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# MANUFACTURER'S RESPONSIBILITY

By HAROLD V. MCCOY†

## I. INTRODUCTION

The most radical and spectacular development in tort law in this century is the typical language describing the developments of the last few years in the field of products liability. While retailers, wholesalers, dealers and even lessors have been embraced within this rapidly expanding field, there is little doubt that the main thrust has been against the manufacturer of the product. With the expansion of long arm statutes and of concepts of what is doing business within a state, few large manufacturers can now find themselves immune to suit in any state of the nation. It is not impossible that with large chattels such as commercial transport aircraft, we will see the day when the use of an airplane within any state will confer jurisdiction over the manufacturer. Finally, though a few courts have reasoned that liability without fault should be a legislative creation rather than judicially imposed, it is a minority doctrine which may very well become the law of the land. We can expect to see it the majority doctrine within the foreseeable future. Liability without fault, ease of acquiring jurisdiction and liberal approaches to the rules of evidence and the inferences to be drawn should certainly have combined to the point where we would expect to find the airplane manufacturer facing a new and enlarged responsibility totally different from that heretofore known.

## II. THEORIES OF LIABILITY

What at first glance appears to have been a bonanza for claimants turns out after closer scrutiny to be not much different in the aviation field from what we have always known. True there are more suits and more recoveries today, but there are many factors other than legal developments which account for this increase in litigation. Historically, the airplane manufacturer has been responsible for negligence in the design and fabrication of his product. *McPherson v. Buick Motor* dates back to 1916. For fifty years it has been the law of this country that remote users of a vehicle may sue the manufacturers with whom they have had no dealings and may recover damages upon proof of fault in design or fabrication. To be sure, there were two qualifications to that doctrine which sometimes defeated recovery. Contributory negligence of the claimant could bar a recovery. That is a defense which is seldom raised, much less successfully applied to passengers in transport airplanes, and, therefore, it can be disregarded. The other limitation on the *McPherson* doctrine, restriction

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to products which were imminently dangerous if defectively made, can also be disregarded. An airplane defectively designed or fabricated is obviously a dangerous instrumentality.

Essentially, therefore, airplane manufacturers have always been cast in liability for defectively made products if the defect was negligently introduced. Today, though, the need to show fault is under severe attack. The *Restatement of Torts* defines this new revolutionary concept as follows:

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

So far it sounds like the old negligence rule since a defect in the product which created an unreasonable danger was required. What was new was the imposition of liability even though the seller had exercised all possible care in the preparation of the product. Then, a defect once proven was usually enough for a plaintiff to prevail. Today, this is even more certain for there has been a progressive relaxation in the quantum and quality of proof required to create a fact question for the jury to resolve. In New York a typical instruction to the jury goes something like this:

When a manufacturer places upon the market a product which is of such a character that when used for the purpose for which made it is likely, if defectively made, to be a source of danger, the law implies a warranty . . . that it is reasonably fit for the ordinary purpose for which it is used. If the product is in fact defective and not reasonably fit to be used for its ordinary purpose, the manufacturer is liable to any person properly using the product for injury resulting from its defective and unfit condition.

In relation to commercial airliners, it is hard to visualize a case where a plaintiff who proves that the airplane was defective and unfit for ordinary use does not recover because he cannot prove negligence in the design, testing, inspecting or fabrication of the aircraft. In the past, a defect always had to be shown, and it had to be one arising from failure to exercise reasonable care. But the technical proof establishing that a modern airplane is not reasonably fit for use as an airplane will almost invariably sustain a finding that the manufacturer was not careful enough.

Page Keeton, Dean of the University of Texas Law School, in discussing proof of the manufacturer's negligence in a law review article, ended with this conclusion:

There will inevitably be a considerable diversity of opinion about the kind and quantum of evidence required as a basis for justifying the submission of negligence on the part of the manufacturer of a product to the jury. Moreover, even if negligence as a requirement for liability is ultimately eliminated and some form of strict liability is imposed, most of the same problems that have been discussed herein will remain because plaintiff will be required to

sustain the burden of showing a defect in the product that would make the product unreasonably dangerous.

