

1970

## Current Trends in Aviation Product Liability Law

Wallace E. Maloney

---

### Recommended Citation

Wallace E. Maloney, *Current Trends in Aviation Product Liability Law*, 36 J. AIR L. & COM. 514 (1970)  
<https://scholar.smu.edu/jalc/vol36/iss3/15>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CURRENT TRENDS IN AVIATION PRODUCT LIABILITY LAW

BY WALLACE E. MALONEY†

## I. INTRODUCTION

THE DISPUTES that today bring people into the courts reflect all too clearly the society in which they arise. A striking example of this can be found in the extent to which the litigation currently glutting our courts mirrors our increasing dependence upon the products of American research and technology. I speak of product liability litigation. We have integrated into our daily routines such things as television, powerful automobiles, jet aircraft travel and a variety of gadgetry without having the slightest conception of how most of them function. If one of these space-age miracles runs amuck, we simply call the repairman. However, if an injury results from the use of one of these products, whether it be an automobile, airplane or an underarm deodorant, Americans go to court and ask twelve laymen to decide exactly what went wrong. As Samuel Butler somewhat dourly observed, the public does not know enough to be experts, yet knows enough to decide between them.

The refinements of contemporary science have made the products of our daily use increasingly complex so that even the highly qualified scientist has difficulty in communicating with his fellow scientists concerning their internal operation. The chief reason for this is that the domain of science has countless subdivisions and each subdivision has its own lexicon. The result is what someone has called "*the barbarism of specialization*." The very science that has made possible the creation of this wonderful and bountiful productivity is erecting a "Tower of Babel" whose builders do not speak one another's language. The lawyer, for purposes of his own understanding and for presentation of an understandable case to a lay judge and jury, must translate the knowledge of the most exotic scientist to the simplest, most easily understood language. The lawyer's need to simplify eliminates many of the fine distinctions for which scientists develop their own special terminology.

This need to simplify and to clarify on the part of the lawyer makes him very unpopular with the scientists with whom he must now work. The tentative nature of many of the scientists' conclusions are a real problem for the lawyer. For a jury, the lawyer wants a simple story, told as the rock-bottomed "gospel truth." On the other hand, to the man of science, all scientific findings are only tentative truth, good until further notice, to be immediately discarded when some other expert develops another

---

† B.A., West Virginia University; LL.B., West Virginia University School of Law; Member of American and West Virginia State Bar Associations; Member and Director of Aviation Committee, Federal Bar Association.

theory that perhaps explains a few more of the many mysteries of science.

The manufacturers of aircraft who have been sued in a products liability case now find themselves in an extremely difficult position. Convinced that their's is "the side of the angels," they are faced with a plaintiff's counsel who most likely will come into court and show that his client bought his ticket, boarded the aircraft, securely fastened his seat belt and then was either grievously injured or killed. Such an appeal to a jury of twelve laymen is particularly appealing and one which can be difficult to counter, both legally and emotionally. If the plaintiff has sued both the manufacturer and the airlines, he does not care who pays the recovery and is usually quite happy to see the airline point the finger of guilt at the manufacturer and vice versa. These interdefendant battles greatly benefit the plaintiff's case and usually leave both defendants in a worsened position.

It is clear that both the manufacturer's counsel and the airline's counsel must be able to simply explain the mass of highly complex engineering data, the aerodynamic principles, the quiet involved physics and yes, even the law, to both the judge and jury in such a way as to defeat the cacophony of Babel which has in the past, to some extent, prevented their effectively demonstrating the merits of their case.

The Bible relates that the "*gift of tongues*" was bestowed through divine intervention. Today, faced with strict liability in tort, both the manufacturer and the airline must not only give up hope of any sort of divine intervention, but also they must give up all thought of intervention by either the legislature or the judiciary. Salvation lies only in the defense lawyer's ability to clearly, simply and effectively present the case to the trier of fact.

In the middle of the 1950's, we witnessed an astronomical rise in medical malpractice suits.<sup>1</sup> Between the years 1935 and 1955 there was a total of 605 reported cases of medical professional liability in the United States.<sup>2</sup> In the year 1959, 6000 physicians were sued for medical malpractice.<sup>3</sup> It soon became patently obvious that the physician-lawyer, or the lawyer with a broad scientific background was desperately needed to handle this rather startling assault upon the medical profession.

The situation faced today by the aircraft industry is clearly analogous to that of the medical profession. There is today a great need for the aviation attorney, or the attorney who is soundly based in engineering principles, an attorney who can effectively bridge the gap between the technical and the vernacular for the jury and overcome the presumption of guilt that is now the spectre facing manufacturers in general and the aircraft industry specifically.

## II. DEVELOPMENT OF PRODUCTS LIABILITY LAW

Today, as since its inception, the primary goal of products liability

---

<sup>1</sup> Comment, *Emergency Medical Treatment*, 10 WM. & MARY L. REV. 956 (1969).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

law has been the allocation of costs between the manufacturer and the consumer for injuries caused by defective products. Legal theories have been devised to effect this allocation and the creativity of the legal profession in devising means to hasten a change in the state of the law is borne witness to the movement of the doctrine of *caveat emptor*<sup>4</sup> to that of negligence,<sup>5</sup> breach of warranty—express or implied<sup>6</sup> and finally to that of strict liability in tort in little less than a century.<sup>7</sup>

One of the primary tenets at common law is that losses should be borne by the individual incurring them, unless there is some valid reason for shifting them from one to another.<sup>8</sup> This was the doctrine of *caveat emptor* or "let the buyer beware." Modern products liability law, however, proclaimed the death of the doctrine of *caveat emptor* and the economic background that it once reflected. The disappearance of the American frontier and the almost total development of this nation's resources, has seriously weakened this doctrine. Initially it was felt that *caveat emptor* was particularly adapted to the dynamic and expanding civilization of the 19th Century—the nation was in a state of flux, highly dangerous and speculative enterprises which involved high degree of risk to others were clearly indispensable to "the industrial and commercial development of the economy of the new and expanding nation."<sup>9</sup> It was considered that the interests of those injured by these budding industries must give way to them, and that too great a burden must not be placed upon them lest this industrial advance be stultified.

The theory of negligence was the judiciary's first departure from that doctrine and one that caused considerable consternation among the manufacturing class of the day. Under it, the manufacturer was, and is today, required to exercise reasonable care to assure that the product he sells does no harm to the buyer.<sup>10</sup> It was this imposition of a "duty of care"

<sup>4</sup> See generally, W. PROSSER, *LAW OF TORTS* 648 (3d ed. 1964).

<sup>5</sup> See generally, Winfield, *The History of Negligence in the Law of Torts*, 42 L.W. REV. 184 (1926); Miles on *Treatment of Negligence*, Digest of English Civil Law 545 (1910); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1008; Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

<sup>6</sup> See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>7</sup> The landmark English case from which the doctrine of strict liability in tort developed was *Rylands v. Fletcher*, 3 H & C 774, 159 Eng. Rat. 737 (1865), reversed in *Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd* in *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). The first United States jurisdiction to fully accept the doctrine was California. *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897 (1963).

<sup>8</sup> See W. Prosser, *LAW OF TORTS* § 53 (3d ed. 1964).

<sup>9</sup> W. Prosser, *LAW OF TORTS* 523 (3d ed. 1964).

<sup>10</sup> For a full study of the development of this departure see *Langridge v. Levy*, 2 M. & W. 519, 150 Eng. Rep. 863 (1837), *aff'd* in 4 M. & W. 338, 150 Eng. Rep. 1458; *Thomas v. Winchester*, 6 N.Y. 397 (1852); *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S.E. 118 (1852); *Norton v. Sewall*, 106 Mass. 143 (1870); *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870); *Heaven v. Pender*, 11 Q.B.D. 503 (1882); *Devlin v. Smith*, 89 N.Y. 470 (1882); *Schubert v. J.R. Clark Co.*, 49 Minn. 331, 51 N.W. 1103 (1892); *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N.W. 418 (1894); *Lewis v. Terry*, 111 Cal. 39, 43 P. 398 (1896); *Huset v. J.I. Case Threshing Mach. Co.*, 20 F. 865 (1903); *Tomlinson v. Armour & Co.*, 75 N.J.L. 748, 70 A. 314 (1908); *Welhausen v. Charles Parker Co.*, 83 Conn. 231, 76 A. 271 (1910); *Roberts v. Anheuser-Busch Brewing Ass'n*, 211 Mass. 499, 98 N.E. 95 (1912); *Boyd v. Coca Cola Bottling Co.*, 132 Tenn. 23, 177 S.W. 80 (1915); *Jackson Coca Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791 (1914); *Ketterer v. Armour & Co.*, 247 F. 921 (1917); *Herman v. Markham Air Rifle Co.*,

upon the seller that represented a radical departure from *caveat emptor*. The contractual relationship between the seller and the buyer constituted the rationale behind it; and this "duty of care" was subsequently expanded to embrace products sold that were "inherently dangerous." *MacPherson v. Buick Motor Co.*,<sup>11</sup> further opened the floodgates by defining "inherently dangerous"<sup>12</sup> as any product that was negligently made, thereby creating in the manufacturer an obligation to exercise the care of a reasonable man<sup>13</sup> to ensure his products caused no harm. Further, it held that the manufacturer of a chattel was liable for negligence resulting in injury to an ultimate purchaser with whom the manufacturer had no privity of contract,<sup>14</sup> if the product was likely to cause injury if made negligently.<sup>15</sup> Quite rationally, the court had held that if the seller exercises the required standard of care, the buyer will be unable to recover under the negligence theory.<sup>16</sup>

The next step in the progression toward the ever-increasing liability of the manufacturer was the development of warranty law. A warranty, unlike negligence, is not a fault concept. It is, rather, a contractual agreement and any affirmation of fact or promise or description of the goods or model or sample will create an express warranty. Warranties, although part of the common law,<sup>17</sup> were first codified in the Uniform Sales Act.<sup>18</sup> Section 15(2) of the Uniform Sales Act,<sup>19</sup> and its successor in interest, Section 2.314 of the Uniform Commercial Code,<sup>20</sup> contained the oft-litigated warranty of merchantability,<sup>21</sup> which unless specifically excluded, is implicit in every contract.<sup>22</sup> This implied warranty of merchantability provides that in every sale by a merchant who deals in goods of the specific kind, there is an implied warranty that such goods are merchantable. For the product to be merchantable, it must at least

258 F. 475 (1918); *Drury v. Armour & Co.*, 140 Ark. 371, 216 S.W. 40 (1919); *Minutilla v. Providence Ice Cream Co.*, 50 R.I. 43, 144 A. 884 (1929); *Rogers v. White Metal Rolling & Stamping Corp.*, 249 F.2d 262 (1957), *cert. denied*, 356 U.S. 936 (1957); *Lentz v. Hayes Freight Lines*, 302 F.2d 67 (1962).

<sup>11</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>12</sup> *Id.* at 1053.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Warranties, although part of the common law, see *Rogers & Co. v. Niles & Co.*, 11 Ohio St. 48 (1960), were codified first in the UNIFORM SALES ACT. Section 15(2) of the Uniform Sales Act provided: "Where the goods are brought by description from a seller who deals in goods of that description . . . there is an implied warranty that the good shall be of merchantable quality. See § 76 for definitions of "buyer" and "seller" as they are used in the act.

UNIFORM SALES ACT § 15(2) and its successor in interest, UNIFORM COMMERCIAL CODE, § 2-314 contained the oft-litigated warranty of merchantability, which unless specifically excluded, is implicit in every contract. This warranty of merchantability provides that the goods are fit and usable for the general purpose for which they shall have been sold. An action brought under this provision of the UCC requires that there be a privity of contract which extends to the buyer's family and guests, UNIFORM COMMERCIAL CODE § B-CVR. Further, the warrantor must be given reasonable notice of a breach of implied warranty, § 2-607. The Code also allows the seller to exclude or modify all warranties, including the warranty of merchantability, by giving appropriate notice, § 2-316.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

pass without objection in the trade under the contract description. In the case of fungible goods, it must be of fair to average quality within the parameters of the description; be fit for the ordinary purposes for which such goods are normally used; run, within the variation permitted by the agreement in question, of even kind, quality and quantity within each unit and among all of the units involved; be adequately contained according to the terms of the agreement; and conform to any promises or affirmations of fact made on the label of the packaging.

Perhaps the most important test of the above is "fit for the ordinary purposes for which such goods are normally used" and it is the failure to live up to this promise that is the usual claim in a warranty of merchantability suit. As is the case in all implied warranty causes of action, it is of no import that the seller himself did not know of the specific defect or that he could not have discovered it. Implied warranties are not based upon any theory of negligence, as noted before, but upon absolute liability which is imposed upon certain sellers.

More germane to the discussion at hand is the implied warranty of fitness for a particular purpose, which is set forth in the Uniform Commercial Code, Section 2-315. This warranty arises whenever any seller, whether he be merchant or otherwise, has reason to know the particular purpose for which the product is to be used and that the purchaser is relying on the seller's skill and judgment to select suitable goods. The comment to the section states, "A particular purpose differs from the ordinary purpose for which goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business, whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability. . . ."<sup>23</sup>

An action brought under either of these provisions of the Uniform Commercial Code requires that there be a privity of contract, which extends to the buyer's family and guests of the buyer, and that the warrantor be given reasonable notice of a breach of implied warranty.<sup>24</sup> The Code, in an attempt to place the buyer and seller on a somewhat equal legal footing, allows the seller to exclude or modify all warranties, including the warranty of merchantability and fitness for purpose.<sup>25</sup>

The warranty of merchantability can be disclaimed or modified only by mentioning merchantability and, in the case of a writing, making the disclaimer clearly conspicuous. Section 1-201(10) of the Uniform Commercial Code states:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color.

I might add parenthetically that it is the court and not the jury that decides any fact question as to the conspicuousness of the disclaimer. The

---

<sup>23</sup> UNIFORM COMMERCIAL CODE § 2-315, Comment (2).

