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DEVELOPMENTS IN RECENT AVIATION CASES

STEPHEN C. JOHNSON*

INTRODUCTION

A BROAD expansion of aviation remedies occurred in the courts during the decade of the 1970's. The decade ended, however, upon a more restrictive note. This article reviews the significant court decisions rendered during 1979, and some less significant decisions, to demonstrate what has occurred in several areas of aviation law. One year's cases may only suggest trends or possible changes in courts' attitudes. Claimants in aviation cases appeared, however, to have met increased restraint in the nation's courts in 1979.

Last year's decisions indicate reluctance by the courts to extend the strict products liability doctrine into commercial disputes. A denial of punitive damage recovery in wrongful-death actions under state law was held to be constitutional in contrast to an earlier 1970's aviation decision. Also, in contrast to an earlier decision, the Warsaw Convention was held to control state law wrongful-death remedies applicable to international flights. Protection of the Warsaw System was found to be available to agents of international air carriers and to provide such carriers a defense against third party claims. Use of zoning and environmental laws to restrict airport activities was generally unsuccessful. There was an unusual willingness in the courts to enforce exclusions and coverage limitations in aviation insurance policies. Foreign plaintiffs with claims arising out of foreign accidents found their access to United States courts to be restricted under the *forum non conveniens* doctrine.

This is not to suggest that retrenchment occurred in all 1979 aviation case developments. There continued to be significant re-

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coveries in most areas of the law. There were also two significant new remedies adopted, or at least firmly recognized, in last year's decisions. The Court of Appeals for the Ninth Circuit held that there can be recovery from the government, under the Federal Tort Claims Act, for negligent inspection and certification of aircraft by the Federal Aviation Administration (FAA). Furthermore, the California Supreme Court held that persons near an airport can recover damages for personal injuries caused by aircraft noise in addition to inverse condemnation property damage recoveries.

I. LIABILITY OF AVIATION MANUFACTURERS

A. *Strict Liability—Disputes Between Commercial Parties*

Two 1979 decisions demonstrate a reluctance of courts to apply strict products liability rules to disputes between commercial parties. Both cases concluded that the strict liability doctrine was not available to a commercial user of aircraft in a claim against the manufacturer for the loss of, or damage to, the aircraft. One decision was based upon the policy considerations behind the doctrine; the other was based upon contractual disclaimers between the parties.¹

¹ Many cases have held contractual disclaimers of liability are inapplicable to the doctrine of strict liability. This has not generally been true, however, where the contract is between commercial parties in equal bargaining positions. A case frequently cited in this area is *Delta Airlines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965), which held that the following clause was sufficient to preclude recovery by Delta against Douglas under either negligence or strict liability theories for damage suffered by a DC-7 as a result of a nose wheel landing gear malfunction:

The warranty provided in this article and the obligations and liabilities of Seller thereunder are in lieu of and Buyer hereby waives all other warranties, guaranties, conditions or liabilities, express or implied, arising by law or otherwise (including without limitation any obligation of the Seller with respect to consequential damages) and whether or not occasioned by Seller's negligence and shall not be extended, altered or varied except by a written instrument signed by Seller and Buyer; provided, that in the event the provision relieving Seller from liability for its negligence should for any reason be held ineffective, the remainder of this paragraph . . . shall remain in full force and effect.

238 Cal. App. 2d at 98, 47 Cal. Rptr. at 521.

In reversing a judgment for Delta the intermediate appellate court noted:

In short, all that is herein involved is the question of which of two equal bargainers should bear the risk of economic loss if the product sold proved to be defective. Under the contract before us, Delta (or its insurance carrier if any) bears that risk in return

In *Scandinavian Airlines System v. United Aircraft Corp.*,² the Court of Appeals for the Ninth Circuit affirmed a partial summary judgment for United dismissing SAS's strict liability claim for damage to two DC-9's resulting from two separate occurrences of engine fan blade failure. There were no personal injuries in the incidents. Looking to California law, the court found no definitive California Supreme Court decision on the application of California's product liability doctrine to SAS's claim. The court, however, found that none of the policy considerations behind California's doctrine applied to claims for property damage between sophisticated commercial parties and, therefore, held that strict liability was unavailable to SAS. The court reviewed four particular policies behind California's doctrine: risk distribution through product cost, consumer difficulty in inspecting for defects, consumer difficulty in trying to prove negligence, and inducement to design and produce safer products. It found that because SAS and United were financial equals, risk distribution had no significance. Viewing SAS as the "consumer," the court found SAS had the expertise and trained personnel to inspect the engines for defects and to prove negligence in their design and manufacture. Finally, because United would still be strictly liable to airline passengers for injuries caused by defective engines, the court said there remained a significant deterrent to the manufacture of unsafe products. The Ninth Circuit concluded that California law did not provide commercial parties a strict tort liability claim for property damage to the product itself. The court observed that in this case the parties had dealt in a commercial setting from positions of relatively equal economic strength. They had also

for a purchase price acceptable to it; had the clause been removed, the risk would have fallen on Douglas (or its insurance carrier if any), but in return for an increased price deemed adequate by it to compensate for the risk assumed. We can see no reason why Delta, having determined, as a matter of business judgment, that the price fixed justified assuming the risk of loss, should now be allowed to shift the risk so assumed to Douglas, which had neither agreed to assume it nor been compensated for such assumption.

238 Cal. App. 2d at 101, 47 Cal. Rptr. at 524.

For a review of other decisions and articles in this area, see 2 S. SPEISER & C. KRAUSE, *AVIATION TORT LAW* § 19.17, at 536-44 (1979); Foley & Hulting, *Recent Developments in Aviation Law*, 45 J. AIR L. & COM. 319, 321-24 (1979).

² 601 F.2d 425 (9th Cir. 1979).

negotiated the engine specifications and the risk of loss for defects in the engines.³

A claim under a strict products liability theory for loss of an aircraft was found barred under New York law by disclaimers in a sales contract in *O'Brien v. Grumman Corp.*⁴ The disclaimers did not specifically refer to such claims. The federal court was considering various motions for summary judgment in five consolidated cases resulting from a 1974 crash of an IBM corporate jet, a Grumman Gulfstream II. In one action, IBM sought recovery for its aircraft from Grumman on theories of negligence and strict product liability. Grumman moved for summary judgment asserting the claims were barred under New York law by disclaimer provisions in its sales contract. The provisions did not specifically refer either to negligence or to strict liability. Trying to interpret the parties' intent, the court found that negligence claims were not barred, but that claims for strict liability had been excluded by a waiver of implied warranties. There was no evidence that the topic of strict product liability was considered by the parties in their negotiation. When the contract was executed, however, strict liability claims were considered to be the equivalent of claims for breach of implied warranty under New York law. The court concluded the parties had therefore intended to preclude strict liability by the contract provision waiving "all rights, claims and remedies with respect to any and all warranties, express, implied or statutory."⁵

B. *Strict Liability—Design Defects*

A comparison with a competitor's aircraft design was found to raise a sufficient issue of fact regarding defective design to reverse a summary judgment for McDonnell Douglas in *Lamon v. McDonnell Douglas Corp.*⁶ The action was brought by a stewardess who was injured when she fell through an access hatch in an aisle of a DC-10. The hatch cover had been left open by another stewardess. In resisting the motion for summary judgment, the plaintiff submitted an engineer's affidavit drawing a compari-

³ *Id.* at 429.

⁴ 475 F. Supp. 284 (S.D.N.Y. 1979).

⁵ *Id.* at 289.

⁶ — Wash. 2d —, 588 P.2d 1346 (1979).

son with a similar hatch cover in Boeing's 747 which was hinged to the floor and equipped with a spring device to automatically close the cover. The Washington Supreme Court held that the comparison between the aircraft raised an issue of fact as to whether a more reasonably safe alternative was available and, thus, whether there was a design defect under Washington's product liability law.

In *McCullough v. Beech Aircraft Corp.*,⁷ the Fifth Circuit held that a strict liability design defect issue was presented for the Beech Musketeer fuel system when the plaintiff's experts testified it was illogically designed and had caused pilot uncertainty in an accident. Circumstantial evidence indicated the pilot's crash and death had resulted when the aircraft's right fuel tank ran out of gas. The fuel selector valve was found positioned on the empty right tank, although the left tank was found to be full of fuel. The court reversed a judgment for Beech, finding that the trial court had improperly directed the verdict on the design issue by telling the jury, "I don't think there was any fault in the design of this plane."⁸

C. Causation

An intermediate appellate decision from Wisconsin is interesting because it found the pilot's knowledge of an aircraft defect shortly before an accident was sufficient to break a negligence chain of causation but not sufficient to break the chain of causation for a strict product liability claim. In the case of *Goodwin v. Cessna Aircraft Co.*,⁹ three passengers sought to recover damages for serious burns received when a rented Cessna 172 stalled and crashed during a short field takeoff after the pilot's seat had suddenly slipped backward. The lessor of the aircraft was found to have had notice of the problem the day before the accident because one of its employees had experienced a similar backward movement of the seat. No subsequent inspection of the seat was made by the lessor. The pilot involved in the accident had experienced a slippage in the seat during an earlier takeoff on

⁷ 587 F.2d 754 (5th Cir. 1979).

⁸ *Id.* at 760.

⁹ 15 Av. Cas. 17,602 (Wis. Ct. App. 1979).

the day he leased the aircraft. The plaintiffs' claim against Cessna asserted that defective design and manufacture of the seat led the pilot to believe that the seat was secure when it was not. The jury found that Cessna was thirty-five percent responsible, and the pilot was sixty-five percent responsible, for the accident. On interrogatories the jury also found that the lessor had been negligent but that his negligence had not been a cause of the accident.