I do not mean to suggest that proof that an airplane was defectively made or unfit for its intended use without proof of lack of due care does not broaden the manufacturer's responsibility. It does, but, so far, we have seen no cases where a plaintiff had to rely upon such a doctrine. This is because of the very simple reason that in airplane cases, by the time you finish proving the defect, you have proved the lack of due care, and only very subtle technological complexities could give you one without the other.

While there are fact situations upon which one could base an argument that the manufacturer, because of the state of the art, could not have known of the defect, those situations are few and far between. Moreover, they do not usually involve mechanical reliability, but rather, the characteristics of the product when used in the broader areas of operational environment. Turbulence penetration is such an example. With trials being held several years after the accident, too much has been learned during the interim to expect that the corporate manufacturer can reasonably and successfully restrict the juries' or judges' appraisal of the observance of ordinary care to the standards of several years ago.

There has been an increase in recoveries, and there has been an increase in litigation. However, this is just as much due to broadening the class of claimants, more intense accident investigation, a tremendous increase in traffic, lowering the standards of proof, more competent plaintiffs' representation, and finally, a focus upon the manufacturer, rather than the carrier, where the carrier had asserted the partial defense of the Warsaw Convention.

### III. EVIDENCE

Years ago, the total destruction of an airplane and the death of the crew usually precluded, because of the lack of investigative tools then available, any analysis of the accident which might involve the manufacturer. Today, no matter how total the destruction, whether on land or sea, wreckage retrieval and analysis are relentlessly pursued and often with good results. While it does not necessarily always establish a probable cause, it frequently will be adequate to eliminate areas of probable cause, such as fire, explosion, structural failure, or engine failure. This, then, eliminates or narrows the possibilities. Thereafter, scrutiny of the operational history of this type sometimes suggests broad combinations of probable causes which are not contraindicated by the evidence. Such combinations, some involving the manufacturer, are now seen with increasing frequency. While the proof supporting them will not always support a civil case, such findings will guarantee that the manufacturer will be named as a defendant along with the carrier. While Civil Aeronautics Board findings are not admissible in civil suits, they often provide a guide to the claimant's preparation.

#### IV. MANUFACTURER AS A PARTY IN SUIT

As a general rule, we now find the manufacturer named as a defendant in accidents where the causes are not readily discoverable. It is becoming increasingly common to name the instrument manufacturer in accidents where the instruments were being used. Though instrument malfunction may be unprovable, instrument information presentation can always be criticized. If by trial-time proof of a defect meeting civil law requirements has not been developed, claimants still feel the effort has been worthwhile. Incidentally, there are no penalties for losing, except the effort involved. Claimants feel that extra preparation directed towards the manufacturer, even if unsuccessful, further narrows the field of causation against the carrier in its use, maintenance and operation of the aircraft. The claimant, therefore, frequently feels that there has been a distinct benefit in gaining access to the manufacturers records and expertise in his case against the carrier.

No one has made a perfect airplane yet, and in every manufacturer's files there will be engineer reports or customer complaints which can sound damaging until explained. Claimants count on collecting such items and hope there will be enough of them to at least sustain a jury question. In addition, if there is some kind of a defect, claimants can and do count upon the carrier, usually a defendant, to be a valuable and knowledgeable ally in shifting the blame to the manufacturer.

Despite this trend the manufacturer with his resources and knowledge can prevail after careful preparation and presentation of what is invariably complex technical proof if, in fact, the product is not defective.

#### V. NEW DEVELOPMENTS

Here, I refer to those cases where either with or without an attack on the basic design, a complaint is made that instructions for safe use or the warnings given have been inadequate. Dix Noel, a leading writer on the subject, pointed out recently that, "This matter of inadequate directions or warnings is of growing practical importance and deserves special emphasis. Often it is much easier to establish an inadequate warning than to establish an inadequate design." Of course, in the commercial aircraft field, inadequate warning and inadequate instructions for use cases should not increase with the same incredible rapidity as they have in the field of drugs, chemicals, or any other product which will be used by unsophisticated consumers. Such airplanes will almost invariably be used by either military or commercial air carriers. While the manufacturer is charged with an expert's knowledge of his product, the air carriers using the products are similarly charged. Their pilots and engineers, together with their counterparts of the FAA, are frequently present during much of the development stages. By the time the airplane is actually engaged in commercial service, its characteristics and operating procedures are well-known.