<sup>24</sup> UNIFORM COMMERCIAL CODE § 2-318.

<sup>25</sup> UNIFORM COMMERCIAL CODE § 2-316.

warranty of fitness for purpose may likewise be disclaimed also by the inclusion of a conspicuous writing which states in essence that there are no warranties which extend beyond the description on the face of the contract in question.<sup>26</sup>

Judicial interpretation of both sections of the Uniform Commercial Code has considerably served to expand their original scope. Privity of contract has in recent years, for example, broken down considerably and some courts have permitted recovery on the theory that a warranty runs with the chattel<sup>27</sup> or that a manufacturer's advertisements create express warranties directly to consumers.<sup>28</sup> Still other courts have indicated that notice requirements and disclaimers are inapplicable to products liability actions for breach of implied warranty.<sup>29</sup>

It was with this state of the law as a backdrop that the doctrine of strict liability made its appearance upon the American judicial scene. The first judicial decision to suggest the theory of strict liability in tort in this country, then denominated as "absolute liability," was the concurring opinion of then Justice Traynor in *Escola v. Coca Cola Bottling Co.*<sup>30</sup> This was some seventeen years prior to Professor Prosser's espousal of the doctrine of strict liability in tort in his article "*The Assault Upon The Citadel*."<sup>31</sup> It would be 20 years before Justice Traynor would find a vehicle with which to further advance his espousal of this doctrine. In his majority opinion for *Greenman v. Yuba Power Products, Inc.*,<sup>32</sup> the court held that "a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."<sup>33</sup>

Today, in a products liability case, tried under the theory of strict liability in tort, the plaintiff must establish the defendant's relationship with the product, that the injury or damage resulted from a defective condition of that product, which is an unreasonably dangerous one, and which existed at the time the product left the manufacturer's or seller's control.<sup>34</sup> The theory allows a purchaser to recover from all sellers in the

<sup>26</sup> *Id.*

<sup>27</sup> *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 S. 305 (1937).

<sup>28</sup> *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 337 P.2d 897 (1963).

<sup>29</sup> *Ruderman v. Warner Lambert Pharmaceutical Co.*, 23 Conn. Supp. 416, 184 A.2d 63 (1962).

<sup>30</sup> In *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), Justice Traynor stated in his concurring opinion: "In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings . . . even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazard to life and health inherent in defective products that reach the market."

<sup>31</sup> 69 YALE L.J. 1099 (1960).

<sup>32</sup> 59 Cal. 2d 57, 377 P.2d 897 (1962). Chief Justice Traynor in refusing to apply the traditional warranty concept stated: "Although in these cases strict liability has usually been based on a theory of an express or implied warranty running from the manufacturer to the plaintiff the abandonment of the requirement of a contract between them the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make it clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."

<sup>33</sup> *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900 (1962).

<sup>34</sup> See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962); Vander-

distributive chain without regard to privity of contract. It also allows an injured person who was not a purchaser to recover from the same individuals.<sup>35</sup> Thus, this doctrine is a dynamic and frighteningly ever-expanding one.<sup>35A</sup> In a recent appellate court decision, it was suggested

mark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168 (1964). Seely v. White Motor Co., 63 Cal. 2d 1, 403 P.2d 145 (1965); Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Santor v. A & M Karagheussian Inc., 44 N.J. 52, 207 A.2d 305 (1965). See generally Prosser, *The Fall of The Citadel*, 50 MINN. L. REV. 791 (1966).

<sup>35</sup> 33 A.L.R.3d 415.

<sup>35a</sup> *ALABAMA Is Not A Strict Liability Jurisdiction.* The privity requirement is still applied by the Alabama courts in negligent suits against manufacturers and sellers of products alleged to have caused personal injury or property damage, but the inherently dangerous and imminently dangerous product exceptions to the privity of rule are recognized in this state. *Defore v. Bourjois, Inc.*, 268 Ala. 228, 105 S.2d 846 (1958); *Greyhound Corporation v. Brown*, 269 Ala. 520, 113 S.2d 916 (1959); *Remington Arms Company, Inc. v. Wilkins*, 387 F.2d 48 (5th Cir. 1967). Alabama courts still view privity as essential to recovery for breach of warranty. *Collins Baking Company v. Savage*, 227 Ala. 408, 150 S. 336 (1933); *Bilitstein v. Ford Motor Company*, 228 F.2d 738 (5th Cir. 1961). The food and beverage exception to the privity requirement is also recognized in Alabama. *Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 S. 64 (1921).

*ALASKA Is A Strict Liability Jurisdiction.* The Supreme Court of Alaska recently expressly embraced the doctrine of strict liability in tort in the area of products liability. Both sellers and manufacturers are covered. *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244 (Alaska 1969).

*ARIZONA Is A Strict Liability Jurisdiction.* The Restatement formulation of strict liability in tort, § 402A, has been embraced to cover sellers and manufacturers. By ample warning, however, a seller can exonerate himself. *O. S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); *Eck v. Helene Curtiss Industries, Inc.*, 9 Ariz. App. 426, 453 P.2d 366 (1969); plus several other recent Arizona Appellate cases. Strict liability recovery has even been extended to a bystander. *Caruth v. Mariani*, 463 P.2d 83 (Ariz. App. 1970). Strict liability protection has been denied to a plaintiff who voluntarily exposed himself to a known obvious danger. *Maas v. Dreher*, 460 P.2d 191 (Ariz. App. 1969).

*ARKANSAS Is Not A Strict Liability Jurisdiction.* The Arkansas courts have held that the requirement of privity in negligence actions is inapplicable only in actions against manufacturers or sellers of imminently dangerous or inherently dangerous products and in actions where the injury was caused by an unwholesome fool product. *Reynolds v. Manley*, 223 Ark. 314, 365 S.W.2d 714 (1954); *Chappman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Drury v. Armour & Co.*, 140 Ark. 371, 216 S.W. 40 (1919). The privity requirement has been held applicable in actions in which recovery for a product-cause injury is sought on the ground of breach of warranty. *Green v. Equitable Powder Mfg. Co.*, 95 F. Supp. 127 (W.D. Ark. 1951); but recently the Arkansas Supreme Court has reserved the right to review the entire matter of privity in all cases of breach of warranty. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964). The subject of strict liability was recently raised in *Flippo v. Mode O'Day Frock Shops of Hollywood*, 449 S.W.2d 692 (Ark. 1970), and while § 402A of the Restatement was quoted and distinguished—not rejected out of hand—the supreme court still appeared unready to embrace the doctrine, even on more appropriate facts.

*CALIFORNIA Is A Strict Liability Jurisdiction.* California has judicially embraced the doctrine of strict liability in tort in the area of product liability. *Greeman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962); *Vandermark v. Ford Motor Company*, 61 Cal. 2d 256, 391 P.2d 168 (1964); *Seely v. White Motor Company*, 63 Cal. 2d 1, 403 P.2d 145 (1965). The California lower courts have considered quite a number of recent cases in which they have construed the strict liability doctrine very liberally. A product has been deemed "defective" merely because the seller did not give a warning when such omission was unreasonably dangerous. *Ghera v. Ford Motor Company*, 55 Cal. Rptr. 94 (1966). See also *Gutierrez v. San Francisco*, 52 Cal. Rptr. 592 (1966); *Martinez v. Nichols*, 52 Cal. Rptr. 842 (1966); *Barth v. B. F. Goodrich Tire Co.*, 71 Cal. Rptr. 306 (1968); *Casetta v. U. S. Rubber*, 67 Cal. Rptr. 645 (1968). Exception to the strict liability rule has been acknowledged where products incapable of being made safe for intended use are properly prepared and marketed. *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398 (1967).

*COLORADO—The Status of the Law of Colorado As to Strict Liability is Presently in Doubt.* No state court decisions have faced the issue, but at least two federal courts have construed Colorado law to impose strict liability in tort in products liability cases. *Newton v. Admiral Corporation*, 280 F. Supp. 202 (D. Colo. 1967) and *Schenfeld v. Norton Co.*, 391 F.2d 420 (10th Cir. 1968). No Colorado state court decisions confront the issue of privity in negligence actions either. An earlier 10th circuit court case did recognize the inherently dangerous exception to the privity requirement in a negligence case. *White v. Rose*, 241 F.2d 94 (10th Cir. 1957).



**CONNECTICUT Is a Strict Liability Jurisdiction.** The courts have recently judicially embraced the doctrine of strict liability in tort. *Garthwart v. Burgio*, 153 Conn. 290, 216 A.2d 189 (1965); *Rossignal v. Danbury School of Aeronautics*, 154 Conn. 549, 227 A.2d 418 (1967); *De Felice v. Ford Motor Company*, 28 Conn. Supp. 164, 255 A.2d 636 (Super. Ct. 1969); *Guglielmo v. Klausner Supply Co.*, 158 Conn. 308, 259 A.2d 608 (1969). This development confirmed the earlier prediction of a federal district court. *Chairaluce v. The Stanley Warner Management Corp.*, 236 F. Supp. 385 (D. Conn. 1964). Recently a federal court of appeals read into Connecticut Law the "unavoidably unsafe" exception to strict tort liability, provided the manufacturer gives sufficient warning of the unavoidably unsafe condition. *Basko v. Sterling Drug, Inc.*, 416 F.2d 417 (2d Cir. 1969).

**DELAWARE Is Not a Strict Liability Jurisdiction.** The Delaware Supreme Court has explicitly refused to embrace the doctrine of strict liability in tort. *Ciociola v. Delaware Coca Cola Bottling Company*, 53 Del. 477, 172 A.2d 252 (1961). A very recent Delaware superior court decision appears to credit the Restatement formulation of strict liability with some legitimacy but seems to view this doctrine as essentially the equivalent of the imminently dangerous exception to the privity requirement of negligence and warranty actions. *Kates v. Pepsi Cola Bottling Co.*, 263 A.2d 308 (Super. Ct. 1970). The Delaware decisions have recognized both the imminently dangerous and inherently dangerous product exceptions to the privity requirement. *Behringer v. William Gretz Brewing Co.*, 53 Del. 365, 169 A.2d 249 (1961). Privity is also required in a breach of warranty action in this state. See *Behringer v. William Gretz Brewing Co.*, *supra*. The jurisdiction does not follow the food-and-beverage to the privity requirement.

**DISTRICT OF COLUMBIA Is a Strict Liability Jurisdiction.** All privity requirements in products liability actions were struck and strict liability imposed on sellers and manufacturers alike in the very recent case *Cottom v. McGuire Funeral Services, Inc.*, 262 A.2d 807 (1970).

**FLORIDA—The Status of the Law As to Strict Liability Is Presently in Doubt.** The Florida Supreme Court has never espoused the doctrine, but the Florida Court of Appeals for the Third District recently rather casually applied the doctrine of strict tort liability (although it still ultimately rendered judgment against the plaintiff). *Royal v. Black & Decker Manufacturing Co.*, 203 So. 2d 307 (Fla. App. 1967). Florida courts have abolished privity as a necessity for maintaining an action on an implied warranty in *Continental Copper & Steel v. Cornelius, Inc.*, 104 So. 2d 40 (Fla. App. 1958). The privity requirement in negligence actions was abolished in the case of *William v. Caterpillar Tractor Co.*, 149 So. 2d 898 (Fla. App. 1963); See also *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. Sup. Ct. 1963).

**GEORGIA Is Not a Strict Liability Jurisdiction.** The United States Court of Appeals for the Fifth Circuit so held in *Whitaker v. Harvel-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969). This jurisdiction had allowed an action based upon an implied warranty to be maintained in the absence of privity between the plaintiff and the defendant. *Wood v. Hubb Motor Co.*, 110 Ga. App. 101, 137 S.E.2d 674 (1964). An earlier Georgia decision indicated that the privity requirement no longer had vitality in that jurisdiction so far as liability based on a negligence theory was concerned. *Eades v. Spencer-Adams Paint Co.*, 82 Ga. App. 123, 60 S.E.2d 543 (1950).

**HAWAII Is Not a Strict Liability Jurisdiction.** Hawaii courts have held that privity is not necessary in a suit based upon an implied warranty in product liability cases. *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

**IDAHO Is Not a Strict Liability Jurisdiction.** Privity has been required in a product caused injury case based upon a negligence theory in Idaho. However, the standard imminently dangerous and inherently dangerous products exceptions to the privity requirement are recognized. *Abercrombie v. Union Portland Cement Co.*, 35 Idaho 231, 205 P. 1118 (1922). Probably the food and beverage exception to the privity requirement is also followed in this jurisdiction, although no cases directly in point have been reported.

**ILLINOIS Is a Strict Liability Jurisdiction.** The Illinois Supreme Court in a recent case of *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.W. 182 (1965), has adopted the strict liability in tort doctrine imposing liability without fault upon the manufacturer. See also *Wright v. Massey-Harris*, 68 Ill. App. 70, 215 N.E.2d 465 (1966); *People ex rel. General Motors Corp. v. Bua*, 37 Ill. 2d 180, 226 N.E.2d 6 (1967); *Fanning v. LeMay*, 38 Ill. 2d 209, 230 N.E.2d 182 (1967); *Sweeney v. Matthews*, 94 Ill. App. 6, 236 N.E.2d 439 (1968); *Wallinger v. Martin Stamping & Stove Co.*, 93 Ill. App. 437, 236 N.E.2d 755 (1968); *Dunham v. Vaughn & Bushnell*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

**INDIANA Is a Strict Liability Jurisdiction.** Both the imminently dangerous and inherently dangerous product exceptions to the privity requirements in the suits based on a negligence theory were recognized in this jurisdiction. *Gaihermer v. Virginia Carolina Chemical Corp.*, 241 F.2d 836 (7th Cir. 1957); *Holland Furnace Co. v. Nauracha*, 105 Ind. App. 574, 14 N.E.2d 339 (1938). The food and beverage exception to the privity requirement was also recognized in the Indiana court. *Coca Cola Bottling Works v. Williams*, 111 Ind. App. 502, 37 N.E.2d 702 (1941). On 26 May 1970, however, an Indiana appellate court expressly adopted § 402A. *Cornette v. Searjeant Metal Products, Inc.*, 258 N.E.2d 652 (App. Ct. Ind. 1970).