Cessna appealed, claiming the verdicts were inconsistent. The court of appeals affirmed, but its resolution of the inconsistency in the jury's findings is not entirely satisfactory. It found that the pilot's decision to continue with the flight after receiving notice of the seat defect was a sufficient intervening cause to break the chain of negligence causation flowing from the lessor's conduct the day before the accident. Cessna asserted it should be entitled to the same result. In rejecting Cessna's assertion, the court said only that the jury could have inferred that the alleged manufacturing defect might not have been discovered even if the lessor had inspected the seat.¹⁰

Cessna received another adverse causation decision in Wisconsin when a directed verdict was affirmed against Cessna on a claim for hard landing damage to an aircraft owned by F. Lee Bailey. In *Bailey v. Aerodyne, Inc.*,¹¹ the jury found that Cessna had negligently indicated in its service manual that a "quick-drain" valve could be installed in the engine oil sump of a Cessna 210, but that such negligence had not been a cause of the accident. In affirming a directed verdict against Cessna on causation, the court found that a midflight opening of a recently installed "quick-drain" valve was the only credible explanation for the accident.

II. FIXED BASE OPERATOR (FBO) LIABILITY

The many services performed by FBO's can include repairing, servicing, refueling, storing, selling and leasing of aircraft, providing flight instruction and performing some airport functions. Many of these services do not create strict liability exposure. Strict liability, however, was applied with harsh results to an FBO/lessor in a 1979 New Mexico Supreme Court decision.

¹⁰ *Id.* at 17,603.

¹¹ 15 Av. Cas. 17,661 (Wis. Ct. App. 1979).

The failure of a physician pilot to give a preflight check to a rental aircraft and his taking off without engine oil were held to be no defense to wrongful death claims against the lessor who supplied the aircraft without oil. In *Rudisaile v. Hawk Aviation, Inc.*,¹² the New Mexico Supreme Court found that an aircraft leased without oil in its engine was "defective" within the meaning of section 402A of the Restatement (Second) of Torts. In so doing, it reversed an intermediate appellate court ruling that the airplane was not "defective" because "the airplane rented to the decedent had no hidden or latent defects which could not be discovered by the exercise of reasonable care."¹³ The supreme court referred to comments g and i to section 402A and ruled that "to prove liability under § 402A the plaintiff need only show that the product was dangerous beyond the expectations of the ordinary consumer."¹⁴ An aircraft leased without engine oil, the court stated, was such a product. The failure of the pilot to preflight the aircraft was said to be only conventional contributory negligence and no defense to strict liability.¹⁵

Negligence in performing fire protection services was the basis of FBO liability for the fire loss of an aircraft in *Walsh v. Pagra Air Taxi, Inc.*¹⁶ The FBO was held to have shared the duty of a municipality to provide airport fire protection by agreeing in its lease to provide employees trained to use the city's airport fire fighting equipment. The aircraft fire was ignited by its owner's multiple attempts to restart his aircraft after he had landed with a known fuel leak. The FBO's employees on the scene ran to get the city's fire truck but were unable to open the garage door. When the fire was finally extinguished the aircraft had been reduced to salvage. The Minnesota Supreme Court affirmed a proportionate

¹² — N.M. —, 592 P.2d 175 (1979).

¹³ 592 P.2d at 176-77.

¹⁴ 592 P.2d at 177.

¹⁵ See also *Kroon v. Beech Aircraft Corp.*, 465 F. Supp. 1223 (M.D. Fla. 1979), in which a pilot's failure to preflight a Beech 99 and remove the gust lock, a checklist item, was held to be the sole cause of the subsequent crash on takeoff, regardless of allegations of negligent design and failure to warn on the part of the manufacturer. The court noted: "Here the manufacturer had the right to expect the pilot would not attempt to take off with the gust lock still in place any more than a manufacturer would expect experienced pilots to take off with one gallon of gas, although they do now and then." 465 F. Supp. at 1225.

¹⁶ — Minn. —, 282 N.W.2d 567 (1979).

allocation of fault to the FBO, rejecting the argument that the FBO had no legal duty to the visiting pilot. It found that the city, by voluntarily undertaking to provide fire protection services to airport users, had the obligation to use reasonable care in performing the undertaking. The court concluded that the FBO, through its lease agreement, shared in that duty.

FBO liability for aircraft storage often turns on questions of bailment in which the degree of control over the aircraft is the central inquiry. The South Dakota Supreme Court affirmed a directed verdict upon such grounds for an FBO-airport operator in an action by an airplane owner whose craft was damaged in a windstorm while tied down at the FBO's facilities. In *Nelson v. Schroeder Aerosports, Inc.*,¹⁷ the court rejected the plaintiff's bailment theory because the plaintiff had retained the keys to the aircraft and, therefore, the "plaintiff did not relinquish exclusive possession, control and dominion over the aircraft" required to create a bailment. The agreement to provide tie-down space was found to be only a lease.¹⁸

III. OWNER/OPERATOR LIABILITY

Owner/operator responsibility for the conduct of pilots who fly their aircraft was the subject of four decisions reported in 1979. The standard of care to be applied to claims of pilot negligence must be a minimum objective standard generally applicable to all pilots and not a subjective standard reflecting a particular pilot's limited training and experience. Such was the holding of the North Carolina Court of Appeals in *Heath v. Swift Wings, Inc.*,¹⁹ which reversed a defense judgment in a wrongful death action where a jury had found no negligence on the part of a corporate pilot in a takeoff crash.

The question of whether a ferrying pilot was serving as the agent of an aircraft's owner, or was acting as bailee of the aircraft, was raised in a property damage case considered by the New Hampshire Supreme Court. Because the owner had retained control

¹⁷ ___ S.D. ___, 280 N.W.2d 107 (1979).

¹⁸ 280 N.W.2d at 110.

¹⁹ 40 N.C. App. 158, 252 S.E.2d 526, *appeal dismissed*, 297 N.C. 453, 256 S.E.2d 806 (1979).

over the aircraft's destination and had instructed the pilot what to do with the aircraft after the flight, a master-servant relationship was found to exist. Owner liability for property damage caused by the ferrying pilot's crash was affirmed in *Elwood v. Bolte*.²⁰

"Operator of Aircraft Deemed Agent of Owner" is the title of a financial responsibility statute in Minnesota.²¹ This statute was applied extraterritorially by the Minnesota Supreme Court to hold an owner responsible for pilot negligence in a crash in Denver, Colorado, in *Ewers v. Thunderbird Aviation, Inc.*²² The court noted that the statute expressly creates an agency relationship between owners and pilots for aircraft "operated within the airspace above this state or upon the ground surfaces or waters of this state."²³ The court held there was such operation if the aircraft actually operated in Minnesota during some point of its flight.²⁴

Standards applicable to claims of negligence by crop dusting pilots were considered by the Mississippi Supreme Court in affirming a verdict for a pilot and his employer whose aircraft struck and killed a flagman assisting in such operations. In *Cannon v. Jones*,²⁵ the court found that the crop duster did not owe the flagman the same duty that it would owe a "member of the general public," and that the pilot who was flying through a difficult "wire patch" at the time had kept the best "lookout" possible.²⁶

IV. DOMESTIC TRANSPORTATION—AIRLINE LIABILITY

A punitive damage claim was stricken from a wrongful death action, under New York law, in *Hempel v. American Airlines*.²⁷ Such damages are not recoverable under New York's wrongful death statute, and the court rejected the plaintiff's constitutional argument that to allow punitive damages for injury claims, but

²⁰ ___ N.H. ___, 403 A.2d 869 (1979).

²¹ MINN. STAT. ANN. § 360.0216 (West Supp. 1980).

²² 15 Av. Cas. 17,746 (Minn. 1979).

²³ *Id.* at 17,747.

²⁴ *Id.* at 17,748-49. The court stated, however, that the statute would not impose liability unless Minnesota also had strong contacts with the cause of action, as is required by applicable conflict of laws principles. *Id.* at 17,751 n.5.

²⁵ 377 So. 2d 1055 (Miss. 1979).

²⁶ *Id.* at 1058-59.

²⁷ ___ A.D.2d ___, 423 N.Y.S.2d 778 (1979).

not for death claims, denied equal protection of the law. An earlier district court decision from California, *In re Paris Air Crash*,²⁸ accepted such an argument. The *Hempel* court found that case unpersuasive, stating that the argument overlooked the fact that death claims and injury claims involved two distinct and different classes of persons.²⁹ The court also noted that without legislation the common law provided no remedy whatsoever for wrongful death.

Tariffs filed with and accepted by the Civil Aeronautics Board constitute the contract of carriage between airlines and their passengers or shippers. As such, tariffs frequently serve to limit carrier liability. A tariff provision filed by TWA stating that it was not responsible for transportation on connecting flights, even though arranged by TWA as agent for the connecting carrier, was enforced in *Leikind v. Trans World Airlines, Inc.*³⁰ Summary judgment was granted to TWA, dismissing a claim for personal injuries alleged to have been incurred on a Hughes Airwest flight for which TWA had sold the ticket. In *Greenberg v. United Airlines, Inc.*,³¹ however, the court drew an analogy from Warsaw Convention cases to find that a domestic tariff limitation of liability for lost luggage was not enforceable as it had not been effectively communicated on the passenger's ticket.

Another 1979 domestic flight decision recognized that a violation of a Federal Aviation Regulation (FAR) can create a private civil cause of action. In *Manfredonia v. American Airlines*,³² the court applied the test set forth by the United States Supreme Court in *Cort v. Ash*³³ for determining when a statutory or regulatory violation creates a private cause of action. It found that the FAR prohibition against serving alcoholic beverages to an intoxicated person on an aircraft³⁴ provided an independent basis for the plaintiff's suit, which alleged an assault by an intoxicated fellow passenger. The plaintiff had based her action upon an alleged

²⁸ 427 F. Supp. 701 (C.D. Cal. 1977).

²⁹ 423 N.Y.S.2d at 780.

³⁰ 15 Av. Cas. 17,636 (N.Y. Sup. Ct. 1979).

³¹ 98 Misc. 2d 544, 414 N.Y.S.2d 240 (N.Y. Civ. Ct. 1979).

³² 68 A.D.2d 131, 416 N.Y.S.2d 286 (1979).

³³ 422 U.S. 66, 78 (1975).

³⁴ 14 C.F.R. § 121.575 (1979).

violation of New York's "dram shop act." The court, however, found that the state act should not be given extraterritorial effect for an interstate flight and also that this aspect of carrier regulation was federally preempted.

