, the Court followed the *Noel* and *Komlos* proposition that no cause of action is created by the Convention.

See also Zousmer v. Canadian Pacific Air Lines, 307 F. Supp. 892 (S.D.N.Y. 1969), a wrongful death action stemming from a fatal airplane crash in Japan. Plaintiff attempted to remove the case to federal court based on U.S.C. § 1441(b) as a "claim or right arising under the Constitution, treaties or laws of the United States." The court held that for an action to be removable under § 1441(b), the treaty must clearly create an actual right in the plaintiff, and no such right of action was created by the Warsaw Convention. *Id.* at 900.

[26] 36 Colo. App. 350, 540 P.2d 1141 (1975).

[27] 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, 431 U.S. 934 (1977).

that the Convention does not create a cause of action, but only a presumption of liability.

This interpretation was not adopted, however, in *Seth v. British Overseas Airways Corp.*,[28] a 1964 First Circuit Court of Appeals decision allowing an alien to recover from an airline for lost baggage. In *Seth* the court held that Article 18(1), which echoes the "shall be liable for damage" language of Article 17, gives an independent right of action against the air carrier to a passenger whose baggage is lost.[29] This conclusion was reached by reference to the Article 30(3) phrase, "shall have a right of action"[30] which indicated to the court that the Convention created a separate cause of action to enforce the carrier's liability for lost baggage.[31]

The case that set the stage for the Second Circuit's reversal of the *Noel* pronouncement was *Reed v. Wiser*,[32] decided about a year prior to *Benjamins*. In *Reed*, the court was faced with the question of whether the limitation of a carrier's liability in the Convention was intended to embrace the carrier's employees as well. In concluding that carriers' employees were subject to the liability limitations, the court said that the provisions in the Convention should be interpreted in a manner that will carry out the framers' intent, which was to provide uniformity in international aviation liability:

> Another fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of worldwide liability rules to govern international aviation which would supersede with respect to international flights the scores of differing do-

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[28] 329 F.2d 302 (1st Cir. 1964).

[29] *Id.* at 305. Text of article 18(1) at note 4 *supra*.

[30] Article 30(3) provides in part:

> As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place.

[31] The court in *Husserl*, while concluding that there is no cause of action created by the Convention, did observe that "it must be noted that Art. 30 does use the phrase 'shall have a right of action' from which a contrary inference could be drawn." Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238, 1251 (S.D.N.Y. 1975).

[32] 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), *noted in* 44 J. AIR L. & COM. 175 (1978).

mestic laws, leaving the latter applicable only to the internal flights of each of the countries involved.[33]

This expressed view of the Convention as a body of uniform aviation law led Judge Lumbard—author of the earlier *Noel* decision—to reevaluate the previous cases regarding the existence of a cause of action founded on the Convention itself. In writing the decision of the court in *Benjamins v. BEA*, Judge Lumbard placed primary emphasis on the desirability of a Convention-created uniform law governing air crashes. He appeared to be swayed by the views of Calkins[34] that the Convention delegates intended, and took for granted, that the Convention would supply a cause of action.[35] The court proceeded on the assumption that universal applicability was the goal of the Convention and that it would be "inconsistent with its spirit"[36] to insist that a would-be plaintiff first find an appropriate cause of action in the domestic law of a signatory.

The *Benjamins* court carried the *Seth* interpretation of Article 30(3) one step further. While the *Seth* court decided that the Article 30 grant of a "right of action" for lost baggage against the last of several carriers showed an intention for there to be a similar right of action where only one carrier was involved,[37] the *Benjamins* court expanded this Article 30 analogy to find an independent wrongful death action under Article 17. The court implies that if Article 18 creates a cause of action for lost baggage, the similar wording of Article 17 compels a similar interpretation for a wrongful death action.

The court also cited the British Carriage by Air Act[38] as evidence that the source of air carrier liability lies solely in the Convention. This 1932 British statute clearly substitutes liability under Article 17 for any other statutory or common law liability.[39] Although the

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[33] Reed v. Wiser, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

[34] *See* Calkins, *supra* note 11.

[35] 572 F.2d at 917.

[36] *Id.* at 918.

[37] Seth v. BOAC, 329 F.2d 302 (1st Cir. 1964).

[38] Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36, § 1(4) at 440 (1932).

[39] *Id.* "Any liability imposed by Article seventeen of the said [Warsaw Convention] on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law. . . ."

amended 1962 Carriage by Air Act omitted reference to this substitution of liability, there does not appear to have been any change of the law as to the supremacy of the Convention-created cause of action.[40] The British statute, however, has also been cited as support for the opposing view that the Convention was not meant to create a cause of action. It has been argued that the British statutory creation of an exclusive cause of action demonstrates the necessity for domestic legislation to supplement the Convention. While the United Kingdom legislatively declared that the Convention created new rights of action, the United States merely proclaimed the treaty. If the Convention was intended to create its own rights of action, it is argued, there was no need for the United Kingdom to make a statutory declaration of this point.[41] Nevertheless, the *Benjamins* court adopted the former interpretation which looks to the British act as an explanation of the true meaning intended to be given to Article 17.