Questions as to the law of this jurisdiction have been raised by two recent federal court decisions, declaring the strict liability-in-tort doctrine applicable. *Gagley v. Armstrong Rubber Co.*, 344 F.2d 245 (7th Cir. 1965); *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965). Both of these decisions noted and followed the RESTATEMENT (SECOND) OF TORTS § 402A. The

Indiana Supreme Court has never applied the strict doctrine of liability in tort, however.

**IOWA Is a Strict Liability Jurisdiction.** The Supreme Court of Iowa for the first time expressly so held, embracing § 402A and the reasoning of several states, in *Hawkeye-Security Insurance Co. v. Ford Motor Co.*, 174 N.W.2d 672 (1970). The Iowa courts had previously waived privity requirements for actions based on implied warranty in *State Farm Mutual Automobile Insurance Co. v. Anderson-Webber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961).

**KANSAS Is Not a Strict Liability Jurisdiction.** The Kansas decisions recognize both the imminently dangerous and inherently dangerous product exceptions to the general rule of privity in negligence actions. *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950); *Stevens v. Allis Chalmers Mfg. Co.*, 151 Kansas 638, 100 P.2d 723 (1940). Kansas also supports the view that privity is not required in a negligence action for injury caused by an unwholesome food product. *Parks v. T. C. Yost Tie Co.*, 93 Kan. 334, 144 P. 202 (1914). Kansas courts have ruled that privity is not required in an action to recover for breach of an implied warranty where the warranty is "imposed by law" as a matter of public policy. *Rupp v. Norton Coca Cola Bottling Co.*, 187 Kan. 390, 357 P.2d 802 (1960). This seems to be, however, merely an extension of the food-and-beverage or intimate bodily use exception to the privity requirement, and not a general holding that a suit based on an implied warranty may be maintained in the absence of privity.

**KENTUCKY Is a Strict Liability Jurisdiction.** Kentucky courts have repudiated the general rule of manufacturers' non-liability for negligence in the absence of privity. *C. D. Herme, Inc. v. Tway Co.*, 294 S.W.2d 534 (Ky. 1956). More recently the Kentucky court of appeals has held that privity is not a pre-requisite to maintenance of an action for breach of an implied warranty in product liability cases, the court accepting the reasoning enunciated in *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 68, 161 A.2d 69 (1960). The Kentucky decision is *Dealers Transport Co., Inc. v. Battery Distributing Co., Inc.*, CCH Products Liability Rptr. § 5406 (Ky. App. June 4, 1965), and in a modified opinion delivered May 13, 1966, CCH Products Liability Rptr. § 5562 (Ky. App. 1966), the Kentucky court of appeals embraced an implied strict liability in tort. See also *Allen v. Coca Cola Bottling Co.*, 403 S.W.2d 20 (Ky. 1966) and *Kroeger v. Bowman*, 411 S.W.2d 339 (1967).

**LOUISIANA Is a Strict Liability Jurisdiction.** However, the formulation of the strict liability doctrine by the Louisiana Courts is somewhat unique. They extend strict liability if the user is without fault (a typical element of the strict liability of cause of action) and if the kind of injury sustained could reasonably have been an anticipated result of the established defect. *Meche v. Farmers Dryer & Storage Co.*, 193 So. 2d 807 (La. App. 1967); *Arnold v. U. S. Rubber*, 203 So. 2d 764 (La. App. 1967). See also *Dean v. General Motors Corp.*, 301 F. Supp. 187 (E.D. La. 1969) (applying Louisiana law) and *Soileau v. Nicklos Drilling Co.*, 302 F. Supp. 119 (W.D. La. 1969).

The Louisiana decisions have supported the inherently dangerous and imminently dangerous product exceptions to the privity requirements. *Frazer v. Ayres*, 27 So. 2d 754 (La. App. 1945); *Moore v. Jefferson Distilling and Denaturing Co.*, 169 La. 1156, 126 So. 691 (1930). The food and beverage exception to the privity requirements has also been recognized in this jurisdiction. *Auzenne v. Gulf Public Service Co.*, 181 So. 54 (La. App. 1938); *Lartigue v. F. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963). In breach of warranty cases the Louisiana courts have held privity indispensable to recovery. *Strother v. Villere Coal Co.*, 15 So. 2d 383 (La. App. 1954).

**MAINE Is Not a Strict Liability Jurisdiction.** In products liability cases based on negligence, the Maine courts adhere to the privity requirement drawing exceptions thereto in cases involving injuries caused by inherently dangerous products and unwholesome food products. *Pelletier v. DuPont*, 124 Me. 269, 128 A. 186 (1923); *Flaherty v. Helfont*, 123 Me. 134, 122 A. 180 (1923). The Maine courts also require privity on breach of warranty cases. See *Pelletier, supra*.

**MARYLAND Is Not Yet a Strict Liability Jurisdiction.** However, the court of appeals of Maryland has twice discussed the subject of strict liability and refrained from espousing the doctrine only because it did not properly apply to the presented facts. The court has not criticized the doctrine and appears ready to embrace it at such time as an appropriate context arises. *Telak v. Maszczenski*, 248 Md. 476, 237 A.2d 434 (1968); *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1965).

There is authority in Maryland that the privity requirement is not applicable in negligence suits against manufacturers or sellers of products allegedly causing injury. See *Babylon v. Scruton*, 215 Md. 299, 138 A.2d 375 (1958). The law has not been clear as to this point, however, since other authority has indicated that the state embraces the imminently dangerous and inherently dangerous product exceptions to the privity requirement. *Especo Distilling Corp. v. Owing Mills Distillery, Inc.*, 43 F. Supp. 380 (D. Md. 1942). Privity is still required in actions based upon breach of warranty. *Popal v. Hochschild, Kohn & Co.*, 180 Md. 389, 24 A.2d 783 (1942).

**MASSACHUSETTS Is Not a Strict Liability Jurisdiction.** This jurisdiction in *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946), repudiated the privity requirement in all negligence actions in that jurisdiction. An injured plaintiff must no longer show that he comes within one of the recognized exceptions to the privity requirement when his action is based upon negligence theory. Massachusetts courts still require privity, however, in breach of warranty cases. *Kennedy v. Brockelman Bros., Inc.*, 334 Mass. 225, 134 N.E.2d 747 (1956); *Jacquot v. William Filene's Sons Co.*, 337 Mass. 312, 149 N.E.2d 635 (1958).

**MICHIGAN Is Not a Strict Liability Jurisdiction.** Michigan has abandoned the privity rule in negligence actions growing out of product caused injuries. *Spence v. Three Rivers Builders &*

Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958). The Michigan decision also holds that privity is not required in actions based upon breach of an implied warranty. See *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, *supra*; *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960). The courts have held that privity is not required in actions based upon breach of implied warranty. *Hills v. Harbor Steel & Supply Corp.*, 374 Mich. 194, 132 N.W.2d 54 (1965); *Piercefield v. Remington Arms Co., Inc.*, 375 Mich. 85, 133 N.W.2d 129 (1965).

**MINNESOTA Is a Strict Liability Jurisdiction.** The Minnesota Supreme Court has now adopted specifically and completely the doctrine of strict liability in tort expressed in § 402A. In *MacCormack v. Handscraft Co.*, 154 N.W.2d 488 (1967), the court reviewed its past partial encroachments on strict liability and the growing trend for this doctrine and ruled that Minnesota would follow it as well, based on "sound public policy consideration." See also *Kerr v. Corning Glass Works*, 169 N.W.2d 587 (1969). In *Magnuson v. Rupp Mfg., Inc.*, 171 N.W.2d 201 (1969), the court affirmed strict liability theory but held that awareness of the defect by the user forecloses strict liability recovery.

**MISSISSIPPI Is a Strict Liability Jurisdiction.** The Supreme Court of Mississippi expressly overruled prior cases which required privity between a consumer and manufacturer to sustain a suit by the former against the latter, and embraced § 402A of the Restatement in *State Stove Mfg. Co. v. Hodges*, 180 So. 2d 113 (Miss. 1966). See also *Ford Motor Co. v. Dees*, 223 So. 2d 638 (Miss. 1969); *Walton v. Chrysler Motor Corp.*, 229 So. 2d 568 (Miss. 1969).

**MISSOURI Is Not a Strict Liability Jurisdiction.** However, the Missouri Courts do allow an action based on an implied warranty of fitness in the absence of privity. *Morrow v. Wolerac Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); *Williams v. Ford Motor Co.*, 411 S.W.2d 443 (Mo. 1966); *Ross v. Phillip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964). Earlier decisions have supported both the inherently dangerous and the imminently dangerous product exceptions to privity requirement as well as food and beverage exceptions. The supreme court in *Stevens v. Durbin-Burco, Inc.*, 377 S.W.2d 343 (Mo. 1964) indicates that there is still a privity requirement in negligence cases in this jurisdiction unless the plaintiff can show he comes within one of the recognized exceptions. Recently, a federal court in Missouri has predicted in *Hacker v. Rector*, 250 F. Supp. 300 (W.D. Mo. 1966), that the Supreme Court of Missouri will expressly adopt strict liability as defined in § 402A of the Restatement, but the prophecy has not yet been fulfilled.

**MONTANA Is Not a Strict Liability Jurisdiction.** Montana is among the majority jurisdiction in requiring privity in suits based on warranty (express or implied) and in suits based on the negligence of the manufacturer or the seller. The standard imminently dangerous product exception is recognized. *Larson v. U. S. Rubber*, 163 F. Supp. 327 (D. Mont. 1958). The food exception has also been long accepted, allowing recovery on a strict liability theory. *Skelly v. John R. Daily Co.*, 56 Mont. 63, 181 P. 326 (1919); *Bolitho v. Safeway Stores*, 109 Mont. 213, 95 P.2d 443 (1938). Recently this exception was extended to drugs by the Court of Appeals for the Ninth Circuit in *Davis v. Weth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968).

**NEBRASKA Is Not a Strict Liability Jurisdiction.** Nebraska courts apply the general rule that privity is a pre-requisite to recovery in a suit based upon an express or implied warranty but recognize the imminently dangerous and inherently dangerous product exceptions to the privity requirements. *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960); *Colvin v. John Powell & Co., Inc.*, 1963 Neb. 112, 77 N.W.2d 900 (1956). Nebraska cases also set forth the food-and-beverage exception to the privity requirements, allowing recovery on an implied warranty theory. *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961).

**NEVADA Is Not a Strict Liability Jurisdiction.** Strict liability in tort has been rejected in Nevada. *Long v. Flannagan Warehouse Co.*, 79 Nev. 241, 382 P.2d 399 (1963). However, the Nevada Supreme Court has applied strict liability to the manufacture of a bottled beverage, and in that instance seemed to be moved by the broad appeal of strict liability doctrine generally. *Shoshone Coca Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966). Hence, perhaps the Nevada courts may soon apply the doctrine more liberally. Nevada permits recovery for negligence in an exceptional instance of imminently dangerous products. *Cosgriff Neon Co. v. Mattheus*, 78 Nev. 281, 371 P.2d 819 (1962).

**NEW HAMPSHIRE Is a Strict Liability Jurisdiction.** The Supreme Court of New Hampshire has recently adopted the doctrine of strict liability in tort in the area of products liability, citing the cases of several states and the Restatement. *Elliott v. LaChance*, 109 N.H. 481, 256 A.2d 153 (1969); *Buttrick v. Arthur Lessard & Sons, Inc.*, 260 A.2d 111 (N.H. 1969).

**NEW JERSEY Is a Strict Liability Jurisdiction.** New Jersey is the home of one of the leading cases in the strict liability field. *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1969). See also *Rosenau v. City of New Prospect*, 51 N.J. 130, 238 A.2d 169 (1968); *Neward v. Gimbel's Inc.*, 54 N.J. 585, 258 A.2d 697 (1960). The courts in this state have eliminated the requirement of privity in the product-caused injury cases and have gone on so far as to hold that the *Henningson* principles (no need for privity) were equally applicable where no personal injury had occurred and the sole claim was to recover the price paid for a defectively manufactured rug. *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). Contributory negligence, however, had been established to avail a defense to actions for strict liability. *Maiorino v. Weco Products*, 45 N.J. 570, 214 A.2d 18 (1965); *Cintrone v. Hartz*, 45 N.J. 434, 212 A.2d 769 (1965).

**NEW MEXICO Is Not a Strict Liability Jurisdiction.** The strict doctrine liability was im-

pliedly rejected in the case of *Phares v. Sandia Lumber Co.*, 62 N.M. 90, 305 P.2d 367 (1956). Subsequent products liability cases in this jurisdiction have proceeded as warranty actions. *Massey v. Beacon Supply Co.*, 70 N.M. 149, 371 P.2d 798 (1962); *Vitro Corp. of America v. Texas Vitriified Supply Co.*, 71 N.M. 95, 376 P.2d 41 (1962). However, apparently no products liability cases have arisen before the supreme court of New Mexico in the past eight years. This jurisdiction requires privity and product-caused injury cases and recognizes both the imminently and inherently dangerous product exceptions to the privity requirement. *Wood v. Sloan*, 20 N.M. 127, 148 P. 507 (1915). The food and beverage exception to the privity requirement is also followed. *Tafuya v. Las Cruces Coca Cola Bottling Co.*, 59 N.M. 43, 278 P.2d 575 (1955).

**NEW YORK Is a Strict Liability Jurisdiction.** The doctrine of strict liability has been embraced in New York. *Goldberg v. Colman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963). However, the strict liability action is not available to bystanders, since they are not contemplated users. *Berzon v. Don Allen Motors, Inc.*, 23 N.Y. App. Div. 2d 530, 256 N.Y.S.2d 643 (1965).