The *res ipsa loquitur* doctrine has been applied to a wide variety of aviation accidents. In a recent "hard landing" injury case, *Roberts v. Braniff International Airlines*,³⁵ a defense judgment entered upon a jury verdict was reversed because of the trial court's failure to give the jury a *res ipsa* instruction regarding the hard landing.

V. INTERNATIONAL TRANSPORTATION—WARSAW SYSTEM

In 1979 several significant decisions considered the effects of the Warsaw Convention of 1929³⁶ upon claims arising out of international air transportation. Although the treaty continues to be criticized, the cases demonstrate that most courts will prevent efforts to circumvent the Convention's overall purpose of providing uniform remedies for international flight claims. There is, however, a continuing insistence that the Convention's procedural intricacies be fully complied with to obtain its benefits.

A. Scope of the Warsaw System's Application

A recent New York decision reaffirmed that wrongful death claims brought by heirs of passengers killed on international flights are subject to the Warsaw Convention and its liability limitations

³⁵ 15 Av. Cas. 17,732 (Cal. Ct. App. 1979).

³⁶ The complete name of the Warsaw Convention of 1929 is the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," October 12, 1929 [hereinafter cited as Warsaw Convention of 1929]. The U.S. English translation appears at 49 Stat. 3,000 (1934), with Additional Protocol at 49 Stat. 3,025 (1934). The U.S. adhered to the Convention in 1934. Its participation in the treaty has been the subject of continued controversy and criticism particularly regarding the low limitations on liability. In the mid-1960's this criticism, combined with a threat of denunciation of the Convention by the United States, led to the "Montreal Agreement," which is essentially a contractual agreement among international air carriers to waive certain Convention liability defenses and to increase the liability limitation to \$75,000 for passenger claims arising out of international flights involving the United States. The Montreal Agreement and the original Warsaw Convention are reprinted at 49 U.S.C. § 1502 (1976). The defense of a passenger's contributory or comparative negligence under Article 21 was not affected by the Montreal Agreement and is allowed in accordance with the law of the court hearing the case. A uniform comparative negligence rule was proposed in the Guatemala Protocol of 1971 to the Convention; however the Protocol remains unratified. Cf. *Bradfield v. Transworld Airlines, Inc.*, 88 Cal. App. 3d 681, 152 Cal. Rptr. 172 (1979).

as modified by the Montreal Agreement. In *Lowe v. Trans World Airlines, Inc.*,³⁷ a New York court rejected the 1978 decision by a California district court, *In re Air Crash in Bali, Indonesia*,³⁸ which had found that a state wrongful death statute could provide heirs with an independent cause of action unrestricted by the Warsaw Convention. The California federal court had said that the heirs were not parties to the contract of carriage and, therefore, not bound by the Convention. Citing this case, the plaintiffs in *Lowe* brought a motion to strike the carrier's affirmative defense which claimed that the Warsaw Convention limited the carrier's liability to \$75,000. This motion was denied and the court held that the limitation properly applied to wrongful death claims. The *Lowe* court said simply that one of the primary objectives of the Convention, signed by over 100 nations, was to limit the liability of air carriers in such accidents.³⁹

In another New York decision, agents of an international air carrier, performing functions the carrier could or would otherwise perform itself, were found to be entitled to the Convention's liability limitations. The court in *Julius Young Jewelry Manufacturing Co. v. Delta Airlines*⁴⁰ said the question of agency in this context was one of first impression for a state appellate court. It found that the Convention's purposes would be circumvented if such an agent could not assert a defense based upon the Warsaw Convention: "To allow an agent such as Allied, which is performing services in furtherance of the contract of carriage, and in place of the carriers themselves, to be liable without limit would circumvent the Convention's purposes of providing uniform worldwide liability rules and definite limits to the carriers' obligations."⁴¹

³⁷ 15 Av. Cas. 17,810 (N.Y. Sup. Ct. 1979).

³⁸ 462 F. Supp. 1114 (C.D. Cal. 1978), *appeal docketed*, No. 79-3307 (9th Cir. June 11, 1979).

³⁹ 15 Av. Cas. at 17,811.

⁴⁰ 67 A.D.2d 148, 414 N.Y.S.2d 528 (1979).

⁴¹ 414 N.Y.S.2d at 530. The Convention limits the liability of "carriers" in Article 22 without defining the term. Warsaw Convention of 1929, *supra* note 36. The Second Circuit held that the Convention's coverage of "carrier" included its employees in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). The "Hague Protocol of 1955" to the Convention specifically included servants and agents of carriers under the Convention's liability limitations; the U.S. however, has not adhered to the Protocol. *See* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12.02 (1978).

Cross-claims by a codefendant against an international air carrier could also circumvent the Convention if not held subject to its restrictions. This fact was recognized in *Swiss Bank Corp. v. First National City Bank*⁴² by the Federal District Court for the Southern District of New York, which granted summary judgment for Swiss Air Transport Co. (Swiss Air) and dismissed a cross-complaint filed by the First National City Bank (FNCB) as the consignee of a \$637,000 gold shipment which had been delivered to its purchaser without receipt of payment. The action was brought by the shipper, Swiss Bank, against the carrier, Swiss Air, and against the consignee of the shipment, FNCB, which had been instructed to deliver the gold to its purchaser only against payment. Apparently the gold was indirectly turned over to the purchaser upon its arrival in New York, through a series of brokers, without payment being received. The purchaser went out of business shortly thereafter. FNCB's cross-complaint sought indemnification or contribution from Swiss Air for alleged negligent misdelivery. Swiss Air settled with the Swiss Bank for the amount of its maximum liability under Article 22(2) of the Warsaw Convention, which for the 142 kilogram shipment of gold was \$2,840 plus interest. In dismissing FNCB's cross-complaint the court recognized that New York favored contribution among joint tortfeasors over limitations of liability. It found, however, that the limitations of liability in the Warsaw Convention were controlling.⁴³ Swiss Air's payment in settlement was held to preclude the further claim against the carrier by FNCB:

Having already satisfied its total liability with respect to this cargo by payment to Swiss Bank, Swiss Air cannot be required to make further payments to anyone with respect to the same lost cargo. If more than one party incurs a loss as a result of negligent handling of cargo, the Warsaw Convention leaves it to those parties to apportion the loss in whatever manner applicable law allows; it does not provide for multiple recoveries against the air carrier.⁴⁴

The effect of the Warsaw Convention upon an international flight passenger's "bumping" claim was considered in another 1979

⁴² 15 Av. Cas. 17,631 (S.D.N.Y. 1979).

⁴³ *Id.* at 17,633.

⁴⁴ *Id.*

decision from the Federal District Court for the Southern District of New York. Here the Convention was not found to be so encompassing. In *Mahaney v. Air France*,⁴⁵ the plaintiff alleged she had been wrongfully bumped from an overbooked flight in violation of section 404(b) of the Federal Aviation Act.⁴⁶ She sought \$50 in compensatory damages and \$250,000 in punitive damages. The suit was filed over three years after the incident, and the defendant moved to dismiss by asserting that the claim was barred by the Warsaw Convention's two-year period of limitations in Article 29(1). The defendant also asserted that Articles 19 and 24(1) made the Convention's remedy for damage "occasioned by delay" the exclusive remedy for the plaintiff's "bumping" claim. The court disagreed. It held that only the plaintiff's claim for expenses incurred as a result of the delay caused by the "bumping" was barred by the Convention's time limitation. The court found that section 404(b) of the Federal Aviation Act created an independent private cause of action for wrongful "bumping" for which nominal damages could be awarded along with punitive damages if the conduct of the carrier was proven to be "wanton, oppressive or malicious." The court found that such claims were independent of, and not "occasioned by," the delay and, therefore, were not subject to the Convention's statute of limitations.⁴⁷

B. *Application of the Warsaw System's Liability Limitations*

The Supreme Court of Canada has taken exception to the "American view" regarding the degree of notification within international passenger tickets that is required to obtain limited liability under the Convention for injury and wrongful death claims. In *Ludecke v. Canadian Pacific Airlines Ltd.*,⁴⁸ the court considered death and baggage claims arising out of a March 4, 1966 crash in Tokyo. Articles 3(1) and 4(2) of the Convention require passenger tickets and baggage tickets to contain a statement that the carriage is subject to rules relating to liability established by the Convention. According to the Supreme Court of Canada, United States courts, contrary to most other juris-

⁴⁵ 474 F. Supp. 532 (S.D.N.Y. 1979).

⁴⁶ 49 U.S.C. § 1374(b) (1976).

⁴⁷ 474 F. Supp. at 534-35.

⁴⁸ 15 Av. Cas. 17,687 (Can. 1979).

dictions, have required that the liability statement in passenger tickets required by Article 3 be legible and that the tickets be delivered with sufficient time for examination by the passenger in order for the ticket to be considered sufficiently "delivered" to allow the carrier to limit its liability for injury and death claims.⁴⁹ The court stated that this "American view" ignores the plain language of the Convention:

The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.⁵⁰

Referring to this language, the Supreme Court of Canada held that delivery of a passenger ticket was itself sufficient for a carrier to limit its liability for a death claim whether or not the Convention liability statement was legible or was included on the ticket.⁵¹

The similar Convention provision dealing with irregularities in baggage tickets, Article 4(4), specifically requires that certain information be contained on the ticket for the carrier to limit its liability.⁵² Under this language the Convention's statement of

⁴⁹ *Id.* at 17,689-90. A U.S. case frequently cited for this rule is *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968). A 1979 New York decision notes that the "*Lisi* line of cases" is restricted, however, to notice of Warsaw's monetary limitations, and that other Convention provisions do not have to be so communicated to the passenger. In *Abdul-Haq v. Pakistan International Airlines*, 101 Misc. 2d 213, 420 N.Y.S.2d 848 (Sup. Ct. 1979), the court held that notice did not have to be given to a passenger or shipper of the short time limit in which he must give the carrier written notice of damage to baggage or goods. Article 26(2) requires that written notice of damage be given to the carrier within three days of receipt of baggage or seven days of receipt of goods. The plaintiff Abdul-Haq argued that she had not been advised of this short notice requirement. The court responded that, although it is harsh, the argument was to no avail under the Convention. The claim for damage to shipped goods was dismissed for failure to give timely written notice to the carrier.