Procedural advantages available in the federal courts were cited by the *Benjamins* court as an additional reason for allowing a direct cause of action to be brought under the Convention. The Judicial Panel on Multidistrict Litigation[42] was created in 1969, and special procedures such as pre-trial consolidation and assignment to one expert judge have developed in the federal courts to deal with complex litigation.[43] Therefore, the litigation surrounding air disasters can best be handled in the federal system, and a plaintiff's access to the federal courts should not be barred by his failure to establish a cause of action based on domestic law. The court points out that allowing plaintiffs to bring a cause of action directly under the Convention will not greatly increase the volume of federal litigation. Only when plaintiffs and defendants are all aliens and the United States has treaty jurisdiction will it be necessary to invoke federal question jurisdiction.[44]

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[40] 572 F.2d at 919.

[41] Comment, *Air Passenger Deaths*, 41 CORNELL L.Q. 243, 260-61 (1956).

[42] The Judicial Panel on Multidistrict Litigation was created by 28 U.S.C. § 1407 (1976).

[43] *See In re Multidistrict Civil Actions Involving the Air Crash Disaster, New Hanover, New Hampshire, on October 25, 1968*, MDL-DOCKET NO. 43 (D.C. New Hampshire 1971), in which all the cases were ordered to be transferred to New Hampshire for a consolidated trial on liability and remanded to the districts in which they originated for a determination of damages.

[44] 28 U.S.C. § 1331 (1976).

In a firm dissent to the majority decision, Judge Van Graafeiland concluded that there was no need to reconsider the *Noel* interpretation of the Warsaw Convention. He accused the majority of overstepping its powers of review, saying that "the majority no longer approves of the terms of the Convention and therefore by judicial fiat has decided to rewrite it."[45] He accepted the *Noel* interpretation of Secretary of State Hull's letter[46] as expressive of the intended effect of Article 17: that the Article creates a presumption of liability rather than an independent cause of action. The holding of the majority, according to Judge Van Graafeiland, was an unauthorized expansion of federal jurisdiction over "an entirely new class of cases which Congress probably never intended should be there."[47]

Judge Van Graafeiland believed that another compelling reason to avoid judicial reinterpretation of Article 17 was the pending Guatemala City Protocol to Amend the Warsaw Convention.[48] While the Guatemala Protocol has not yet been approved by the United States Senate, some commentators argue that its revised language would ensure that a cause of action would be available to plaintiffs under Article 17.[49] The Protocol changes the language of Article 17 from "the carrier shall be liable" to the slightly stronger, "the carrier is liable."[50] In addition, the proposed amended Article 24 indicates the creation of a cause of action, "In the carriage of passengers . . . any action for damages, however founded, *whether under this Convention* or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention . . . ."[51] These pending amendments

[45] 572 F.2d at 920.

[46] *See* notes 22-23 *supra.*

[47] 572 F.2d at 920.

[48] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *signed* at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague on 28 September 1955, *signed* at Guatemala City March 8, 1971 (reproduced in 10 INT'L LEGAL MATERIALS 613 (1970)) [hereinafter cited as the Guatemala Protocol].

[49] *See* Boyle, *The Guatemala Protocol to the Warsaw Convention*, 6 CAL. W. INT'L L.J. 41, 74 (1975) and Note, *The Guatemala City Protocol to the Warsaw Convention and the Supplemental Plan under Article 35-A*, 5 INT'L L. & POL. 313, 324-25 (1972).

[50] Guatemala Protocol, art. IV, amending the Convention, art. 17 ¶ 1.

[51] Guatemala Protocol, art. IX, amending the Convention, art. 24 (emphasis added).

were further evidence to Judge Van Graafeiland that reinterpretation of the cause of action question was a policy decision within the scope of legislative and executive responsibilities, not a question for the court.[52]

Even if the dissenting judge had been convinced of the appropriateness of reexamining *Noel*, he would have reaffirmed that decision.[53] The Convention does not designate who would be the beneficiaries of a wrongful death action, nor does it specify the measure of damages in such an action.[54] Virtually every wrongful death statute in the United States and abroad sets out specifically who may collect damages and what type of damages they may seek;[55] therefore Judge Van Graafeiland would hold that a Convention that designates neither does not create a cause of action for wrongful death.

Judge Van Graafeiland makes a convincing structural argument that it is the sphere of the executive and the legislature, not the courts, to give new meaning to an international convention. It must be remembered, however, that two judicial interpretations established the notion that a plaintiff could not bring an action directly under the Convention. The federal courts in the 1950's rejected the intent of the Convention drafters to provide a uniform source for causes of action in aircraft accident litigation and followed an executive's interpretation instead. It seems appropriate, in this period of increasing international interchange, that a judicial reinterpretation should establish a new notion of the desirability of uniformity in this type of suit.

Whether other courts will follow the *Benjamins* majority and allow plaintiffs to bring actions in the federal courts based solely on the Warsaw Convention or whether they will consider the question a policy decision suitable for legislative action remains to be seen. If the Guatemala Protocol is adopted by the United States, discussion will begin anew as to the meaning of the new language

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[52] 572 F.2d at 921.

[53] *Id.*

[54] Article 24(2) of the Convention provides, "In the cases covered by Article 17 the provision of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

[55] *See* 572 F.2d at 921 n.3.

in Articles 17 and 24. Perhaps the changes in the wording of the Protocol would provide a strong enough inference of an independent cause of action to encourage the uniformity in aviation liability suits desired by the framers of the Convention in 1929.

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