A duty to warn of dangers in the use of the product exists even though it is perfectly designed and made. There is no duty to warn of dangers which are patent, which are discoverable on reasonable inspection, or of which the purchaser has notice. Nor is there a duty to warn one in a particular trade or profession against dangers generally known to that trade or profession.

The type of user of transport aircraft, therefore, will usually, though not always, be aware of the proper methods and the dangers associated with incorrect usage. From many automobile cases and one or two airplane cases, it is clear that the manufacturer will not only have a duty to warn of any foreseeable dangers at the time he delivers the product, but he will have a continuing duty to warn of the dangers which are brought to his attention after the product has been sold.

A most revolutionary case in this connection is *Noel v. United Air Lines, Inc.* There, a Constellation was lost when an overspeeding propeller, which could not be feathered, parted from its shaft. One way or another, fuel, being dumped, was ignited, and in the resulting fire the aircraft was lost. A foreign air carrier was involved and apparently suit was brought only against the propeller manufacturer. That manufacturer had received reports of other overspeeds and decouplings over a period of eight years, some resulting in minor problems and some resulting in extensive damage, though none had caused any personal injuries or deaths. The manufacturer had been attempting to develop a fix and had actually developed three by the time of the accident. One in particular, called "pitch-lock," was already on the market for six months, but apparently at the time of the accident this fix was still available only for Douglas aircraft. The case was tried without a jury since the Federal Death on the High Seas Act was involved. The trial judge rendered judgment against the manufacturer upon the grounds that a repetitive history of overspeeds and propeller separation, coupled with the manufacturer's failure to remedy the situation, amounted to negligence. Judgment for the plaintiff was affirmed on appeal on the same grounds, but also on two additional grounds. The appellate court held that the manufacturer was negligent when it delivered a system which was defective in design, that it had failed to discharge its duty to the airline to warn of any unusual malfunctions, and that it breached its continuing duty to make available remedial devices. While the majority of the court concurred in the result, there were several opinions delivered which voiced considerable concern about imposing at an appellate level findings of negligence not made by the trial court and findings of negligence based on newly created duties and obligations.

The finding that the system which was delivered in July of 1955, about a year before the accident, was defective in design was based almost wholly on a history of malfunction. Absent was any proof that at the time of design reasonable care had not been observed. Possibly this finding can be explained on the grounds that the malfunction history had continued for

so many years that as a matter of law there had to be a defect in the design which could have been avoided by more care.

If long, continued history of malfunction could be a basis for such a finding, it is difficult to follow how, then, there was a failure to warn of the numerous malfunctions. One would suppose that the overspeed history could hardly escape the notice of the operators of the aircraft. Certainly domestic operators could not have escaped such knowledge.

It is the third finding, however, which is of most concern since it opens up a whole new area of manufacturer's responsibility. Dix W. Noel, in his treatise on manufacturer's liability for negligence, describes the view accepted by the court, that there is a duty to develop with reasonable promptness a safety feature to meet any known serious danger, as somewhat new. He even suggested this duty might be restricted to the aviation field. He also pointed out that the court's position that there is a general post-sale duty to offer the vendee a corrective safety device, which has in fact been developed after the sale, may be somewhat novel.

The puzzle posed by the *Noel* case lies in the fact that the trier of the facts never made a finding that there was fault or lack of due care in the original design. Only the long history of malfunctions, during which years corrective action was being attempted, was discussed by the trial court. Possibly the explanation lies in the fact that the particular propeller involved had been delivered only a year before the accident and some seven years after the first model was introduced. The question occurs, therefore, whether or not the appellate finding of negligence on the basis of a defective product was based more on the duty to withdraw the product until a fix had been obtained. In addition, the fact that a corrective device was already on the market, though not ready for this airplane, no doubt would predispose the court to finding against the manufacturer. Mr. Noel feels that even where there is no negligence in furnishing a defective system initially, there should be a duty to offer the corrective safety device as soon as it is available in cases where it is evident that the original design was *dangerously* defective.

The *Noel* case will no doubt be cited to sustain as many meanings as the point of view of the reader dictates. While possibly it will be restricted to its own facts, one can certainly see that in every product improvement involving the safety of the aircraft, or the elimination of potential hazards, the manufacturer's own efforts will be used not only to discredit the original design, but to impose a new liability, *i.e.*, the improvement was not made soon enough.