Earlier, New York had permitted recovery for express warranty without privity. *Randy Knit Wear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). Further, it permitted recovery upon the basis of implied warranty without privity as to some classes of plaintiffs. *Thomas v. Leary*, 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (1962). The food and beverage exception to the general privity requirement had also been applied in New York. *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

**NORTH CAROLINA Is Not a Strict Liability Jurisdiction.** North Carolina follows the rule requiring privity of contract between a manufacturer or seller in a party with a product-caused injury. The standard imminently and inherently dangerous product exceptions to the privity requirement are recognized in this jurisdiction. *Tyson v. Long Mfg. Co., Inc.*, 249 N.C. 557, 107 S.E.2d 170 (1959), and *Gwyn v. Lucky City Motors, Inc.*, 252 N.C. 123, 113 S.E.2d 302 (1960). A recent North Carolina case has held that privity is even required in food and beverage cases. *Terry v. Double Cola Bottling Co., Inc.*, 263 N.C. 1, 138 S.E.2d 753 (1964).

**NORTH DAKOTA Is Not a Strict Liability Jurisdiction.** A recent North Dakota Supreme Court decision held that a plaintiff in a product liability case may maintain an action against the manufacturer based upon an implied warranty in the absence of privity. *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965). The decision also eliminates the privity requirement in negligence actions.

**OHIO Is Not a Strict Liability Jurisdiction.** Before the recent case of *Lonzrick v. The Republic Steel Corp.*, 1 Ohio 2d 374, 205 N.E.2d 92 (1965), the courts of this jurisdiction had held an insured plaintiff in a products liability case could maintain an action based upon an express warranty without the showing of privity. *Rogers v. Toni Home Permanent Co.*, 167 Ohio 244, 147 N.E.2d 612 (1958). The *Lonzrick* opinion of the Court of Appeals of Cuyahoga County adhered to the strict liability in tort doctrine. In a 4-3 decision announced June 15, 1966, *Lonzrick v. Republic Steel Corp.*, 6 Ohio 2d 227, 218 N.E.2d 185 (1966), the Supreme Court of Ohio affirmed the court of appeals, but even the slender majority of supreme court did not expressly approve the doctrine of strict liability in tort. Instead, the supreme court majority based its decision upon the application of tort liability for implied warranty without privity. No subsequent cases have resurrected the issue.

Earlier Ohio cases based on a negligence theory require either privity or showing of the plaintiff's counts in one of the recognized exceptions, such as the imminently and inherently dangerous product exceptions. *White Sewing Machine Co. v. Feisel*, 28 Ohio App. 152, 162 N.E. 633 (1927); *Inglis v. American Motors Corp.*, 94 Ohio Law Abs. 438, 197 N.E.2d 921 (Ohio App. 1964). Ohio cases also support the food and beverage exception to the privity rule. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928). The courts have also required privity on suits based on implied warranty. *Wood v. General Electric Co.*, 159 Ohio State 273, 112 N.E.2d 8 (1953); *Inglis v. American Motors Corp.*, *supra*.

**OKLAHOMA Is a Strict Liability Jurisdiction.** The Supreme Court of Oklahoma has recently approved application of the doctrine of strict liability in tort to a manufacturer. *Marathon Battery Co. v. Kilpatrick*, CCH Prod. Lia. Rep. 5501 (1965). Earlier, the Oklahoma courts held that privity was not essential to recovery in a negligence action growing out of a product-caused injury where the product in question was either imminently or inherently dangerous. *Crane Co. v. Sears*, 168 Okla. 603, 35 P.2d 916 (1934); *Gosnell v. Zink*, 325 P.2d 965 (Okla. 1958). The standard food and beverage exception to the privity requirement was also recognized. *Cook v. Safeway Stores, Inc.*, 330 P.2d 375 (Okla. 1958).

**OREGON Is a Strict Liability Jurisdiction.** Previously, this jurisdiction had recognized the requirement of privity in negligence actions between the consumer and the manufacturer and also the standard exceptions to the privity requirement such as the imminently or inherently dangerous product exceptions. *Stout v. Madden*, 208 Ore. 294, 300 P.2d 461 (1956); *Wights v. Staff Jennings, Inc.*, 405 P.2d 624 (Ore. 1965). While in *Wights*, the Supreme Court of Oregon, in dicta, explicitly rejected strict liability theory as "proving too much," it expressly adopted and applied the RESTATEMENT OF TORTS § 402A view in *Heaton v. Ford Motor Co.*, 248 Oregon 467, 435 P.2d 806 (1967). See also *State ex rel Western Seed Production Corp. v. Campbell*, 250 Ore. 262, 442 P.2d 215 (1968). A federal district court decision, applying Oregon law, has even awarded strict

liability recovery for loss of property where the manufacturer and purchaser were in privity, in *Arrow Transportation Co. v. Fruehauf Corp.*, 289 F. Supp. 170 (D. Ore. 1968).

**PENNSYLVANIA Is a Strict Liability Jurisdiction.** The state of Pennsylvania adopted Section 402A of the Restatement explicitly, quoting the language of that section in the opinion, in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Thus, the Pennsylvania courts have codified their previous adoptions of individual elements of the concept of strict liability in tort as expressed in cases such as *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963) in *Caski v. Coca Cola Bottling Co.*, 373 Pa. 614, 96 A.2d 901 (1953). Voluntary use of a product known to be dangerous by the plaintiff has been recognized as a complete defense to strict liability. *Feraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966). For cases applying strict liability to sellers and distributors see *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968); and *LaGorga v. Kroger*, 275 F. Supp. 373 (1967).

**RHODE ISLAND—The Status of the Law in Rhode Island relative to Strict Tort Liability is Presently in Doubt.** A federal district court recently felt free to mold its own policy on the question and applied § 402A of the Restatement—predicting that the Supreme Court of Rhode Island would do likewise if faced with a proper case. *Klimos v. International Tel. & Tel. Corp.*, 297 F. Supp. 937 (O.R.I. 1969). The courts of Rhode Island have followed the rule requiring privity of contract between an injured plaintiff and a manufacturer or a seller in an action for product-caused injury, recognizing, however, the standard imminently and inherently dangerous products exceptions to the privity requirements. *S. C. Johnson & Co., Inc. v. Palieri*, 260 F.2d 88 (1st Cir. 1958); *Collett v. Page*, 44 R.I. 26, 114 A. 135 (1921). This state has abolished the privity requirement in the food and beverage cases by statute. R. I. GEN. LAWS ANN. § 2-315 (1960). Before this statute, the Rhode Island courts had held that, even in the food and beverage cases, an injured plaintiff could not maintain an action against the manufacturer without alleging privity. *Lombardi v. California Packing Sales Co.*, 83 R.I. 51, 112 A.2d 701 (1955).

**SOUTH CAROLINA Is Not a Strict Liability Jurisdiction.** The South Carolina decisions establish a requirement of privity in negligence actions arising out of product-caused injury cases, and it also recognizes imminently and inherently dangerous product exceptions to the privity requirement. When a suit is based on either an express or implied warranty, this jurisdiction requires privity between the plaintiff and the manufacturer. *Odom v. Ford Motor Co.*, 230 S.C. 320, 95 S.E.2d 601 (1956); *Beasley v. Ford Motor Co.*, 237 S.C. 506, 117 S.E.2d 863 (1961). The South Carolina decisions also support the food and beverage exceptions to the privity requirement. *Tate v. Mauldin*, 156 S.C. 392, 154 S.E. 431 (1930). A federal district court, applying South Carolina law, recently felt justified in generally banning the privity requirement in product liability actions in tort. *Hughes v. Kaiser Jeep*, 40 F.R.D. 89 (1966).

**SOUTH DAKOTA Is Not a Strict Liability Jurisdiction.** While the body of product liability law in this jurisdiction is not great, the cases support the privity requirement and recognize the imminently and inherently dangerous product exceptions to the privity requirement in negligence cases. *Whitehorn v. Nash-Finch Co.*, 67 S.D. 465, 293 N.W. 859 (1940); *Gustafson v. Gate City Coop. Creamery*, 80 S.D. 430, 126 N.W.2d 121 (1964). This state also adheres to the standard food and beverage exception to the privity requirement. *Whitehorn v. Nash-Finch Co.*, *supra*. A federal court, applying South Dakota law, recently speculated that the South Dakota Supreme Court would turn to the Restatement should the topic of strict liability arise. *Yarrow v. Sterling Drug, Inc.*, 263 F. Supp. 159 (D.S.D. 1967). However, in that case the products involved were drugs, and hence the factual context of the decision could possibly be absorbed within the food and beverage exception to the privity requirement.

**TENNESSEE Is a Strict Liability Jurisdiction.** The Supreme Court of Tennessee first indicated, in dicta, a favorable inclination toward the doctrine of strict products liability in *Ford Motor Co. v. Lonon*, 398 S.W.2d 240 (Tenn. 1966). Later, a federal district court cataloged a buyer's potential grounds for recovery against a manufacturer as:

- (a) negligence;
- (b) breach of warranty, with privity;
- (c) breach of implied warranty without privity (under UCC)
- (d) misrepresentation; and
- (e) strict liability.

The federal court felt convinced that the dicta of *Lonon* would be applied in future decisions. *Lee v. Sears Roebuck & Co.*, 262 F. Supp. 232 (E.D. Tenn. 1966). The Supreme Court of Tennessee made good its prediction holding for the plaintiff on the grounds of strict liability as outlined in § 402A of the Restatement in *Olney v. Beamon Bottling Co.*, 418 S.W.2d 430 (Tenn. 1967).

**TEXAS Is a Strict Liability Jurisdiction.** The Texas courts adopted § 402A of the Restatement explicitly in the case of *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967). However, on the same date this decision was rendered, the high court in Texas ruled that in the strict liability context, the plaintiff cannot recover where he persists in the use of the product knowing that it is dangerous. Since *McKisson*, a whole rash of appellate and federal cases have applied the doctrine. See, e.g., *O. M. Franklin Serum Co. v. C. A. Hoover & Son*, 418 S.W.2d 482 (Tex. 1967); *Ford Motor Co. v. Darryl*, 432 S.W.2d 569 (Tex. Civ. App. 1968); *Pittsburgh Coca Cola Bottling Works of Pittsburgh v. Ponder*, 443 S.W.2d 546 (Tex. 1969); *Curtis Industries v. Pruitt*, 385 F.2d 841 (5th Cir. 1967); *Olsen v. Royal Metals Corp.*, 392 F.2d 111 (5th Cir. 1968); *Ross v. Upright, Inc.*, 402 F.2d 943 (5th Cir. 1968).

*UTAH Is Not a Strict Liability Jurisdiction.* Utah stands with those states requiring privity between the manufacturer or seller and the injured plaintiff in both suits based upon a warranty and upon a negligence theory, while also recognizing the imminently and inherently dangerous product exceptions to the privity requirement. *Hooper v. General Motors Corp.*, 123 Utah 515, 216 P.2d 549 (1953); *Hewitt v. General Tire & Rubber Co.*, 3 Utah 2d 353, 284 P.2d 471 (1955). Support is also to be found in the Utah decisions for an exception to the privity requirement in cases of injury caused by unwholesome food products. *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P.2d 822 (1958).

*VERMONT—The Status of the Law as to Strict Liability in Vermont is Presently in Doubt.* The Vermont state courts have not recently dealt with the question of privity of contract in warranty or negligent cases. In fact, no case has been found supporting the standard food and beverage exceptions or even inherently or imminently dangerous exceptions to the privity rule. In a recent federal court decision, a suit based upon an implied warranty in the absence of privity was allowed against a manufacturer. *Deveny v. Rheem Taxi Co.*, 319 F.2d 124 (2d Cir. 1963).

*VIRGINIA Is Not a Strict Liability Jurisdiction.* Virginia has enacted a statute which eliminates the requirement of privity in actions based upon warranty or upon negligence. VA. CODE ANN. § 8-654.3 (Supp. 1962), re-enacted as VA. CODE ANN. § 8.2-318 (1965). This jurisdiction allowed a suit based upon an implied warranty without the need of showing privity between the injured plaintiff and the manufacturer or seller. Virginia has standard exceptions to the privity requirements, i.e., the imminently dangerous, inherently dangerous, and food and beverage exceptions to the privity requirement. *Harris v. Hampton Roads Tractor & Equipment Co.*, 202 Va. 958, 121 S.E.2d 471 (1961). The Virginia courts have not accepted the strict liability doctrine in *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), but have actually rejected the *Henningson* case. See *Harris*, *supra*.

*WASHINGTON Is a Strict Liability Jurisdiction.* The State of Washington recently joined the trend toward explicit adoption of § 402A of the Restatement. In *Ulmer v. Ford Motor Co.*, 452 P.2d 729 (1969) the court adopted the doctrine but specifically limited it to actions against manufacturers. Application to other sellers was preserved for subsequent consideration. Proof that that injured user of the defective product voluntarily and unreasonably encountered an obvious danger has been recognized as a complete defense available to a defendant manufacturer. *Brown v. Quick Mix Co.*, 454 P.2d 205 (Wash. 1969).

*WEST VIRGINIA Is Not a Strict Liability Jurisdiction.* West Virginia has held that there must be privity between one seeking recovery for a product-caused injury on the ground of negligence and the manufacturer or seller of the product from whom recovery is sought in the absence of one of the recognized exceptions to the privity rule. *Roush v. Johnson*, 139 W. Va. 607, 80 S.E.2d 857 (1954). The jurisdiction also recognizes the food and beverage exception to the privity requirement. *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E.2d 898 (1939). In West Virginia, there must be privity of contract between an injured plaintiff and a manufacturer where the plaintiff seeks to impose liability upon the manufacturer on the basis of an express or implied warranty. *Burgess v. Sanitary Meat Market*, 121 W. Va. 605, 5 S.E.2d 75 (1939). The West Virginia decisions nowhere mention the strict liability doctrine, and one recent case has even questioned the existence of the standard exceptions to the privity requirements in negligence actions in that state. *Williams v. Chrysler Corp.*, 137 S.E.2d 225 (W. Va. 1964).