⁵⁰ Article 3(2), Warsaw Convention of 1929, *supra* note 36.

⁵¹ 15 Av. Cas. at 17,689-90.

⁵² Article 4 of the Convention reads as follows:

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one

liability is expressly required. The Canadian Supreme Court found that in this case the required information had been sufficiently set forth to apply the Warsaw baggage liability limitation.

Limitation of carrier liability for baggage claims was the source of many of the 1979 reported United States decisions dealing with the Warsaw Convention. One of the "particulars" required to be set forth on a baggage check or ticket is the weight of the luggage.⁵³ Failure to state the weight precluded a carrier from asserting the Convention's Article 22(2) limitation of liability for lost luggage in *Maghsoudi v. Pan American World Airways, Inc.*⁵⁴ The court reasoned that a statement of weight was required by the Convention and was necessary for the passenger to be able to determine if additional liability coverage for his baggage, beyond the Warsaw amount, was needed.

The distinction between "checked" and "unchecked" baggage, for which different requirements and limitations apply,⁵⁵ was held to turn upon the degree of control exercised by the carrier over the baggage in *Schedlmayer v. Trans International Airlines*.⁵⁶ In this case the plaintiff successfully recovered \$1,000 for cash which disappeared from her handbag after she had turned it over to a stewardess during a flight. No baggage or claim check was given

part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue; (b) The place of departure and of destination; (c) The name and address of the carrier or carriers; (d) The number of the passenger ticket; (e) A statement that delivery of the baggage will be made to the bearer of the baggage check; (f) The number and weight of the packages; (g) The amount of the value in accordance with article 22(2); (h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence of the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Warsaw Convention of 1929, *supra* note 36.

⁵³ *Id.* art. 4, §§ (3)(f), 4.

⁵⁴ 470 F. Supp. 1275 (D. Hawaii 1979).

⁵⁵ Arts. 4, 22, Warsaw Convention of 1929, *supra* note 36.

⁵⁶ 99 Misc. 2d 478, 416 N.Y.S.2d 461 (Civ. Ct. 1979).

to the passenger and, later in the flight when she asked for her bag, she was told that it could not be retrieved until her baggage was claimed at the destination airport. The money was gone when the bag was returned. The court found that when the stewardess took the bag and the passenger could not retrieve it, the carrier had assumed sufficient control over the handbag for it to become "checked" baggage. As such, it was necessary for the carrier to give a baggage ticket or claim check meeting the requirements of Article 4 in order for the carrier to limit its liability.

A carrier's control over baggage was also the key to determining when "transportation by air" under Article 18 of the Convention terminated, making the baggage no longer subject to the Convention. In *Berman v. Trans World Airlines*,⁵⁷ the court found that once baggage had been released to a passenger to take through customs, the carrier had parted with all control over it and, thus, the "transportation by air" of the baggage was completed. Consequently, when the carrier's agents later put the plaintiff's bags on a conveyor to take them from the customs area to the airport street level, their voluntary assistance was deemed to be a bailment. The carrier was held responsible for a bag lost from the conveyor and the Convention's limitation of liability was held to be inapplicable.

Attempts to avoid baggage liability limitations through claims of willful misconduct by the carrier were unsuccessful in the 1979 decisions. Article 25 of the Convention precludes limitation where damage is caused by the carrier's willful misconduct or by that of an agent of the carrier acting within the scope of his employment. In *Rymanowski v. Pan American World Airways, Inc.*,⁵⁸ a claim that baggage disappeared because of collusion between an airline agent and Caracas customs officers was held insufficient to constitute willful misconduct because the agent would not be "acting within the scope of his employment" if he engaged in such conduct.⁵⁹ In *Olshin v. El Al Israel Airlines*,⁶⁰ an alleged failure to warn a passenger of the danger of theft to her jewelry in a par-

⁵⁷ 101 Misc. 2d 511, ___ N.Y.S.2d ___ (Civ. Ct. 1979).

⁵⁸ 70 A.D.2d 738, 416 N.Y.S.2d 1018 (1979).

⁵⁹ 416 N.Y.S.2d at 1019.

⁶⁰ 15 Av. Cas. 17,463 (E.D.N.Y. 1979).

ticular airport was found insufficient to show willful misconduct. The plaintiff could not prove that the carrier was aware the jewelry was in her luggage or had intentionally not warned her of the alleged danger. Similar allegations were also found inadequate in another missing baggage case, *Petryakov v. Pan American World Airways, Inc.*,⁶¹ in which the court quoted the following regarding willful misconduct:

[I]n order that an act may be characterized as willful there must be on the part of the person or persons sought to be charged, a conscious intent to do or to omit doing the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. The burden of establishing willful misconduct rests upon plaintiff. . . . It is essential to remember that "the misconduct, not the conduct, must be willful."⁶²

Finally, the Tenth Circuit in *Stone v. Mexicana Airlines, Inc.*,⁶³ held that an allegation of "wanton and willful misconduct" did not avoid the Convention's two-year period of limitations on bringing an action for injuries alleged to have occurred in a Mazatlan crash. The policy of uniformity was deemed controlling regardless of the type of conduct giving rise to the cause of action.

VI. FEDERAL TORT CLAIMS ACT—UNITED STATES GOVERNMENT LIABILITY

Most of the past year's decisions which considered the liability of the federal government under the Federal Tort Claims Act (FTCA)⁶⁴ in aviation matters dealt with the responsibilities of air traffic controllers. One of the more significant case developments, however, occurred in another area—government liability for FAA aircraft inspection and certification.

A. *FAA Inspection and Certification of Aircraft*

The Court of Appeals for the Ninth Circuit, in what may be-

⁶¹ 15 Av. Cas. 17,777 (N.Y. Civ. Ct. 1979).

⁶² *Id.* at 17,779.

⁶³ 610 F.2d 699 (10th Cir. 1979).

⁶⁴ 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2401-2402, 2411-2412, 2671-2680 (1976).

come a leading case in this area, outlined what was necessary to establish a cause of action against the government under the FTCA for negligent inspection and certification of aircraft. In *United Scottish Insurance Co. v. United States*,⁶⁵ the court found that government liability could exist for such claims if allowed under a "good samaritan test" of the state law to be applied under the FTCA:

The crucial inquiry is whether, in undertaking the inspection, a duty arose under state law because of the relationship thereby created—the good samaritan rule.

In *Indian Towing Co. v. United States*, *supra*, 350 U.S. 61, the Supreme Court suggested the proper basis for liability in tort for these kinds of governmental activities. In that case, the Court ruled that the government could be held liable for its negligent operation of a lighthouse pursuant to the so-called "good samaritan" doctrine. As the Court stated, "one who undertakes to warn the public of danger *and thereby induces reliance* must perform his "good Samaritan" task in a careful manner. (emphasis by the court).⁶⁶

The three-judge panel in *United Scottish* considered an appeal by the United States from an adverse district court judgment. The district court had found that the FAA had negligently inspected a DeHavilland Dove in issuing a Supplemental Type Certificate after a gasoline-fueled heater was installed in the aircraft. The negligent inspection was held to be a proximate cause of an in-flight fire which led to the crash of the aircraft and to the death of its four occupants. The government was held liable to all plaintiffs, which included heirs of some of the decedents, the owner of the air taxi service, the operator of the aircraft and the insurance companies which provided liability coverage for the air taxi service. On appeal the government asserted that it should have no FTCA liability for FAA inspections and certifications. It claimed that the Act's waiver of sovereign immunity was limited to circumstances where a private person could be held liable pursuant to state law and that there was no analogous "private person" liability for governmental safety inspections and approvals.⁶⁷

⁶⁵ 15 Av. Cas. 17,846 (9th Cir. 1979).

⁶⁶ *Id.* at 17,850.

⁶⁷ *Id.* at 17,847; 28 U.S.C. § 1346(b) (1976).

The appellant also argued that violations by the government of its own FAA regulations could not serve as a basis for FTCA liability for the performance of governmental functions.

The court in *United Scottish* disagreed with the government's basic argument, finding that the United States can be held liable under the FTCA for negligent aircraft inspection and certification, citing with approval its earlier comments in *Arney v. United States*.⁶⁸ The court went on to "spell out the circumstances, pursuant to the Act, in which such liability could actually arise."⁶⁹ In so doing, it agreed in part with the government by holding that a statutory or regulatory violation by the FAA would not in itself automatically create a cause of action in this area. The court distinguished governmental "good samaritan" activities which were carried out pursuant to federal statutes or regulations where no governmental duty existed in the absence of such statutes or regulations. For such activities it held that a court must first make "the crucial inquiry" of whether applicable state law would provide "good samaritan" liability where such activities were improperly performed.⁷⁰ The court reviewed various "good samaritan" doctrines, including those set forth in Restatement (Second) of Torts sections 323 and 324, and found that a "reliance element" of the injured parties upon the "good samaritan" activity was an integral part of most doctrines.⁷¹ The court recognized that many of the air traffic controller cases did not go through a "good samaritan" analysis and based governmental liability directly upon violations of FAA regulations or manual procedures. Such cases were not considered to be inconsistent because the court felt that the inherent and ongoing reliance of pilots upon controllers satis-

⁶⁸ 479 F.2d 653 (9th Cir. 1973). The Ninth Circuit had said in *Arney* that "government may be liable for negligence in improper issuance of a type airworthiness certificate." *Id.* at 658. The court in *United Scottish* rejected the contention that this was only dicta in its *Arney* decision. 15 Av. Cas. at 17,848.

⁶⁹ 15 Av. Cas. at 17,848.

⁷⁰ *Id.* at 17,850. The court says that a state's negligence per se doctrine cannot be applied automatically without first making the determination that state law provides a good samaritan remedy. *Id.* at 17,849-50. It suggests that the appropriate role of a federal regulatory violation is to provide evidence of unreasonable conduct under the applicable good samaritan rule. *Id.* at 17,854 n.9.