If the *Noel* case becomes part of the general law, a whole new set of questions and issues will arise. Standards of care in the line of product improvement will have to be developed. Juries will have to resolve the issue of whether there is fault in the amount of emphasis devoted to improving a product already on the market. Since the amount of time and effort spent in making the improvement can always be attacked, this decision may substantially increase the manufacturer's responsibility. Finally,

what will be the cutoff date for product improvement? It can be argued that this duty necessarily continues, therefore, while the airplane is being used anywhere in the world. More rationally, though, we can expect to see the duty end when the hazard is no longer a foreseeably dangerous one. The point will be, of course, where disagreement begins.

Gordon Close, in a 1966 article published in *For The Defense*, quoted some correspondence he had received from a patent attorney on this subject. Since it points up the sociological issues involved, it is worth reprinting:

The notion that technological innovation should be penalized by imposing liability for not *previously* having introduced *later-developed* improvements seems to me more than just unfair as between litigants. It militates against technological change upon which all national hopes for abundance, leisure, and high civilization primarily depend.

The Constitution provides for the patent system "to promote the progress of science and the useful arts"; a large share of our federal budget is devoted to research and development; and Congress enacts bill after bill to foster scientific education. All this expresses a national policy to encourage and accelerate technological innovation, and that policy would be opposed by the novel notions of liability now advanced by the personal injury lawyers.

If liability for design negligence is to become a part of our law, it should be based on legislative and regulative standards, not on a hopeless morass of individual tort determinations. Moreover, if we are to live with design negligence, liability should be found only where a specific finding is made that the negligent design accused was negligent in light of the state of the art and standards at least as early as the time the accused product was sold, not at any later time.

While the extension and the application of the *Noel* doctrine yet remains to be seen, it is probably safe to predict that fault finding in the area of lagging product improvement is here to stay. Fortunately, most of the major manufacturers do have ambitious product improvement programs, and, in addition, close liaison with their users, so that in heavy transport operations at least, inadequate instruction or failure to warn will be a comparatively infrequent source of liability. However, the future is very much open on lagging product improvement as a source of liability.

## VI. CONCLUSION

This has not been a good year for forecasters; nevertheless, with a certain amount of reliability it can be predicted that the future will see the manufacturer's responsibility only increase in the number of suits and recoveries. Part of it will be due to the constantly expanding air travel. Part of it will be due to a legal environment which is ever changing, and only in the direction of increased legal responsibility.

In an industry where knowledge is acquired faster than planes can be designed, redesigned and produced, "state of the art" will rarely be a popular defense. We already hear it being urged that the risk of loss should be imposed upon those best able to afford it. That this is a social

change which should only be imposed by the legislatures is still being debated.

The increase in the cases of commercial aircraft should not be significant. Under the present guidelines of strict tort liability, the manufacturer has both the means and opportunity of exonerating itself when exoneration is due. It is more difficult, but well within bearable limits.

Product support organizations, when properly run, are more than capable of reducing incidents arising out of a failure to warn or directions for use to insignificant numbers. Improvement in product support and communication between government, the various trade associations, the carriers and the manufacturing industry is constantly increasing. In this exchange lies the source of quickly identifying and correcting hazards which only are disclosed through use.

In the small plane area, different problems are presented which, coupled with increasing legal responsibility, might well result in an increase of suits and recoveries. In this area, the consumer usually pursues aviation as an avocation rather than a profession. Communication and product support are necessarily different. Nevertheless, the same rules of legal responsibility apply. In the areas of failure to warn and directions for use, the consumer will rarely be an expert. Where such is the case, every reasonably, foreseeable hazard encountered in the ordinary use of even a perfectly made product must be brought home to him.

The lawyer can hardly make a significant contribution to air safety in the fields of design and fabrication. However, the lawyer might well have something to contribute if he can bring home to the people responsible for the advertising and the manuals that these are an integral part of the product for purposes of legal responsibility, and more importantly, safety.

In striving for safety all that can be required is that which is practicable in view of the risks involved. Since, in aviation, the risks and hazards are considerable, so must the manufacturer's effort be considerable. Anything less cannot be tolerated. Selfishly, the risks of economic loss dictates nothing less. Since United States built aircraft carry the predominant part of the world's passengers and cargo, we have an unusual responsibility and an unusual opportunity to lead the way in making good airplanes even better.