*WISCONSIN Is a Strict Liability Jurisdiction.* Privity requirements in all product liability cases were banned and the strict liability doctrine adopted by the Supreme Court of Wisconsin in *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). The assault upon privity requirements was actually initiated in the earlier case of *Smith v. Atco Co.*, 6 Wis. 2d 371, 94 N.W.2d 697 (1959), but in that case privity was still an acknowledged element of breach of warranty actions.

*WYOMING Is Not a Strict Liability Jurisdiction.* While there is a paucity of product liability in this jurisdiction, the more recent cases indicate that Wyoming has adopted the inherently dangerous product exception to the privity requirement but requires privity between a consumer and a manufacturer in other cases based upon theories of either warranty or negligence. *Parker v. Heasler Plumbing & Heating Co.*, 388 P.2d 516 (1964). While no case law could be found on the subject, a recent amendment to the warranty section of the Uniform Commercial Code in this jurisdiction would seem to indicate that Wyoming will allow a suit based upon an implied warranty without the showing of privity.

#### GENERAL OBSERVATIONS:

It can be noted generally that in the near future, as cases arise involving incidents occurring after the date of adoption of the UCC, the abolition of the privity requirement in an action based upon the implied warranty of merchantability will become virtually universal (UNIFORM COMMERCIAL CODE § 2-314), since all states but Louisiana have already adopted the code—and Louisiana is already a strict liability state. The distinction between this, when it is applicable under UCC definitions, and strict liability theory is more conceptual than pragmatically real.

Also to be observed is the highly dynamic nature of the current trend toward acceptance of strict tort liability doctrine. Virtually no state's supreme court has confronted and rejected this theory within the past 4 years, yet in that time at least 13 states have freshly accepted it. The courts of 4 to 5 other states have indicated noncommittal approval.

that the manufacturer or seller may be liable even though there is no "defect" in the product, if it is likely to cause injury when used within the range of ordinarily anticipated uses and the manufacturer or seller does not give the user notice of this fact.<sup>36</sup>

This effectively serves to remove the burden of proving the defendant's negligence from the shoulders of the plaintiff, the rationale being that the unparalleled complexities of the end product of American industrial ingenuity places an insuperable burden upon the plaintiff in ferreting out the existing negligence. As Professor William Prosser pointed out in "The Assault Upon The Citadel," "An honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."<sup>37</sup> As noted before, in a negligence action brought against the manufacturer the plaintiff must prove first, that the injury was caused by a defect in the product and second, that the defect existed when the product left the hands of the defendant. In neither of these instances does strict liability in tort serve to aid him in any way whatsoever. "It cannot prove causation; and it cannot trace the cause to the defendant."<sup>38</sup> As Professor Prosser notes, if the plaintiff is able to establish these two points, his only remaining task is that of proving the defendant manufacturer's negligence. "This is by far the easiest of the three and it is one in which the plaintiff almost never fails."<sup>39</sup>

Professor Prosser goes on to say in this article that although the plaintiff has the burden of proof on the issue of negligence in almost every jurisdiction, he is aided by the very liberally construed doctrine of *res ipsa loquitur*,<sup>40</sup> or its practical equivalent.<sup>41</sup> In all jurisdictions, this gives

<sup>36</sup> *Williams v. Brown Mfg. Co., Inc.*, Docket No. 41425 (Ill. Sup. Ct. filed, November 1969).

<sup>37</sup> 69 YALE L.J. 1099, at 1114 (1960).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> The doctrine of *res ipsa loquitur* was first applied in *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863). The application of the doctrine is limited by certain well settled principles. The event involved: (1) must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) must not be caused by an instrumentality or agency within the exclusive control of the defendant; (3) must not have been due to any voluntary action or contribution on the part of the plaintiff. It is held in a majority of the states that the doctrine does not apply where common knowledge or experience is not sufficiently extensive to permit it to be said that the plaintiff's condition would not have existed but for the negligence of the defendants. *Ayers v. Parry*, 192 F.2d 181, 185 (3d Cir. 1951). An example of the doctrine can be seen in *Fehrman v. Smirl*, 20 Wis. 2d 1, 121 N.W.2d 255 (1963). There the Supreme Court of Wisconsin stated that the question of negligence in the case "did not lie within the field of common knowledge of layman," but went on to hold that a *res ipsa loquitur* instruction to the jury could be supported on the basis of expert medical testimony given into evidence at the trial.

<sup>41</sup> For liberal construction of the doctrine of *res ipsa loquitur*, see *Richenbacher v. California Packing Corp.*, 250 Mass. 198, 145 N.E. 281 (1924); *Dryden v. Continental Baking Co.*, 11 Cal. 2d 33, 77 P.2d 833 (1938); *Coca Cola Bottling Co. v. Creech*, 245 Ky. 414, 53 S.W.2d 745 (1932); *Cassini v. Curtis Candy Co.*, 113 N.J.L. 91, 172 A. 519 (1934); *Gross v. Loft, Inc.*, 121 Conn. 394, 185 A. 80 (1936); *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 54, 203 P.2d 522 (1949); *De Pale v. Liggett & Myers Tobacco Co.*, 25 F. Supp. 1006 (1939), *aff'd*, 109 F.2d 598 (3d Cir. 1940); *Coca Cola Bottling Co. v. Davidson*, 193 Ark. 825, 102 S.W.2d 833 (1937); *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918); *Quinn v. Swift & Co.*, 20 F. Supp. 234 (M.D. Pa. 1937); *Bissonnette v. National Biscuit Co.*, 100 F.2d 1003 (2d Cir. 1939); *De Groat v. Ward Baking Co.*, 102 N.J.L. 188, 130 A. 540 (1925).

Pennsylvania achieves the same result through the use of a practical equivalent of *res ipsa loquitur* denominated as "exclusive control." *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953). Circumstantial evidence has been used to achieve the same result. *North American Aviation v.*

rise to a permissible inference of the defendant manufacturer's negligence and serves very handily to get the plaintiff to the jury. "Once the cause of the harm is layed at the doorstep a jury verdict for the defendant on the negligence issue is virtually unknown."<sup>42</sup> The question can reasonably be asked then, why does the plaintiff's attorney clamor so loudly for the cause of strict liability in tort? The answer is quite simple, for as long as the negligence issue remains a factor in the case, it must be litigated and the plaintiff's counsel must prepare himself to examine and cross-examine witnesses and defendant's experts.<sup>43</sup> As long as the possibility exists that negligence may not be found, plaintiff's counsel must face the rather dim prospect that the case can conceivably be decided for the defendant. A case which can be so decided is worthless in terms of settlement and one in which settlement is difficult to accomplish.<sup>44</sup> Therefore, if the defendant is able to introduce evidence as to his own due care, the possibility must remain that it can influence not only the size of the verdict but that it could conceivably affect the jury to the extent that it will hold for the defendant manufacturer. Strict tort liability, therefore, serves the plaintiff's counsel as a tool of intimidation, a tool which they have wielded with considerable deftness during the past decade, but one which can be blunted by a creative defense.

### III. CURRENT TRENDS IN AVIATION PRODUCTS LIABILITY

Aircraft manufacturers, not unlike manufacturers of the television sets and automobiles I spoke of briefly before, are subject to the same liability for violation of this duty to exercise reasonable care in the manufacture of their products. They may be held liable for their negligence,<sup>45</sup> for breach of express<sup>46</sup> or implied warranty<sup>47</sup> and as is befitting the current trend, liable under the doctrine of strict liability in tort.<sup>48</sup>

The aircraft manufacturer may be held liable for negligently designing his aircraft<sup>49</sup> or negligence in the fabrication of the final product.<sup>50</sup> Further, he can find himself liable for failure to warn users of the aircraft of what may be considered dangerous propensities, and this duty continues long after the aircraft is sold.<sup>51</sup> It is no longer enough that the manufacturer of the aircraft meets the standards of the industry, it is further required that he meet a standard of due care under the circum-

Hughes, 247 F.2d 517 (9th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958); Lajoie v. Bilodeau, 148 Me. 359, 93 A.2d 719 (1953); Merchant v. Columbia Coca Cola Bottling Co., 214 S.C. 206, 51 S.E.2d 749 (1949). See also Indiana Lumbermen's Mut. Ins. Co. v. Matthew Stores, Inc., 349 Mich. 441, 84 N.W.2d 755 (1957).

<sup>42</sup> 69 YALE L.J. 1099, at 1115 (1960).

<sup>43</sup> *Id.* at 1116.

<sup>44</sup> *Id.*

<sup>45</sup> North American Aviation v. Hughes, 247 F.2d 517 (9th Cir. 1957); Carter Carburetor Corp. v. Riley, 186 F.2d 148 (8th Cir. 1951).

<sup>46</sup> Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954).

<sup>47</sup> Krause v. Sud Aviation, 301 F. Supp. 513 (S.D.N.Y. 1968).

<sup>48</sup> Rossignal v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A.2d 418 (1967).

<sup>49</sup> Smith v. Piper Aircraft Corp., 18 F.2d 169 (1955); Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

<sup>50</sup> See Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961).

<sup>51</sup> DeVito v. United Airlines, Inc., 98 F. Supp. 88 (E.D.N.Y. 1951).



stances in which his particular product will be utilized.<sup>52</sup> This, when the disastrous consequences of a failure of his product are looked to, is a high standard of care indeed.

In this country a very special legal problem exists, with reference specifically to the system of governmental supervision through a certification process by the Federal Aviation Administration (FAA) of all civil aircraft licensed to fly.<sup>53</sup> It is a problem which has been given relatively little attention and one when considered in depth, holds out some promise of relief to the aircraft manufacturer. Therefore, it would behoove us to give some special consideration to the question of whether the United States Government can be held liable, by virtue of this certification, in a products liability action brought against an aircraft manufacturer. Further, whether or not manufacturers are relieved either of all of their liability for a defect or perhaps a portion of it by virtue of this increasingly and ever-growing large Government supervisory role.

Another problem of equally large proportions is the very unusual and difficult problems in conflicts of law presented to aircraft manufacturers in product liability cases. It is not at all unusual for an aircraft to be manufactured in Kansas from parts that were manufactured by subcontractors in five or six other states, sold to a dealer in Florida, purchased by a gentleman who lives in Texas, and have the aircraft crash in the middle of a navigable body of water that divides two other states. Further, the manufacturer may be sued in still another state, which may be its state of incorporation, or one in which it does a considerable portion of its business. Thus, it can be said without fear of contradiction that the applicable laws pertaining to negligence, contracts, breach of warranty, privity, statutes of limitations and damages may be extremely difficult to resolve, even after the pieces of the puzzle have been placed in some semblance of order.

The authority under which newly constructed civil aircraft are certificated in the United States today is the Federal Aviation Act of 1958,<sup>54</sup> which for all intensive purposes is identical to its predecessor, the Civil Aeronautics Act.<sup>55</sup> Therein it is provided that:

[T]he Administrator is empowered, and it shall be his duty to promote safety of flight of civil aircraft in the air commerce by prescribing and revising from time to time:

- (1) Such minimum standards governing the design, materials, workmanship, construction and performance of the aircraft, aircraft engines and propellers, *as may be required in the interests of safety*. [Emphasis added.].
- (2) Such minimum standards governing appliances *as may be required in the interest of safety*.<sup>56</sup> [Emphasis added.].

Section 603A of the Act provides:

---

<sup>52</sup> See Comment, *Tort Liability of Manufacturers and Vendors Aviation Products*, 1953 WISCONSIN L. REV. 109.

<sup>53</sup> Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. §§ 1301-1542 (1958).

<sup>54</sup> *Id.*

<sup>55</sup> 52 Stat. 1007 (1938).

<sup>56</sup> *Id.*

(1) [T]he Administrator is empowered to issue type certificates for aircraft, aircraft engines and propellers; to specify in regulations the appliances for which the issuance of type certificates is *reasonably required in the interests of safety*; and to issue such certificates for appliances so specified. [Emphasis added.].

(2) Any interested person may file with the Administrator an application for a type certificate for aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph [1] of this subsection. Upon receipt of application, the Administrator shall make an investigation thereof and may hold hearings thereon. The Administrator shall make, or require the applicant to make such tests during manufacture and upon completion as the Administrator deems *reasonably necessary in the interest of safety*, including flight tests and tests of raw materials or any part or appurtenance to such aircraft, aircraft engine, propeller, or appliance. If the Administrator finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules and regulations prescribed by the Administrator, he shall issue a type certificate thereof. The Administrator may prescribe in any such certificate the duration thereof and such other items, conditions and limitations as are required in the aircraft, aircraft engines, or propellers, a numerical determination of all the essential factors relative to the performance of the aircraft, aircraft engine, or propeller, for which the certificate is issued. [Emphasis added.].

Section 603 (c) of the Federal Aviation Act of 1958 provides:

(c) [T]he registered owner of any aircraft may file with the Administrator application for an airworthiness certificate for such aircraft. *If the Administrator finds that the aircraft conforms to the type certificate therefor, and after inspection, that the aircraft is in condition for safe operation, he shall issue an airworthy certificate.* The Administrator may prescribe in such certificate the duration of such certificate, the type of service for which the aircraft may be used, and such other terms, conditions, and limitations as are required in the interest of safety. Each certificate shall be registered by the Administrator and shall set forth such information as the Administrator may deem advisable. The certificate number, or such other individual designation as may be required by the Administrator, shall be displayed upon each aircraft in accordance with regulations prescribed by the Administrator. [Emphasis added.].

A careful examination of this legislation clearly indicates that although it alludes to only *minimum standards* governing the design and construction of aircraft, it is quite explicit in its requirements for tests relating to the entire aircraft; and these tests are to be such as to ensure beyond any question of doubt the aircraft's reliability and its safety. It, therefore, becomes abundantly clear that the certification of an aircraft is a very integral part of the manufacturing and utilization of aircraft in the United States, and that without such certification, the manufacturer may not sell and the operator may not fly an aircraft. Since the certification process is such an integral part of the design and construction of civil aircraft, it is an area with which the aviation lawyer must be familiar if he is to effectively prosecute or defend an aircraft products liability suit.