⁷¹ *Id.* at 17,851-52.

fied the "good samaritan" test.⁷²

In this case, because the district court had made no determination of the state law issues regarding "good samaritan" duties, the court reversed and remanded the case for further consideration. It suggested that the district court judge determine which state's substantive law applied, what form, if any, of the "good samaritan" rule was adopted by that state, and whether the appellees' case satisfied the rule.⁷³

B. *Air Traffic Controller (ATC) Responsibility*

Two recent decisions have considered the responsibility of controllers in emergency situations and have held the government liable for inadequate responses by the controllers. In *Swoboda v. United States*,⁷⁴ the government was held fifty percent responsible for the death of a pilot lost during a transpacific flight. Early in the flight the pilot had reported that he was unable to transmit on his VHF channels; Anchorage Center, which was controlling the flight, was aware of the difficulty. The Center later received a report from another aircraft of intermittent signals from the Emergency Locator Transmitter (ELT) in the decedent's aircraft. No action was taken. Three hours after a position report was overdue, Anchorage issued an "uncertainty phase." This phase, however, was later canceled when another report of the ELT signal was assumed to be a position, rather than a distress, transmission. One hour later, the "uncertainty phase" was reissued and one and one-half hours thereafter the Center issued an alert to Search and Rescue. Wrong coordinates were initially given to Search and Rescue, resulting in several hours of search activity in the wrong

⁷² *Id.*

⁷³ *Id.* at 17,853. In another 1979 decision, the Sixth Circuit affirmed the dismissal of an action against the government which asserted that the FAA had negligently issued a license to an air carrier without having required it to show that it carried insurance for its passengers. In *Hoffman v. United States*, 600 F.2d 590 (6th Cir. 1979), the court found that the crash involved had been solely caused by the gross negligence of the pilot in failing to check his gasoline supply and in overloading the plane prior to takeoff. The plaintiffs' injuries were in no way caused by the failure to require proof of insurance. The court went on to say that if it was to address other issues under the FTCA it would be "forced to find" that the plaintiffs' claim was also barred by the Act's exemptions from liability for discretionary functions and misrepresentation, under 28 U.S.C. § 2680(a) and (h) (1976), respectively. 600 F.2d at 591.

⁷⁴ 22 AM. TRIAL LAW. A. L. REP. 326 (S.D. Fla. 1979).

area. Nothing was ever found. The court held that the Center's failure to follow search and rescue procedures mandated by FAA regulations was a proximate cause of the death.

In a lengthy decision, *Himmeler v. United States*,⁷⁵ a district court reviewed the obligations of a controller concerning a Visual Flight Rules (VFR) pilot lost in Instrument Flight Rules (IFR) weather. Many other ATC cases are reviewed in that opinion. The government was held liable for deaths and injuries of members of a family in a home struck by the pilot's aircraft after he apparently had become disoriented in the IFR conditions. In its long narration of the incident, the court found what it considered to be multiple errors and omissions by the controller who had found himself alone in a tower late at night trying to save this pilot. The controller had failed to stay in frequent communication with the pilot. He had not adequately drawn the VFR pilot's attention to his instruments. He asked the pilot to look outside his aircraft for airport lights when seeing ground level was impossible under the conditions and looking outside would only contribute to the pilot's disorientation. The controller failed to correct a misunderstood transmission and improperly asked the pilot to make excessive turns. The controller also failed to vector the pilot toward an alternative airport with VFR conditions. The court found that many of these failures were violations of the rules within the Air Traffic Controller Manual, and that the controller basically had failed to take command of the situation.

Other 1979 ATC decisions were concerned more with the obligations of pilots in bad weather. In two cases the government obtained defense judgments because pilots failed to respond to warnings. In *Brock v. United States*,⁷⁶ the Court of Appeals for the Fourth Circuit affirmed a judgment dismissing wrongful death claims for a pilot and copilot killed when their TWA aircraft hit a ridge line during an IFR approach to Dulles International Airport. The court found that the claims were barred by the crew's negligence in failing to respond properly to warnings from the aircraft altitude-alert horn and its radio altimeter warning, both of which sounded as the aircraft was approaching the ridge line.

⁷⁵ 474 F. Supp. 914 (E.D. Pa. 1979).

⁷⁶ 596 F.2d 93 (4th Cir. 1979).

Crew negligence also existed because the crash occurred at an elevation of 1,669 feet, when the crew knew they were not supposed to be flying below 1,800 feet. The court also held that it was the crew, not the FAA controller, who had the last clear chance to avoid the crash. In *Associated Aviation Underwriters v. United States*,⁷⁷ FTCA claims resulting from six deaths were dismissed by summary judgment where a pilot crashed while attempting to fly around a weather line of thunderstorms in Texas. The court found that the pilot had been adequately advised of deteriorating weather conditions by various controllers involved with his flight and had also ignored specific advice from a controller that he not proceed with his flight.⁷⁸

In another bad weather case, *INA Aviation Corp. v. United States*,⁷⁹ a court exonerated a controller who had given the latest hourly weather report to an IFR pilot running low on fuel and looking for a place to land. The pilot did not request any further weather observations and had not declared an emergency.

In two recent decisions from the Court of Appeals for the Ninth Circuit, the degree of ATCs' comparative fault for mid-air collision accidents was reviewed. In *Mattschei v. United States*,⁸⁰ the plaintiff's decedent had attempted to land on a wrong runway, unaware that another aircraft was above and behind him. The controller's warning and instruction to go around came too late. Applying California's comparative negligence rules, the trial court found that the decedent was seventy percent responsible for the crash, allocating fifty percent to his runway error and twenty percent to his failure to see and avoid other aircraft under Visual Flight Rules. The trial court had not allowed the parties to bring the other pilot into the case. It found, therefore, that the government, as a joint tortfeasor, was fully liable for the thirty percent

⁷⁷ 462 F. Supp. 674 (N.D. Tex. 1979).

⁷⁸ *Id.* at 682. See also *McKinney v. Air Venture Corp.*, 578 S.W.2d 849 (Tex. Civ. App.—Ft. Worth 1979, writ ref'd n.r.e.), reversing a defense judgment for the owner of this aircraft against a wrongful death claim for one of the passengers. The jury had found the pilot not negligent, apparently accepting the defense blaming the accident on the air traffic controllers. The appellate court, however, found the jury's determinations to be against the overwhelming preponderance of the evidence.

⁷⁹ 468 F. Supp. 695 (E.D.N.Y. 1979).

⁸⁰ 600 F.2d 205 (9th Cir. 1979).

balance of the plaintiffs' damages. The Ninth Circuit affirmed the finding of thirty percent liability but remanded the case to allow the government to implead the other pilot to determine how the thirty percent should be equitably shared between the other pilot and the government. In the other Ninth Circuit mid-air collision case, *Rudelson v. United States*,⁸¹ the court rejected the government's argument that controllers do not have legal duties beyond those spelled out in the FAA operations manual for controllers. The collision occurred between a trainer aircraft, in which a student and instructor pilot were practicing takeoffs and landings, and a Piper aircraft which had entered the traffic pattern unannounced. The trial court allocated twenty percent of the fault for the accident to the controllers for failing to scan the entry corridor area of the traffic pattern during the two minutes immediately before the collision. Although there was no such scanning requirement in the ATC manuals, the court said flights by a trainer aircraft in the entry corridor area presented a dangerous situation which the controllers had a duty to monitor. Pretrial settlements actually resulted in the government's bearing a disproportionate share of the damages. The trial court had allocated forty-five percent of the fault to the pilot entering the traffic pattern unannounced, twenty-five percent to the instructor pilot, and ten percent to his student, for failing to maintain proper vigilance. The district court found that the student's heirs were entitled to \$1,360,586.25 in damages, which amount was reduced by the ten percent fault of the student. All defendants, other than the government, had settled with the student's heirs prior to trial for \$200,000. The trial court found that the government was liable, as the sole remaining nonsettling defendant, for the entire balance, or approximately \$1,025,000. The government was also held liable for the fifty-five percent balance of the damages suffered by the heirs of the other pilot who had been charged with forty-five percent of the fault. The Ninth Circuit affirmed the awards, finding that California comparative negligence rules still held a joint tortfeasor liable for the totality of damages caused by other parties regardless of his share of the fault. An equitable right to partial indemnification from other tortfeasors applied only to those who

⁸¹ 602 F.2d 1326 (9th Cir. 1979).

had not already settled with plaintiff. The court also affirmed one additional point that involved a subrogation claim brought against the United States by one of the insurance companies seeking partial indemnification for its contribution toward the pretrial settlement. The court rejected the claim because the total contribution paid by the underwriter was significantly less than what the pro rata share of its insureds would have been in the final damage awards.

C. Government Liability for Aeronautical Charts

A publisher's liability for aeronautical charts has been the subject of recent case law.⁸² A 1979 decision considered the government's liability under the Federal Tort Claims Act for such matters and drew a distinction between the accuracy of information actually placed on the charts and the adequacy of government specifications stating what information is to be put on the charts. In *Baird v. United States*,⁸³ a pilot claimed that he had crashed off an airport runway because he had been misled by information on the Wichita Sectional Aeronautical Chart for that particular airport. He claimed the information on the chart had led him to believe that the airport's lighted runway was also its longest runway. Under government specifications for such charts, a code was given for the airport of "2230 L 28." The code gave the airport's elevation, indicated by "L" that lighting was available from sunset to sunrise, and stated by the "28" that the longest runway available was 2,800 feet in length. The longest runway at this airport, however, was not the lighted runway. Because the information as stated was correct, the court viewed the plaintiff's claim to be asserting negligence on the part of the government in developing the specifications and regulations under which the chart was prepared. The court, therefore, granted the government's motion to dismiss. It held that the development and formulation of such specifications was within the "discretionary function" exception to liability under the Federal Tort Claims Act.⁸⁴

⁸² See *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 463 F. Supp. 94 (D. Nev. 1978) (Jeppesen liable for defective approach chart); *Times Mirror Co. v. Sisk*, 15 PROD. LIAB. REP. (CCH) § 17,820 (Ariz. Ct. App. 1978) (reversing a trial court strict liability determination against Jeppesen). See also McCowan, *The Liability of the Chartmaker*, 44 J. AIR L. & COM. 375 (1978).

⁸³ 15 Av. Cas. 17,476 (D. Kan. 1979).