The certification process itself consists of an award, by the FAA, to the manufacturer of an aircraft or of a component part, of a "type certificate"

which attests to the safety of its design. An "airworthiness certificate" is also issued which attests to the airworthiness and safety of the particular aircraft certified.

The type certificate states, in essence, that the aircraft's design is sound, and that its handling characteristics within the tested flight regimes indicate it is an aircraft which will operate safely. It further states that the aircraft complies with the minimum requirements of the FAA regulations as propounded by the Federal Aviation Act of 1958.

The aircraft manufacturer obtains approval for its particular aircraft by submitting an application, for a type certificate, and extensive data relating to the basic design, engineering studies, and flight test reports, to the FAA. The FAA then conducts its own tests and reviews all of the information provided by the manufacturer. In this evaluation process, the FAA may suggest changes in the design to effect what it considers more desirable or safer handling characteristics of the aircraft in question.<sup>57</sup>

Such suggested changes are thoroughly discussed with the manufacturer, and often lead to modifications since the manufacturer must satisfy the FAA if he is to obtain the type certification for his aircraft.

In some instances, manufacturers of small aircraft may make application to the administrator to have the burden of examination and testing shifted to a properly qualified private person, denominated as a designated manufacturer's certification representative (DMCR).<sup>58</sup> Such a person must hold a position of some responsibility in the manufacturer's organization with specific respect to the design and manufacture of the aircraft, and must have been issued a certificate of designation by the Federal Aviation Administrator. Qualification under this delegation option procedure can only be accomplished if the manufacturer possesses a type certificate and production certificate and further, employs a competent staff of engineering, flight test production and inspection personnel, deemed adequate to maintain compliance with all of the applicable FAA certification requirements.

The FAA, however, does not completely vacate the field. The actual certification is still scrutinized and they continue to inspect the aircraft manufacturer's engine operation on a periodic basis. Further, the criteria used by the DMCR to determine the particular fitness of the design and airworthiness, must all be approved by the FAA, and they may also verify compliance and participate in any or all test programs. The type certificate itself, for the particular aircraft, is issued by the Administrator upon application and statement of compliance submitted by the DMCR. Once a type certificate has been issued, the DMCR may personally issue airworthiness certificates for a particular aircraft that he feels conforms to the type design and that is in safe operating condition. The Federal Aviation Administrator may, of course, at any time withdraw the manufacturer's privileges with respect to the DMCR if it feels that the manufacturer has failed to comply with the FAA requirements of procedure.

<sup>57</sup> 14 C.F.R. § 406.14(a) (Revised 1961).

<sup>58</sup> 14 C.F.R. § 410.2 (Revised 1961).

Besides the designation option procedures afforded manufacturers of small aircraft, there are also provisions for the designation of engineering representatives. A designated engineering representative (DER)<sup>59</sup> may approve engineering data and other considerations within his designated field. The designations issued by the FAA are flight analyst, flight test pilot, structural engineering, power engineering, power plant engineering, radio engineering, propeller engineering and systems and equipment engineering.<sup>60</sup>

Perhaps the first case to lay the admissibility of the issue of a government certification squarely before a court was *Maynard v. Stinson Aircraft Corp.*,<sup>61</sup> where the court held that a certificate of worthiness was inadmissible because of the inability of the defense to lay a proper foundation. The court noted that the defendant company had specifically attempted to elicit testimony from employees of the Department of Commerce, the Division of Aeronautics, for the purpose of determining exactly what examination was made of the plans for the aircraft in question. "The witnesses, however, were instructed by an attorney for the Secretary of Commerce not to answer any questions concerning whether they had ever examined the plans or whether anyone for the Department of Commerce ever made any examination of the plans, or if they made an examination, who made it, and what kind of an examination was made."<sup>62</sup>

The court continued, "Therefore, it affirmatively appearing that the testimony was denied to the defendants in this case by an act of the officer of the United States Government, it becomes impossible for this court to receive that certificate in evidence and turn it over to the jury for their consideration. The plans might have been carefully checked by the experts of the United States Government. Then again, they might not. The parties were denied the opportunity by federal officials to find out whether they were or were not checked, and, therefore, the certificate itself becomes immaterial and incompetent in this case."<sup>63</sup>

I think it is clear that what the court was attempting to say was that in an action brought against an aircraft manufacturer in which an allegation of poor design is made, the certificate will be allowed into evidence if the proper foundation is offered. Such foundation is obviously the testimony of the examining officer who issued the certificate of airworthiness and his criteria for such an issuance.

In *Prashker v. Beech*<sup>64</sup> the question of admissibility of a Beech Bonanza's Type Certificate was considered by the court at the pre-trial. The plaintiffs alleged that the aircraft had been improperly designed and that Beech had proceeded with its manufacture of the aircraft with full knowledge of such defects.

Beech indicated that an offer would be made of both the type and

---

<sup>59</sup> 14 C.F.R. § 418 (Revised 1961).

<sup>60</sup> 14 C.F.R. § 418.24(6)(8) (Revised 1961).

<sup>61</sup> 1940 U.S. Avi. Rep. 71, 1 Avi. 698 (1937).

<sup>62</sup> *Id.* at 702.

<sup>63</sup> *Id.*

<sup>64</sup> 258 F.2d 602 (1958).

airworthiness certificate. The plaintiffs, however, argued that the certificates would be inadmissible unless it could be shown that the matters in issue had been the subject of the Civil Aeronautics Administration's (CAA) examination prior to the issuance of the certificates. The plaintiffs further contended, apparently looking to the rationale of the *Maryland* case, that the certificates could only be admitted through testimony of the CAA inspectors who had actually granted them. The court said in its pre-trial opinion, "I am of the opinion that the certificates would not be admissible as to the general safety or approval of the plane, but would be admissible as tending to negative notice of general unsatisfactory nature of the plane arising from prior accidents. The complaint alleges a duty on Beech to make tests. A certificate showing that tests were made would be admissible to meet the allegations of the complaint, regardless of the specific nature of the tests."<sup>65</sup> Thus, the court in effect assumed the posture that the receipt from the Government of the type and airworthiness certificates was admissible on the very narrow issue of notice.

The irony of the position of the court in this case is indeed exquisite! In essence, what the court is doing is asking a jury of twelve laymen to decide whether or not the physicists, the engineers, the test pilots and other experts, who made highly technical decisions in the extremely complicated field of aerodynamics, were wrong. "In short, the jury is asked to conclude, on the basis of obscure and contradictory testimony, phrased in vague, indefinite and speculative terms by men who never have flown a Bonanza or witnessed a Bonanza flight, that the Bonanza design is unsafe, although the Civil Aeronautics Administration experts came to a different conclusion after months of study, investigation and actual flight tests."<sup>66</sup>

In *DeVito v. United Airlines, Inc.*,<sup>67</sup> Douglas Aircraft Corporation attempted to show that the emergency procedure which it had established had been approved by the CAA. The court responded by stating:

This contention, however, ignores the important fact that the D.E.V. 133 Report submitted by Douglas to the Civil Aeronautics Administration granted its airworthiness directives after modification, contained no reference to the effects of carbon dioxide upon flight personnel during flight tests of January and February, 1948.<sup>68</sup>

Thus, since the manufacturer failed to provide the CAA with data concerning this specific problem, the validity of the certificate in question is placed in grave doubt.

Looking to this case, it would appear that it would behoove the aircraft manufacturer to be as candid as possible in submitting his extremely detailed records of design and manufacture of the FAA when attempting to secure type and airworthiness certificates. Such record keeping would

---

<sup>65</sup> *Prashker v. Beech Aircraft Corp.*, Civ. No. 1643 (Aug. 13, 1957) (pre-trial opinion).

<sup>66</sup> Brief for respondent Atlantic Aviation Co., *Prashker v. Beech Aircraft Corp.* (1958).

<sup>67</sup> 98 F. Supp. 88 (E.D.N.Y. 1951).

<sup>68</sup> *Id.*

bear heavily on the court's determination of the true value of both the type and airworthiness certificates.

In *Rapp v. Eastern Airlines, Inc.*,<sup>69</sup> the court held that the FAA at the time the type certificate for the aircraft was issued, had a duty to promote safety of flight in air commerce by prescribing and revising from time to time such minimum standards governing design and performance of aircraft engines as would be required in the interest of safety, such duties being prescribed under Sections 601 and 603(a) of the Federal Aviation Act of 1958. In this case, the FAA issued a type certificate for an aircraft, attesting to its airworthiness, when it knew the aircraft was capable of ingesting birds on takeoff, with the resultant loss of power output. This was a serious hazard to the aircraft and the court held that the government, by failing to provide further tests to determine the outcome of such an encounter, negligently issued such a certificate.

It would, therefore, appear, from the holding in the *Rapp* case, that the Federal Government may indeed become the unwilling partner of the aircraft manufacturer in personal injury actions resulting from aircraft crashes, if they can be shown to have negligently certified an aircraft as airworthy. Further, it would seem that the airworthiness certificate will be admissible into evidence if the proper foundation is laid by way of the testimony of the issuing Federal Aviation Administration inspector as to the criteria used in granting the certificate.

The current trend in aviation product liability is not at all unlike that of product liability cases in general. The severity of the application of the various theories of liability, however, is applied with a vigor that the courts apparently feel is commensurate to the risk to which the public is exposed. What follows is best perhaps described as the rather rapid evolution of aviation products liability.

In 1955, Northwest Airlines brought action against the Glenn L. Martin Company<sup>70</sup> for alleged negligence in the design and manufacture of an aircraft, alleging the wing splice was vulnerable to metal fatigue. The jury returned a general verdict in favor of the manufacturer, and the airline appealed. The court of appeals held that the evidence, including the evidence that an engineer and two or three inspectors hired by the airline had observed the manufacture of the planes, was insufficient to warrant an instruction on assumption of risk or instruction as to contributory negligence based on a failure to discover the defects. The judgment was reversed and remanded for a new trial.

What this case is stating is that one need not anticipate the negligence of another until he becomes aware of such negligence, and further that it is not contributory negligence to fail to look out for danger when there is no reason to apprehend that there is indeed any danger. Here, the court felt that the manufacturer owed a duty to the airline who had a right to assume such a duty would be performed.

---

<sup>69</sup> 264 F. Supp. 673 (E.D. Pa. 1967); *rev'd* 399 F.2d 14 (3d Cir. 1967); *aff'd on rehearing*, 399 F.2d 14 (1968).

<sup>70</sup> 224 F.2d 120 (6th Cir. 1955).

In *North American Aviation v. Hughes*,<sup>71</sup> early in 1957, an action was brought against North American, the manufacturer of an F-86 aircraft which had been delivered to and accepted by the United States Air Force. The case arose out of the death of a pilot who was flying the plane from the factory to an Air Force Base, and who was killed when the aircraft crashed after take-off. The court held that there was substantial evidence to sustain a verdict for the plaintiff on the theory that the crash was due to a mechanical defect which developed immediately after take-off. The proximity of delivery to the crash led the court to impose a type of quasi, *res ipsa loquitur* in this particular case. This case is one of the few where this doctrine has been applied successfully against an aircraft manufacturer.

In 1958 came *Prashker v. Beech Aircraft Corporation*.<sup>72</sup> This was an action for wrongful death of the plaintiff's decedent who was killed when an airplane manufactured by the defendant Beech Aircraft Corporation, and sold by the co-defendant, crashed, and for the loss of the airplane. The district court directed a verdict in favor of the defendant and the plaintiff appealed. The court of appeals held that the evidence put forth failed to establish that the manufacturer was negligent in designing the aircraft in question, and that the evidence also tended to clearly establish that the crash was caused by the contributory negligence of the pilot in attempting to fly the aircraft in extremely poor weather conditions, the pilot was VFR qualified only, and during the course of the flight encountered IFR conditions.

In a case of this nature, the evidence must demonstrate either a breach of express or implied warranty by the manufacturer, if the plaintiff is to be successful. Here, the buyer was precluded from recovering damages for a breach of implied warranty of merchantability in view of evidence tending to show that the damage to the aircraft was proximately caused by the negligence of the buyer's pilot; and, further, by the fact that the buyer's evidence failed to prove the airplane was not reasonably fit for flying. As this case would illustrate, there is often a blatantly gross attempt to recover even where the total ineptitude of the pilot is clear.

In 1961, *Boeing Airplane Co. v. Brown*<sup>73</sup> was decided. This was an action against the aircraft manufacturer for the death of an Air Force crew member allegedly due to a defect in an aircraft component manufactured by a third party. The district court rendered judgment for the plaintiff and the defendant subsequently appealed. The court of appeals held that evidence supported a finding that under California law the manufacturer had been negligent with respect to installing an inherently defective component and that its negligence had been the proximate cause of the accident. Under California law, a manufacturer who buys and installs a component which has been manufactured by another manufacturer, is subject to the same liability as though it

<sup>71</sup> 247 F.2d 517 (9th Cir. 1957).

<sup>72</sup> 258 F.2d 602 (3d Cir. 1958).

<sup>73</sup> 291 F.2d 310 (9th Cir. 1961).

were the manufacturer of the particular component, and is charged with the same duty to exercise reasonable care in design and construction of the component as well as in the testing and inspection of it when it is installed. Further, the airplane manufacturer under California law is liable for negligence in the design and manufacture of the component manufactured by another, in inspecting or testing the component, and for its own negligence in installing the component or failing to warn of known defects. This is true even though the manufacturer was not found negligent in failing to learn of an inherent defect in design. Clearly, this case places an even greater burden upon the manufacturer of the final aircraft to ensure that his subcontractors are providing him with components which are complete *and* totally safe. As the decision in *Greenman* would certainly indicate, the California court is by far the most liberal and activist in the nation. The decision in this case lends ample credence to this theory.

In 1963, in *Pan American World Airways, Inc. v. United Aircraft Corp.*,<sup>74</sup> the supplier of gear shafts for propeller governors was held negligent in failing to supply shafts which would operate under the environmental conditions which the supplier knew were to be encountered. The court stated that such negligence on the part of the supplier was the proximate cause of the damages sustained when the shafts malfunctioned in flight. The airline was held not contributorily negligent for continuing to operate the aircraft after two earlier fractures occurred in flight, for the reason that the supplier had assured the airline that the trouble emanated from a single faulty batch of gear shafts. Although the theory of negligence was used in this case, it is clear that strict liability in tort under the theory espoused in Section 402 (b) of the Restatement (Second) of Torts could well have been used today.

In *Goldberg v. Kollsman Instrument Corporation*,<sup>75</sup> a 1964 case, an action for the wrongful death of a passenger was instituted against the air carrier, the manufacturer of the airplane, and the manufacturer of the altimeter aboard the craft. The plaintiff appealed from an order which dismissed their causes of action as to the manufacturers of the airplane and the altimeter. The court of appeals held that an aircraft manufacturer's implied warranty of fitness of the airplane for the contemplated use ran to and in favor of an airline passenger despite the lack of contractual privity, but the implied warranty as to the manufacturer of the altimeter of the airplane did not.

What this case essentially accomplished was the re-establishment of the circuitry of action for which the courts *and the advocates of strict liability in torts* have so valiantly stormed their illusory citadel. It serves to set the stage for dog fights between co-defendants rather than adjudicating the rights of the parties in one cause of action arising from the same incident.

---

<sup>74</sup> 192 A.2d 913 (1963).

<sup>75</sup> 12 N.Y.2d 432, 191 N.E.2d 191 (1963).



In *Banks v. Continental Motors Corp.*,<sup>76</sup> a 1966 case, the court dismissed a suit against an engine manufacturer. Evidence was adduced by an airplane owner and his insurer against the manufacturer of the engine that the failure of the aircraft engine and the subsequent crash was due to throttle ice forming in the air induction system. The court held that this was insufficient to establish negligence on the part of the engine manufacturer which had made no formal ice tests and provided no air heat rise for a fuel injection engine.

Breach of both express and implied warranties was alleged by the plaintiff and advertisements of the manufacturer were introduced into evidence, which stated that its fuel injection engine eliminated icing hazards. The court dismissed the allegation of the breach of express warranty on the ground that the representations of the manufacturer were made specifically with respect to the refrigerating effect of vaporization icing, and not with respect to the elimination of throttling ice, of the type found in the air induction system of the aircraft. The plaintiff's allegation of breach of implied warranties was also dismissed, but here on the basis that no supporting evidence had been offered. This case served to offer some hope to the manufacturer who clearly and explicitly advertised the use of his product. Here, the plaintiff, groping for a deep pocket, seized upon the advertising; but the court saw through the attempt.

Another case which came into prominence in 1966 was that of *Webb v. Zurich Insurance Co., et al.*<sup>77</sup> There, suits against Cessna were filed based on warranty, and alternatively, on negligent design and manufacture of the aircraft. The court stated in its opinion that a careful reading of the record in this case does not reveal any basis for liability on the part of Cessna. On the contrary, it is clear that the aircraft when delivered was completely airworthy. The only fault testified to is some damage to the finish of the aircraft caused by a hailstorm which occurred after its manufacture, but before its sale. A reduction in the sale price was given as a result thereof. Needless to say, once the aircraft was delivered there was no further control of it by Cessna, and the rule of *res ipsa loquitur* could not be involved. Thus, the court in essence held that the manufacturer, Cessna, was not liable for the death of the passengers in the crash, either on the theory of negligent manufacture of the airplane or on the theory of *res ipsa loquitur*, in view of the evidence that the airplane was completely airworthy when delivered and that the manufacturer did not possess any control of the airplane after its delivery.

In 1967, two cases of importance in the field of aviation products liability were handed down. First was *Rossignol v. Danbury School of Aeronautics, Inc., et al.*,<sup>78</sup> which was an action against a valve manufacturer, engine manufacturer, and an aircraft manufacturer, seeking

---

<sup>76</sup> 373 F.2d 314 (4th Cir. 1966).

<sup>77</sup> 194 So. 2d 435 (La. Ct. App. 1967).

<sup>78</sup> 154 Conn. 549, 227 A.2d 418 (1967).

damages for injury to an aircraft, based on theories of strict liability in tort, breach of warranties, and negligence.

The defendant, Eaton Manufacturing Co., sold an exhaust valve to the defendant, Avco Corporation, and Avco incorporated this exhaust valve into an engine which it manufactured and sold to the defendant, Piper Aircraft Corporation. Piper further incorporated the engine into an aircraft which it manufactured and sold to the defendant, Danbury School of Aeronautics, Inc. The Danbury School sold the airplane to a customer, who after using it, resold it to Danbury, who in turn sold it to the plaintiff in May of 1963. In August of 1963, the airplane was damaged in a crash landing that was due to engine failure. The specific cause of the accident was determined as being due to a cracked, or defective exhaust valve in No. 3 cylinder, probably caused by excessive valve guide wear. At the time of the accident, the engine had been operated for 687 hours, and the normal overhaul time for such an engine is somewhere between 800 and 1200 hours.

Although the case presented several questions for appellate review, the basic issue involved was whether or not the complaint alleged facts sufficient to state a cause of action against Avco and Eaton, sounding in strict tort liability, as a separate and distinct basis of liability. The court, in analyzing the development of strict liability in tort, determined that the minimum essential allegations to a cause of action based on that theory were—that the defendant had indeed sold the product; that it was in an unreasonably dangerous, defective condition to the user or consumer or his property; that it was the cause of physical harm to said consumer or user or his property; that the seller was normally engaged in the activity of selling this particular product; and that it reached the user or consumer without substantial change in the condition in which it had been sold. The failure of the plaintiff to allege the latter was fatal to his appeal. The court stated that his pleadings lacked an element which was essential to a statement of a good cause of action based on the theory of strict liability in tort.

The second case of some importance in 1967 was that of *Ulmer, et al. v. Hartford Accident and Indemnity Co.*<sup>79</sup> In this case, three military personnel were killed in the crash of a United States helicopter. In a diversity action seeking recovery for the death of the occupants, the United States District Court for the Eastern District of Louisiana entered judgment from which the plaintiffs appealed. The court of appeals held that the evidence justified a jury determination that the Navy had sole possession of the helicopter from 1952 until the time of the crash some time in 1958. Also, that the Navy had subjected the helicopter blades to various overhauls and maintenance work during that period, thus it was held that they were in part responsible for the crash. Consequently, it was held that the aircraft was not in substantially the same condition as it was when it left the control of the manufacturer. This, coupled with the intervening acts of the United States Navy in the over-

<sup>79</sup> 380 F.2d 549 (5th Cir. 1967).

hauling and maintenance work during the six-year period, led the court to conclude that there would be no liability for the manufacturer of the aircraft. This is, by the way, an excellent defense in a product liability suit, for if there was an intervening act liability will not accrue.

In 1968, there were, as in 1967, two decisions of some note, both of which were rendered by federal courts in the state of New York. The first of these actions was *Montgomery v. Goodyear Aircraft Corp.*,<sup>80</sup> in which the aircraft involved was a non-rigid twin-engine blimp that crashed into the ocean off the New Jersey coast. Roughly twenty-one members of the crew were killed or died after the crash, and this action was brought by the representatives of the estates of eleven of the decedents against the Goodyear Tire & Rubber Company, which was the manufacturer of the fabric used in the construction of the airship envelope. The estates of the plaintiffs based their claims upon the theory that the blimp crashed at sea because of a tear in the skin, which was due to the Goodyear Company's failure to properly bond one of the seams.

The court of appeals affirmed the decision of the district judge who held that the plaintiffs had failed to meet the burden of proof imposed upon them in establishing, by competent evidence, their cause of action. This finding was essentially based upon the weight of testimony given by eye-witnesses. They testified, in essence, that they had not seen any tear in the envelope prior to the crash of the airship into the sea. What they did testify to, however, was that the tear in the envelope which they observed occurred after the airship had impacted.

The total absence of any competent evidence of a tear's existence prior to the crash led the court to a finding that liability could be attributed to the manufacturer only on the basis of sheer speculation. Therefore, the defendant manufacturer was held not liable by virtue of the plaintiff's failure to carry the burden of proof as to a defect being in existence prior to the airship's crash.

The second action was that of *Krause v. Sud-Aviation*.<sup>81</sup> Here, the aircraft involved was a helicopter that crashed into the Gulf of Mexico and whose occupants died as a result of the crash. Actions were brought by the representatives of the decedents for wrongful death against the helicopter manufacturer, Sud-Aviation. The district judge who rendered the decision in this case decided that the evidence established that the defendant helicopter manufacturer had negligently welded the helicopter's horizontal stabilizer bracket to the upper right longeron, resulting in a condition known in the trade as "insufficient root penetration;" and that the manufacturer was liable for the crash because of the failure of the longeron.

The court further held that the fact the failure of the longeron had occurred under normal flight conditions served to shift the burden to the defendant manufacturer to show that abnormal stresses, rather than a defective condition, were the proximate cause of the failure in

<sup>80</sup> 231 F. Supp. 447 (S.D.N.Y. 1964).

<sup>81</sup> 301 F. Supp. 513 (Dis. 1968).

question. Prior to this crash, the helicopter's rear rotor had been dipped into the water during a practice landing, and it was the manufacturer's theory that the fracture began at that time and progressed by subsequent fatigue until the crash occurred. The trial judge rejected this theory, finding that the evidence admitted failed to meet the burden of proof that had been placed upon the manufacturer. The district judge further held that the implied warranty doctrine is applicable to cases that arise under the Death on the High Seas Act and that the helicopter manufacturer, therefore, impliedly warranted that its product would not prove dangerous or harmful in its ordinary and intended use and breached that warranty when the aircraft crashed as the result of a structural failure.

In March of 1969, the Minnesota supreme court decided the case of *Tayam v. Executive Aero, Inc.*<sup>82</sup> There, an action was brought against the Mooney Aircraft Company, the manufacturer, and Executive Aero, Inc., the dealer-seller of a 1964 Mooney Super 21 single-engine, four-place aircraft which crashed. In a jury trial, judgment was rendered against both the manufacturer and the dealer-seller in favor of the estate of the plaintiffs. The manufacturer, Mooney Aircraft Company, did not appeal from these judgments; but on appeal of the judgment by Executive Aero, Inc., the judgment was affirmed.

The principal theory of the plaintiffs' claim was based upon the failure to warn and that such constituted a breach of duty which was owing, and was the negligence proximately causing the crash. The Minnesota supreme court held that the proof presented in the trial court clearly established the liability upon both defendants and, further, that both the manufacturer and the seller of the aircraft that crashed negligently failed to warn the purchaser of the possible danger of a power failure if the power boost equipment permitting the fuel injection engine to be operated on unfiltered air is left on while flying through conditions normally associated with the development of ice.

The particular significance of this case is that it is clearly illustrative of the situation where there is no theory or claim of a manufacturing defect, and a total absence of any evidence of negligence with regard to design or manufacture, the workmanship, materials, or inspections is presented, and where liability is imposed only upon the sole theory and claim of the manufacturer's and seller's duty to warn of uses that can be reasonably foreseen and may well be encountered in the normal and ordinary operation of the aircraft. Thus, a duty to warn will be imposed upon the manufacturer to the purchaser in connection with operating procedures reasonably held to be within the contemplation of the manufacturer.

As I noted in the opening remarks of this section, the conflicts of law problem with regard to product liability cases has become exceedingly complex. Such landmark decisions as *Kilberg v. Northeast Airlines*, *Babcock v. Jackson*, *Long v. Pan American Airways*, *Weinstein v. Eastern*

---

<sup>82</sup> 166 N.W.2d 584 (1969).

*Airlines, Inc.*, and *Scott v. Eastern Airlines*, have all led to a drastic change in the law within a period of less than ten years.

In the *Kilberg*<sup>83</sup> case, the facts were as follows. Edward Kilberg, 33 years of age, unmarried and without dependents, was fatally injured in an aircraft accident in Massachusetts. He was a resident of New York City and his mother was his sole next of kin. The action, however, was brought by his brother, Jack Kilberg, a New York resident, as administrator, against Northeast Airlines for his wrongful death. The complaint alleged three causes of action; the first cause seeking damages in the amount of \$15,000 for wrongful death, the second seeking \$150,000 for a breach of contract of safe carriage, and the third seeking damages in the amount of \$50,000 for conscious pain and suffering prior to his death. In point of fact, however, Mr. Kilberg died immediately in the accident and there was no possible provable damages for the alleged conscious pain and suffering prior to his demise.

Defendant subsequently moved to dismiss the second cause of action upon the ground that it failed to state facts sufficient to constitute a cause of action. The appellate division unanimously reversed the order of the special term denying the motion and this was unanimously affirmed by the court of appeals. Although this was the only question on appeal, four of the seven judges on the court sought to take advantage of the opportunity to proclaim for New York State a new legal philosophy, with respect to out-of-state limitations of damages where New York State residents were involved. This slim majority advised the plaintiff he might apply "if so desired, for leave to amend his first cause of action," this being, of course, without regard to the \$15,000 wrongful death limitation in the Massachusetts statute which he had pleaded. Thus, the *Kilberg* decision did lead to the adoption of the "grouping of contract" or "center of gravity" theory on conflicts of law which eventually paved the way for New York's rejection of *lex loci delecti*.

The question of whether *lex loci delecti* was still the law in New York State was finally settled in the landmark case of *Babcock v. Jackson*.<sup>84</sup> Babcock was involved in an accident in Ontario, Canada, in which the New York plaintiff's cause of action was barred by the Ontario death statute. The plaintiff sought to recover against the New York driver of the vehicle in which she was a passenger. Persuading the New York Court of Appeals of the merits of her case, they totally rejected the rule of *lex loci delecti* and adopted the center of gravity, or grouping of contracts test. The court, in rationalizing its position, stated, "Justice, fairness, and the best practical result . . . may be achieved by giving controlling effect to the law of the jurisdiction, which because of its relationship or contract with the occurrence with the parties has the greatest concern with the specific issue raised in the litigation."