⁸⁴ *Id.* at 17,480.

VII. AIRPORTS

A. Noise Regulations and Remedies

In a most significant development, the California Supreme Court, in *Greater Westchester Homeowners Association v. City of Los Angeles*,⁸⁵ found that a personal injury tort remedy exists in favor of persons residing near an airport suffering from its noise. The court held that residents neighboring a municipally owned and operated airport can sue the municipality under a nuisance theory for personal injuries sustained as a result of noise from aircraft using the facility in addition to claims for property damage caused by noise. The opinion in *Greater Westchester* contains a review of the seminal decisions considering aircraft and airport noise regulation, the degree of federal preemption in the area, and the private remedies for such noise. The case itself is part of a long series of disputes between Los Angeles International Airport and its adjoining landowners. In this particular litigation, which was initiated in 1968, questions of inverse and direct condemnation were bifurcated and previously tried. Judgments favoring the plaintiffs were entered and satisfied. In the subsequent "nuisance phase of the case," the trial court found that the plaintiffs also had actionable nuisance claims for damages for "annoyance, inconvenience, discomfort, mental distress, and emotional distress," and that recovery for such claims was independent of the property damage recovery.⁸⁶ The plaintiffs were awarded damages for personal injuries sustained during the period of 1966 through 1975.

The City of Los Angeles appealed, asserting first, that federal preemption of aircraft noise control precluded the nuisance claims and second, that the claims were barred by a California statute which provided that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."⁸⁷ The court rejected both arguments. While several aspects of noise control are preempted by federal laws, the court recognized that some areas were not, such as the right and obligation of a proprietor of an airport to exercise reasonable control over matters

⁸⁵ 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979).

⁸⁶ *Id.* at 92, 603 P.2d at 1331, 160 Cal. Rptr. at 734.

⁸⁷ *Id.* at 93, 603 P.2d at 1331, 160 Cal. Rptr. at 735.

affecting noise. The court found nothing in the Federal Aviation Act of 1958, as amended, to indicate an exercise of federal power over noise disputes between airports and owners or occupants of adjacent property. It stated, moreover, that language in the Act appeared to preserve the validity of nuisance causes of action.⁸⁸ Recognition of a state nuisance remedy for personal injury was said to place no greater burden on commerce than the constitutionally recognized claims for property damage.⁸⁹ The City's statutory defense was also rejected by the court. The court found that the statutes, which generally authorized and regulated airports and aircraft flights, did not contain a sufficient showing of legislative intent to sanction nuisances resulting from such activities.

While the California Supreme Court in *Greater Westchester* broadly held that a nuisance cause of action for noise injury exists, it did state that the facts of that particular case were significant. It noted that the City had decided initially to build, and later to expand, the airport in the immediate vicinity of an existing residential area. The City had chosen the particular location and direction of the airport runways and had approved their usage by jet aircraft. The City had also entered into service agreements with commercial air carriers "all with full and prior knowledge of the potential noise impact."⁹⁰ Although there was federal involvement in these matters, they were all said to be undertaken at the City's initiative.

The property damage remedy for the impact of noise under an inverse condemnation theory, while better recognized than the nuisance claim in *Greater Westchester*, continues to receive disparate results in different jurisdictions. A recent decision from Minnesota, *Alevizos v. Metropolitan Airports Commission*,⁹¹ provides an interesting contrast to the California case just discussed because it found that property owners directly below or adjacent to the airport's flight path, who suffered impacts of the overflights every bit as great as the California plaintiffs, failed to prove a claim of inverse condemnation. The matter was being considered

⁸⁸ *Id.* at 100, 603 P.2d at 1337, 160 Cal. Rptr. at 739.

⁸⁹ *Id.*

⁹⁰ *Id.* at 98-99, 603 P.2d at 1335, 160 Cal. Rptr. at 738.

⁹¹ 15 Av. Cas. 17,709 (Minn. Dist. Ct. 1979).

upon remand from the Minnesota Supreme Court which had set forth the test to be applied to determine if the property owners had a right to compensation.⁹² One requirement was that the invasion of property rights must have resulted in a definite and measurable diminution of the property's market value. The plaintiffs' claim was denied when the court found that, although the impact upon plaintiffs was sufficient to deprive them of practical enjoyment of their property, they had not carried their burden of proving sufficiently definite and measurable loss in the market value of their property.⁹³

The right of an airport authority to condemn property for a "noise buffer zone" around an airport was denied in *Highland Realty, Inc. v. Indianapolis Airport Authority*.⁹⁴ A condemnation right was held to exist to establish "clear zones" at the ends of runways, where such cleared areas were necessary for safety purposes. Property could not be condemned, however, to create a "noise buffer zone" or a "clear area protection zone" to provide protection against noise pollution and potential inverse condemnation claims.⁹⁵

Landowners near Luke Air Force Base attempted to prevent the government from stationing F-15 aircraft and from conducting training of German pilots at that base by asserting various claims relating to increased noise pollution at the facility. Dismissal of the multiple claims was affirmed in *Westside Property Owners v. Schlesinger*.⁹⁶ In its decision, the Court of Appeals for the Ninth Circuit reviewed the requirements for Environmental Impact Statements under the National Environmental Policy Act of 1969⁹⁷ for activities which increase levels of pollution. The court affirmed a

⁹² *Alevizos v. Metropolitan Airports Comm'n*, 28 Minn. 471, 478, 216 N.W. 2d 651, 662 (1974).

⁹³ 15 Av. Cas. at 17,715. A Pennsylvania court was not similarly troubled in affirming an inverse condemnation award in another recent comparable situation. *City of Philadelphia v. Keyser*, 15 Av. Cas. 17,752 (Pa. Commw. Ct. 1979).

⁹⁴ 15 Av. Cas. 17,791 (Ind. Ct. App. 1979).

⁹⁵ *Id.* at 17,796.

⁹⁶ 597 F.2d 1214 (9th Cir. 1979).

⁹⁷ 42 U.S.C. §§ 4321-4361 (1976). NEPA and Environmental Impact Statement requirements for airport expansion were also discussed in another recent decision in which the court issued a preliminary injunction halting such work. *Citizens for Responsible Area Growth v. Adams*, 477 F. Supp. 994 (D.N.H. 1979).

dismissal of a request for injunctive relief as barred by sovereign immunity and also held that the FAA was not authorized to regulate or control noise pollution of military aircraft.⁹⁸

B. *Airport Operation*

When one city has its airport located on the land of another, conflict often arises. Two recent decisions have rejected different approaches taken by municipalities to restrict the use of other cities' airports located on their lands. In *Town of Morristown v. Township of Hanover*,⁹⁹ a zoning ordinance was adopted by Hanover in an effort to limit the use of the Morristown Municipal Airport to general aviation and to ban all commercial operations. The court held the ordinance to be invalid, saying that there was an "island of immunity from zoning regulations for property operated and used for the primary purpose of a municipal airport or for uses which are reasonably accessory or incidental to that primary purpose."¹⁰⁰ In *City of Blue Ash v. McLucas*,¹⁰¹ the City of Blue Ash sued the FAA claiming that it had agreed to an extension of a runway by the Cincinnati Municipal Airport located on its lands only because Cincinnati had stipulated that the airport would not be used by jet aircraft. The limitation was reflected in the FAA's Environmental Impact Statement, but it did not later appear when the FAA published its limitations for use of the airport. Blue Ash sought injunctive relief to correct the published restriction. The FAA said it would change the limitation only if requested to do so by the airport owner and operator, Cincinnati. Dismissal of the action was affirmed, with the court noting that the FAA was not a party to the earlier agreement. The court said that the proper remedy was an action between the cities which was already pending in a state court.¹⁰²

In *Amersbach v. City of Cleveland*,¹⁰³ employees of a municipal

⁹⁸ 597 F.2d at 1220-22.

⁹⁹ 168 N.J. Super. 292, 402 A.2d 983 (1979).

¹⁰⁰ 402 A.2d at 984. In contrast, the right to use zoning powers to deny a request for a private Restricted Landing Area (RLA) was recognized in *Wright v. County of Winnebago*, 73 Ill. App. 3d 337, 391 N.E.2d 772 (1979), provided there is adequate basis for the denial.

¹⁰¹ 596 F.2d 709 (6th Cir. 1979).

¹⁰² 596 F.2d at 712.

¹⁰³ 598 F.2d 1033 (6th Cir. 1979).

airport were held not to be covered by federal minimum wage standards or other provisions of the Fair Labor Standards Act of 1938¹⁰⁴ because a municipal airport was found to constitute an "integral governmental function"—not a "proprietary function"—and, therefore, was immune from such regulation. The court noted also that of the 475 airports which served the United States and its territories, and which were certified for scheduled commercial air carriers, only two were privately operated.¹⁰⁵

Immunity cannot, however, always be claimed by a local government serving as an airport operator. In *Interair Services, Inc. v. Insurance Co. of North America*,¹⁰⁶ this defense was rejected as to damage claims for a fire in a hangar leased from a city when the fire was alleged to have been caused by the government's failure to properly inspect and maintain the hangar under its lease.

VIII. AVIATION INSURANCE

If last year's decisions are indicative, either aviation insurers are drafting more carefully or there is a growing willingness in the courts to enforce coverage limitations and exclusions. No fewer than five state supreme courts have considered aviation policy coverage questions since late 1978. Four of the five found no coverage for the claims presented.

In November 1978, the Texas Supreme Court in *Ranger Insurance Co. v. Bowie*,¹⁰⁷ reversed an intermediate appellate court to hold that coverage was excluded by a policy "Pilot Clause" for an aircraft damage claim. The clause required the aircraft's pilots to hold valid and effective FAA medical certificates. The pilot, found dead at the crash site, had a current medical certificate. The

¹⁰⁴ 29 U.S.C. § 201 (1976).

¹⁰⁵ 598 F.2d at 1038 n.7.

¹⁰⁶ 375 So. 2d 317 (Fla. Dist. Ct. App. 1979). Cf. *Rogers v. Western Airlines, Inc.*, ___ Mont. ___, 602 P.2d 171 (1979) (Montana Supreme Court affirmed dismissal of airline indemnification claims against City of Great Falls for passenger injuries resulting from falls on snow and ice between aircraft and city's passenger terminal). The City had the obligation to maintain the area under its lease of space to the airlines, but asserted a statutory immunity defense. The court did not reach the immunity question on the indemnification claims as it found the dismissals were proper as no recovery could be had by the plaintiffs against the airlines without establishing independent active negligence by the carriers, and such would bar the carriers' right to indemnification.

¹⁰⁷ 574 S.W.2d 540 (Tex. 1978).

court held, however, that the certificate was not "valid" because it had been fraudulently obtained. The pilot had not disclosed a known and continuing heart condition.¹⁰⁸

The Idaho Supreme Court was not troubled by what appeared to be a significant inconsistency in the insurance policy in *Levra v. National Union Fire Insurance Co.*¹⁰⁹ In that case, the court held that the policy form's printed definition of "insured" excluded coverage for a rental pilot. The printed provision stated that the policy did not apply to a "renter pilot." In a typed declaration for the policy, however, it was stated that the aircraft was to be used only for instruction and rental purposes.¹¹⁰

Under much less ambiguous language, the West Virginia Supreme Court held there was no coverage in a carrier's policy for the tragic 1970 crash of a charter flight that was carrying the Marshall University football team and coaching staff. In *White v. Washington National Insurance Co.*,¹¹¹ the court refused to find any ambiguity in a provision limiting coverage to aircraft "flying upon a regular passenger route with a definite schedule of departures and arrivals between established and recognized airports." The charter flight was held not to be covered. The court would not accept assertions of ambiguities "created by Herculean straining which renders common words meaningless."¹¹²

The Minnesota Supreme Court, in *Rausch v. Beech Aircraft Corp.*,¹¹³ found that an aircraft lessee's policy exclusion of "liability arising out of the . . . use . . . of aircraft" barred a claim for attorneys' fees and expenses brought by an aircraft owner/lessor who had successfully defended himself against claims arising out of a crash of the leased aircraft. The owner/lessor had obtained a judgment for his expenses against the lessee under the terms of his lease contract and sought to recover directly from the lessee's insurer. The court held that, although the lessee's liability for the fees had been based upon a contract, liability still arose from the

¹⁰⁸ *Id.* at 541.

¹⁰⁹ 99 Idaho 871, 590 P.2d 1017 (1979).

¹¹⁰ 590 P.2d at 1018.

¹¹¹ ___ W. Va. ___, 253 S.E.2d 144 (1979).

¹¹² 253 S.E.2d at 145.

¹¹³ ___ Minn. ___, 277 N.W.2d 645 (1979).

lessee's use of the aircraft and thus was excluded from coverage.¹¹⁴

The Louisiana Supreme Court, on the other hand, applied that state's "anti-technical statutes" to hold that coverage existed for a crash of a company aircraft which was being flown by a pilot not named in the policy. In *Benton Casing Service, Inc. v. Avemco Insurance Co.*,¹¹⁵ the court first found that a declaration stating that the policy was to apply to aircraft in flight "only while being operated by one of the following pilots" did not constitute an exclusion of coverage for unlisted pilots. Instead, it was held to be a warranty or representation of the insured. A Louisiana statute provides that misrepresentations by an insured in negotiating for an insurance contract cannot defeat coverage unless made with the intent to deceive.¹¹⁶ The court found that there was no such intent in this case because the company had several aircraft and several pilots and did on occasion advise its underwriters to change or add pilot/employees on its policies.

Two other insurance coverage decisions last year considered the question of whether a causal relationship between a particular policy coverage limitation and the claim was required in order to deny coverage. Both decisions held that such a relationship was not required. In *United States Aviation Underwriters, Inc. v. Rex Ray Corp.*,¹¹⁷ the court was asked prior to trial for a declaratory determination of two coverage issues relating to a "pilot hours" clause in the policy. The first was whether the insured or the insurer had the burden of proof under the clause which required that the aircraft's pilots have a minimum of 2,000 hours as "pilot in command," of which at least 100 hours were to have been in the particular type of aircraft being insured. The court found that the "pilot hours" clause was a policy coverage exclusion rather than a warranty or condition of coverage, and, therefore, the burden of proof of its breach was on the insurer. The second question was whether there had to be proof of a causal connection between the claimed loss and a violation of the "pilot hours" clause in order to enforce the exclusion. The court said

¹¹⁴ 277 N.W.2d at 646.

¹¹⁵ 368 So. 2d 129 (La. 1979).

¹¹⁶ LA. REV. STAT. ANN. § 22:619(A) (West 1978).

¹¹⁷ 15 Av. Cas. 17,625 (Mass. Super. Ct. 1979).

that because the exclusion itself defined a risk not covered by the policy, there was no logical reason to require a causal connection. The court stated that this was "the more common rule."¹¹⁸ The Court of Appeals for the Fifth Circuit, applying Florida law in *Hollywood Flying Service, Inc. v. Compass Insurance Co.*,¹¹⁹ also held that a causal relationship was not required to enforce a policy exclusion. The court affirmed the dismissal of an action to recover the insured value of an aircraft which had crashed into the Gulf of Mexico. The cause of the crash was not known. The person who rented the aircraft, however, testified that several items of aircraft equipment had not been working and that the FAA-approved manual was not on board. The court affirmed an exclusion of coverage for flights made without the aircraft having an airworthiness certificate "in full force and effect." The aircraft deficiencies were found to make the certificate not in effect so long as they remained uncorrected.¹²⁰

IX. JURISDICTIONAL AND PROCEDURAL MATTERS

A. Subject Matter Jurisdiction

Federal court subject matter jurisdiction was held to exist for death claims arising from an aircraft crash in the territorial waters of Canada in *First & Merchants National Bank v. Adams*.¹²¹ The court denied a motion to dismiss, finding that there was federal jurisdiction both under the Death on the High Seas Act (DOHSA)¹²² and under the court's general maritime jurisdiction.¹²³ The argument that DOHSA jurisdiction was limited to the "high seas," and excluded the territorial waters of Canada, was rejected. The court said the controlling language of the Act required only that the accident occur in navigable waters "beyond a marine league" (three miles) from the shores of the United States.¹²⁴ The court found that federal general maritime jurisdiction existed because the aircraft

¹¹⁸ *Id.* at 17,630.

¹¹⁹ 597 F.2d 507 (5th Cir. 1979).

¹²⁰ *Id.* at 508.

¹²¹ 15 Av. Cas. 17,800 (E.D. Va. 1979).

¹²² 46 U.S.C. § 761 (1976).

¹²³ 28 U.S.C. § 1333 (1976).

¹²⁴ 15 Av. Cas. at 17,802.

was engaged in an activity "traditionally accomplished by a water-borne vessel" when the accident occurred as the aircraft was transporting passengers over a thirty-mile stretch of navigable waters.¹²⁵ The court, however, recognized that whether the wrongful death claim was brought under general maritime law or under DOHSA, the scope of the remedy and its "subsidiary elements" remained subject to the limitations set forth in DOHSA.¹²⁶

An attempt to bring a class action against the Civil Aeronautics Board under the Federal Tort Claims Act was unsuccessful in *Kantor v. Kahn*.¹²⁷ Subject matter jurisdiction was lacking due to a failure to meet the administrative claim requirements of the Act.¹²⁸ The class administrative claims were held defective because they failed to name all the claimants, because they did not state that those named had the authority to present and settle claims for those unnamed, and because they failed to provide a specific statement of damages for each of the claimants. The court said it was aware of no successful class actions under the FTCA. It thought, however, that it was at least theoretically possible to bring such an action and suggested how it might properly be done.¹²⁹

B. Personal Jurisdiction

While the required "minimum contacts" in aviation product cases continue to diminish, the 1979 decisions still look somewhat to the nature of the defendant's business before deciding whether it is fair to compel a nonresident defendant to appear where an accident has occurred. The decision in *Bach v. McDonnell Douglas, Inc.*,¹³⁰ however, comes fairly close to a concept of national jurisdiction for aviation manufacturers in the absence of actual "minimum contact" with a forum state. The most significant contact found for the foreign defendant in that

¹²⁵ *Id.* at 17,805.

¹²⁶ *Id.* at 17,804. The court cites *Public Administrator v. Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir. 1979), which in turn is based upon the Supreme Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

¹²⁷ 463 F. Supp. 1160 (S.D.N.Y. 1979).

¹²⁸ 28 U.S.C. § 2675 (1976); 28 C.F.R. § 14.3 (1979).

¹²⁹ 463 F. Supp. at 1164.

¹³⁰ 468 F. Supp. 521 (D. Ariz. 1979).

case was its presumed knowledge that its products would be used "in American skies." The foreign defendant was the Martin-Baker Co., Ltd. of England (Martin-Baker), which designed and sold military aircraft ejection seats in England. One of its products was involved in a fatal accident which occurred while a United States military aircraft happened to be flying over the state of Arizona. The aircraft was on a reconnaissance flight from a Marine air base in California. The plaintiffs who brought the wrongful death action were citizens of Idaho. It was undisputed that Martin-Baker had never transacted any business in Arizona and owned no property in that state. The ejection seat had been sold and delivered to McDonnell Douglas in England. In reviewing the record for "minimum contacts" to satisfy the due process fairness requirements under *International Shoe Co. v. Washington*,¹³¹ the court found three: Martin-Baker had designed the seat used in a flight over Arizona; ten years earlier it had provided a technical representative under contract at the Davis-Monthan Air Force Base in Arizona; and at least some of the company-designed seats were currently used in aircraft over Arizona.¹³² The court found that there had been "purposeful activity" in Arizona "in the product liability context" and noted the following: "In this case, there is no evidence of sales to Arizona consumers. But there is an indication that Martin-Baker received economic benefit (albeit indirectly), through the use of its ejector seats not only in the skies of Arizona, but many other states."¹³³ Martin-Baker contended it had no knowledge of where its equipment would be used. Because it sold its products to the United States armed forces knowing that they would be used "over many, if not all states of this nation," it was charged with knowledge that its product "would be used in and/or over Arizona."¹³⁴ The court said: "It is also reasonable to conclude that when an injury-causing product is sold with knowledge that it will, at least, partially be used in the sky over a state, it is a purposeful activity."¹³⁵

¹³¹ 326 U.S. 310 (1945).

¹³² 468 F. Supp. at 528.

¹³³ *Id.* at 527.

¹³⁴ *Id.* at 528.

¹³⁵ *Id.*

In deciding that such activity and contacts were sufficient to satisfy the due process requirement of fairness for personal jurisdiction, the court noted that Arizona appeared to be the only federal judicial district where venue over all defendants appeared to be proper. It also said that Martin-Baker was a "substantial enterprise which is financially able and capable of defending its interests in a number of states of this nation."¹³⁶

In *Heckel v. Beech Aircraft Corp.*,¹³⁷ however, the court denied personal jurisdiction over smaller out-of-state service and repair businesses which had done work on an aircraft. The action asserted death and injury claims which arose after an aircraft engine failed during takeoff and the aircraft crashed when an emergency landing was attempted on a golf course in Pittsburgh, Pennsylvania. Among the many parties sued were an Indiana repair station, an Indiana business which had inspected, repaired, and certified engine parts the year before the accident, and a Utah FBO which had done a major engine overhaul eight years earlier. None of these three defendants had any contact whatsoever with Pennsylvania other than the presence of the aircraft. The court found that due process fairness principles prevented Pennsylvania from exercising jurisdiction over the three after looking primarily to the size and scope of their businesses:

[W]here there is a wide spread commercial enterprise which defendant knows will reach the forum state there is nothing unjust in requiring the defendant to defend there.

. . . .

We do not have here a case of a manufacturer or a component parts manufacturer placing its products in the stream of commerce to be distributed to all the 50 states. Rather, here we have the case of small airplane service and repair shops located in foreign states which have never had any contact with Pennsylvania except for the subject matter of this lawsuit, an airplane crash in the commonwealth involving an airplane which they had previously serviced. We hold that under such circumstances the contacts of these defendants are insufficient to establish jurisdiction in Pennsylvania.¹³⁸

¹³⁶ *Id.* at 525-26.

¹³⁷ 467 F. Supp. 278 (W.D. Pa. 1979).

¹³⁸ *Id.* at 283.

In another Pennsylvania federal court decision, *Furnival Machinery Co. v. Joseph T. Barta Associates, Inc.*,¹³⁹ "minimum contacts" for a breach of warranty claim against an out-of-state seller were found to exist. The seller had no direct contact with Pennsylvania. It had specific knowledge, however, that the aircraft sold was going to end up in that state through a three-party transaction. That knowledge was held to be sufficient contact with Pennsylvania to warrant personal jurisdiction for the breach of warranty suit brought by the ultimate purchaser in Pennsylvania.

C. *Forum Non Conveniens*

Suits brought in the United States by foreign plaintiffs based upon accidents occurring in their home countries are subject to examination under the *forum non conveniens* doctrine. Two 1979 decisions addressing such situations dismissed claims where the defendants agreed to accept jurisdiction in the plaintiff's home country.

In *Dahl v. United Technologies Corp.*,¹⁴⁰ the district court in Delaware dismissed claims of four Norwegian residents who were personal representatives of four Norwegians killed in a crash of a Norwegian-owned Sikorsky helicopter. The crash occurred in the territorial waters of Norway. The helicopter had been manufactured in Connecticut by the Sikorsky division of United Technologies, a Delaware corporation. The court found that Norway was an available alternative forum because United Technologies offered to consent to service of Norwegian process. It also agreed to make its witnesses and documents available there and to pay any Norwegian judgment. In applying the *forum non conveniens* doctrine, the court first reviewed the "private interests" of the parties as litigants. It noted that no relevant evidence was in Delaware. In contrast, Norway was the location of the plaintiffs, the crash, the owner and operator of the helicopter, the maintenance of the helicopter, and its maintenance and operational records. Moreover, the Norwegian Civil Aviation Administration was conducting an investigation of the accident's probable cause. All liability and damage witnesses related to these matters were in Norway.¹⁴¹

¹³⁹ 470 F. Supp. 735 (E.D. Pa. 1979).

¹⁴⁰ 472 F. Supp. 696 (D. Del. 1979).

¹⁴¹ *Id.* at 700.

A "public interest" analysis equally favored Norway. The court particularly noted that the substantive law of Norway, in any event, would be governing the plaintiff's principal claims.¹⁴³

The presence of a component manufacturer in the forum state was not sufficient to prevent a *forum non conveniens* dismissal of suits brought in California by Canadian residents relating to the 1978 crash of a Pacific Western Airlines Boeing 737 at Cranbrook, British Columbia. In *Hemmelgarn v. The Boeing Co.*,¹⁴³ dismissal was conditioned upon a consent to British Columbia jurisdiction by Boeing and Rohr Industries (Rohr), a California subcontractor of Boeing. The court considered the presence of Rohr in California to be "at most a nominal connection between California and the facts related to the accident and the claims" when compared to the "very substantial connection to Canada."¹⁴⁴ The accident occurred during a flight inside Canada. All the plaintiffs were residents of Canada, as were the passengers and crew of the aircraft. All entities responsible for the accident were either Canadian residents or were said to be subject to Canadian jurisdiction. Actions were already pending in Canada against the City of Cranbrook, the operator of the airport. The court also noted that the defendants would not contest liability for claims brought in Canada, and that damage judgments would be paid from a fund already created there for that purpose. It also observed that all witnesses and evidence relating to possible liability of the carrier, the City of Cranbrook, and the Canadian government, which provided the air traffic control services at the airport, were in Canada.

D. Foreign Sovereign Immunities Act of 1976

The Foreign Sovereign Immunities Act of 1976 (Immunities Act)¹⁴⁵ is of particular interest when a foreign government-owned airline may be involved in domestic litigation. The basic scheme of the Immunities Act is to exempt foreign states and foreign corporations, which are fifty percent or more owned by foreign states, from suit in state or federal court, except upon the condi-

¹⁴³ *Id.* at 701.

¹⁴³ 15 Av. Cas. 17,575 (Cal. Super. Ct. 1979).

¹⁴⁴ *Id.* at 17,576.

¹⁴⁵ Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-1611 (1976) and amending 28 U.S.C. §§ 1332, 1391, 1441)).

tions set forth in the Act. Suits are primarily allowed where such entities are engaged in commercial activity. Language in the Act, codified in 28 U.S.C. section 1441(d), appears to restrict such actions to nonjury trials in the federal courts:

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury¹⁴⁶

The Immunities Act was used to successfully remove a class action brought against KLM from a New York state court to federal court in *Greeley v. KLM Royal Dutch Airlines*.¹⁴⁷ The court found that the majority of KLM's stock was owned directly or indirectly by the government of the Netherlands. In seeking to remand the case to state court, the plaintiff alleged he would be prejudiced by the lack of a right to a jury trial under the Act. The court did not disagree with the assertion. It found, however, that prejudice was not a factor to be considered in reviewing the petition for removal.¹⁴⁸

In *Icenogle v. Olympic Airways, S.A.*,¹⁴⁹ a right to a jury trial was found to nevertheless exist where wrongful death actions were originally brought in federal court under its diversity jurisdiction. The actions were brought by United States citizens against a commercial carrier owned by the government of Greece. The court was asked to strike the plaintiffs' jury demand under the authority of the Immunities Act. The motion was denied as the court found that passage of the Act did not affect diversity jurisdiction over foreign government-owned commercial corporations for claims exceeding \$10,000, nor did it affect the right to a jury trial for such claims. The Act was said by the court to simply provide an additional basis for federal court jurisdiction over claims in any amount against such corporations, and only such claims brought under the Act were to be tried without a jury. The court did note, however, that

¹⁴⁶ 28 U.S.C. § 1441(d) (1976).

¹⁴⁷ 15 Av. Cas. 17,527 (S.D.N.Y. 1979).

¹⁴⁸ *Id.* at 17,528.

¹⁴⁹ 82 F.R.D. 36 (D.D.C. 1979).

where a case was removed to federal court under the Act, a jury trial was "categorically" barred in 28 U.S.C. section 1441(d). It suggested that the denial of a jury trial for those claims would present a serious constitutional question.¹⁵⁰

E. Choice of Law

An interesting, but perhaps unique, choice of law decision in 1979 considered the law to be applied to claims arising out of the tragic 1975 crash of the United States Air Force C-5A aircraft carrying Vietnamese orphans from Saigon to the United States. The court, in *In re Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975*,¹⁵¹ applied an "interest analysis" to decide which law to apply to questions of capacity to sue on behalf of the deceased orphans. Because of the extensive United States government involvement in the Vietnamese war and in the flight, and because of the demise of the Vietnamese government shortly after the accident, the court found that the law of the "Seat of the Government of the United States" should apply.¹⁵² That law is the law of the District of Columbia.¹⁵³

F. Contribution

What should the solution be where an owner/operator of an aircraft successfully defends a wrongful death action and the plaintiff then sues the aircraft manufacturer, which files a third-party action against the owner/operator for indemnity or contribution? The manufacturer believes it can more successfully prove the owner/operator's fault. The Minnesota Supreme Court rationally solved the problem by partially reversing a summary judgment dismissal of such a third-party claim in *Hart v. Cessna Aircraft Co.*¹⁵⁴ It found that the trial court correctly determined that there should be no right of contribution because the prerequisite of common liability to the plaintiff could not exist in view of the owner/operator's successful defense against liability.

¹⁵⁰ *Id.* at 39.

¹⁵¹ 476 F. Supp. 521 (D.D.C. 1979).

¹⁵² *Id.* at 526-27.

¹⁵³ *Id.* at 527.

¹⁵⁴ — Minn. —, 276 N.W.2d 166 (1979).

Because the plaintiff had chosen to sue the defendants separately, however, the court said that the risk should be on the plaintiff. The court held that in the second suit the manufacturer could be liable only for that portion of the negligence attributed to it. The plaintiff would not be allowed to recover whatever portion of fault was proven by the manufacturer in the second action to be that of the owner/operator.¹⁵⁵

¹⁵⁵ 276 N.W.2d at 170.