In *Dym v. Gordon*,<sup>85</sup> the rule in *Babcock* was further refined when

---

<sup>83</sup> *Kilberg v. Northeast Airlines*, 176 N.E.2d 526 (N.Y. 1961).

<sup>84</sup> 12 N.Y.2d 473 (1963).

<sup>85</sup> 16 N.Y.2d 120 (1965).

the New York Court of Appeals rejected an attempt on the part of the defense to restrict the rule in *Babcock* to one of domicile.

In *Weinstein v. Eastern Airlines*,<sup>86</sup> the question presented was whether or not the death of a passenger resulting from the crash of an aircraft in legislatively defined navigable waters, less than one marine league from the shore of the state, constituted a maritime tort. The position as taken by the Third Circuit in the *Weinstein* case was echoed by the court holding in *Scott v. Eastern Airlines, Inc.*<sup>87</sup> The *Scott* case involved a wrongful death action for the death of a passenger in the same accident. The court, in agreeing with *Weinstein*, held that the accident constituted a maritime tort and that, therefore, admiralty law governed the rights of all the parties. The Massachusetts wrongful death statute limiting recovery to \$20,000 was controlling. The judgment was subsequently withdrawn on a rehearing, and in a four to three decision the court held that Pennsylvania law rather than admiralty law applied to the rights of the parties.

In *Morgan v. Eastern Airlines, et al.*<sup>88</sup> the defendant aircraft manufacturer moved for a dismissal in a suit for damages which alleged, *inter alia*, negligent design and manufacture of an airplane and breach of implied warranties. Plaintiff's decedents had been killed in an airplane crash that occurred in Louisiana. The court held that under Georgia law there is a requirement of contractual privity as a condition precedent to an implied warranty recovery and, therefore, the plaintiffs would have to proceed in tort since they were not parties to the sale of the crashed aircraft. The Georgia court went on to hold that the prevailing conflict of laws rule concerning torts is that of *lex loci delicti* and accordingly turned to the Louisiana law and determined that the plaintiffs' tort action against the manufacturer for negligent design and manufacture would be recognized in Louisiana.

The trend is clear, I believe, that the grouping of contacts or center of gravity theory will soon be the law of the land. The State Legislatures are increasingly aware of the financial burdens that will be placed on the state and local welfare agencies, if their citizens are not adequately recompensed for injuries suffered outside of the state. The courts, in many cases, however, have saved the legislature from enacting such statutes by the use of the time-honored, although sometimes soundly castigated, process of judicial legislation.

Although the intent for such decisions is altruistic, and from that standpoint, laudable, the situation described in the opening of this section clearly reflects the difficulties that the grouping of contacts theory can create. It is unquestionably a phase of the law that requires constant attention and constant study on the part of counsel, if he is effectively to serve his client.

---

<sup>86</sup> 203 F. Supp. 430 (E.D. Pa. 1962); *Rev'd and aff'd* in part 316 F.2d 758 (3d Cir. 1963); *cert. denied*, 375 U.S. 940 (1963).

<sup>87</sup> 264 F. Supp. 673 (E.D. Pa. 1967); *rev'd*, 399 F.2d 14 (1967); *aff'd on rehearing*, 399 F.2d 14 (3d Cir. 1968).

<sup>88</sup> 253 F. Supp. 119 (N.D. Geo. 1966).

#### IV. THE SUCCESSFUL DEFENSE OF AN AVIATION PRODUCT LIABILITY CASE

By now, from what I have said, I am sure most of you have gotten the impression that I feel that the cards are stacked against the aircraft manufacturer in attempting to present a reasonably effective defense. However, this is not necessarily true and is not my feeling at all. There are several effective and winning defenses in a products liability suit other than a direct attack upon the plaintiff's proof of negligence or defect. The primary defense, of course, is that the product, the aircraft, is not defective. This defense actively involves the management, i.e., the engineering staff, of the accused aircraft manufacturer since it will be his expertise in concert with that of the aviation attorney that will be needed to disprove the allegations of the defect alleged.

The second defense to aviation products liability suits is that the defect was not the proximate cause of the accident. It might well be true that there were only ten rivets to a panel when there should have been fifteen, or perhaps a certain fuel line joint was not flared as much as it should have been, but this will not meet the plaintiff's burden if the proximate cause of the accident was the fact that he failed to see a mountain prior to impact. Once again, this is an area where close cooperation is necessary with the manufacturer's engineers and experts. If evidence can be adduced through the use of expert testimony or, if plausible, through easily understandable experiments, that the accident could not have been caused by the defect alleged, then the finder of fact will have to, we hope, find the manufacturer not guilty.

A third defense, and again one requiring active participation of the aircraft manufacturer's staff, is that the product is not in the same condition at the time of the accident as when it was sold by the manufacturer. Here, personnel of the aircraft manufacturer would be required to examine carefully the alleged defective part and be able to show in what way it has been changed. In addition, it would have to be shown that there is some causal relationship or connection between the change and the defect. As you know, with all the Federal Aviation Regulations pertaining to inspections, overhaul, etc., it would be a rare case when an aircraft with more than 100 flying hours had not been tampered with in some fashion or another.

A fourth defense is the malfeasance of the injured party, or as is most often the case in aviation litigation, his malfeasance prior to his death. In actions based upon warranties, the plaintiff must show that he used the product in the manner that it was intended to be used. Consequently, it would be extremely unreasonable to hold a manufacturer liable for the crash of a four-place aircraft that had been packed with six hefty individuals off on a hunting trip, over grossing the aircraft by 300 pounds, or to hold him liable in the case of an aircraft not stressed for acrobatic flight, that came apart while pulling 7 G's. Here again, as in all of the above cases, the refutation of this allegation must require the

full co-operation and assistance of the manufacturer to show how the product should have been used, and how, if it had been used within the flight envelope that it was constructed for, no difficulty would ever have arisen.

A fifth defense, more in the realm of the creative use of procedure, is with respect to the evidence the plaintiff may be prohibited from introducing. The removal of negligence as an element of the plaintiff's proof in a *strict liability in tort* case, can, in some cases, work to the advantage of the defense. If the plaintiff need not prove negligence, presumably evidence of negligence will be excludable by the objection of immateriality, thus eliminating the possibility of such evidence of negligence inflaming the passions and prejudice of the jury. In a case brought under this doctrine, the defendant may be able to control whether evidence of his handling comes into the case at all. If the plaintiff tries to demonstrate that the manufacturing plant had certain shortcomings and that perhaps the machine operator the night before had over indulged, he can be stopped, I think. Such evidence would be irrelevant to a *strict liability in tort* claim. If indeed these facts are true, that fact need never get before the jury and the defense can successfully avoid the penalty verdict, which such facts might bring.

On the other hand, if the manufacturer's plant is loaded with the most modern testing devices and is maintained like a fine Swiss chronometer, if every component in every aircraft and the aircraft itself is tested and tested again for defects, if he buys only the finest raw materials and subjects them to the most scrupulous and exacting quality analysis before, during and after processing, the defense should be able to show it. Such evidence would be circumstantial evidence totally bearing on the question of whether the component part could have been defective when it was sold by the manufacturer. Truly, in many cases it may be the only evidence available to a defendant on that issue. Such evidence, however, would not be admissible to prove due care or lack of negligence, which are barred as a defense, but it should be admissible as tending to disprove that the aircraft was defective at all, when it was sold by the manufacturer. This circumstantial evidence does, without question, have a salutary, mitigating influence on damages.

An occasional plaintiff may plead both strict liability in tort and negligence, and if he does, the harm which may be suffered from proving a manufacturer's negligence, will not be harm done by the doctrine of *strict liability in tort* at all, but will be a harm he could have done to the defense case anyway under the old negligence doctrine.

The designation of *strict liability* is deceptive. What has really happened is that the plaintiff is given another form of action to add to a negligence count and an implied warranty count if he chooses. He still has some very substantial burdens of proof and the defendant has ample opportunity for defense. One real value of the doctrine of *strict liability in tort*, as noted before, is that it provides the plaintiff's counsel with a



tool of intimidation in forcing a settlement with a defense attorney not yet fully schooled in the sophisticated and subtle defenses to *strict liability in tort*.

We must bear in mind that the defense of these products cases requires no techniques vastly different from those used in ordinary negligence cases. Whether the defendant was negligent in the manufacture of the product, i.e., whether it exercised due care, is in some cases a much more demanding question than whether a product is, in fact, defective. However, the issue on the question of defect is a very precise and difficult one to handle. A case involving a charge of defective design in an aircraft component of some complexity involves some highly technical proof, and it is at this stage that the aviation attorney is best able to put his experience and scientific background to its fullest use.

## V. CONCLUSION

In this age of extraordinary technological development, there is bound to be considerable experimentation and attendant occasional failures. This is to be expected as industry presses beyond the present state of the art. Without this experimentation, our progress toward the ultimate advancement of technology in our society would be considerably slowed.

The notion that technological innovation should be penalized by the imposition of liability for later developed improvements seems to be more than just unfair between litigants, and it is one that our European neighbors look upon in stunned dismay. It militates against the technological changes upon which all of our national hopes for abundance, leisure and high civilization primarily depend.

The Constitution of the United States provides for a patent system "to promote the progress of science and the useful arts" and a large share of our Federal Budget is directed toward the research and development of new and useful products. The Congress enacts bill after bill to foster scientific education so that a favorable climate can be created in which such research can proceed at an accelerated pace. All this expresses a national policy to encourage and accelerate technological innovation, and that policy is directly opposed by some of the novel notions of liability now advanced by many personal injury lawyers, and unfortunately accepted by some courts.

If liability for design defects is to become an integral part of our law, it should be based on legislative and regulative standards, and not on a hopeless, quaking quagmire of individual tort determinations. Moreover, if a manufacturer is to be responsible for design defects, liability should be found only where a specific finding is made that the design used was negligently developed in light of the state of the art and standards not later than the time the accused product was sold.

The doctrine of *strict liability in tort* also deserves further attention. In essence, the rule proclaims a form of socialized accident insurance in which the manufacturers and sellers are but the mere collectors of

premiums from the consumers of the product. At a recent meeting of a group of New Jersey anaesthesiologists, it was decided to allot to each patient's bill the cost of their malpractice insurance and denominate it as such. It is not that I argue against the settlement of just claims caused by negligence, but what I would take issue with are the over-inflated "rogue verdicts" that bear no resemblance at all to the loss suffered, and the ever accelerating shift of the burden of proof to the defendant-manufacturer.

There is a vast gulf that separates wrongful death and bodily injury awards in the U.S.A. from those in other parts of the world. In the U.S.A., there is a high standard of living and an acute awareness of the right of the individual in a society plagued by ever-rising prices and wages. Even so, awards here are simply not capable of comparison with those handed down in any other country in the world.

Cases involving the defective design of a product, or a defective product, involve, as I noted earlier in this talk, technical evidence that is frequently extremely difficult to explain to a juror. How can we hope to communicate a sophisticated morass of technical facts to a jury of lay people, usually having little or no training in technical fields? This is the real challenge! It can be done, but it requires considerable thought, a good working relationship between attorney and engineer, and considerable time expended long before the case is called for trial. Not infrequently, the manufacturer and his engineer will feel confident that the charge leveled against the product is completely unsound from an engineering point of view and refuse to give it the very serious consideration that it most certainly deserves. Those of us who have stood before a jury, trying by word of mouth to convince them of the validity of some engineering principle, know that too frequently it is an exercise in futility. This is particularly true if the argument is based solely on the technical language of the engineer. Unless the attorney is able to translate from the technical jargon of the scientist to the vernacular of the layman, the scientific testimony is meaningless.

One thing that is abundantly clear in all of these cases—a suit characterizing a manufacturer's product as "defective" is an attack upon the very lifeline of his existence. Very often, the fact that such a suit is on file appears in the trade journals circulated among his customers, suppliers and competitors. It is almost immediately a subject of discussion within the trade and the manufacturer can be on trial in the industry as well as in court. The integrity and competence of the defendant is being challenged in the area in which his success is wholly dependent. The loss of the case can result in much more serious consequences than the amount of the verdict or an increased insurance premium. His very existence may well be at stake.

In fact, the aircraft manufacturer is faced with the future prospect of a great escalation in product liability suits. Why? It is precisely because such suits represent a source of great recovery, that is, a rich defendant

capable of paying even the most exaggerated verdict. There is then, too, the added bonus of a nice, impersonal corporation for which the jury is inclined to feel absolutely no compassion.

In the case of a passenger's death or injury, the airline will most surely pay the verdict, unless the cause of the crash can be shown to be the fault of some other entity. The most recent past has seen a great assault upon the United States Government for its alleged negligence in its air traffic control activities, carried on by the Federal Aviation Administration. Some of these suits have been meritorious, others have not; but one factor common to all has been a highly technical attempt to prove Governmental negligence by demonstrating very slight deviations from written procedures, which may or may not have been a proximate cause of the accident. At any rate, with the now huge verdicts facing the airlines, it behooves their lawyers to seek the company of a prospective partner to help pay the verdicts which will surely be handed down.

Although it may not seem so, aircraft manufacturers have rarely been a target defendant in aviation crash litigations. However, their day is at hand!

Ralph Nader, safety advocate of automotive prominence, has now turned his attention to the aircraft field. On January 21, 1970, he testified before a U.S. Senate Subcommittee with regard to safety features of light planes, and released a ninety page study made by two of his "raiders" wherein it is charged that:

Flying in most light aircraft today is similar to mailing a couple of eggs and a bag of nails together in a cardboard box.

Clearly, the case against the aircraft manufacturer is being prepared, and without question it will be well prepared and well tried.

Several law firms and individual lawyers in the United States have turned their attention nearly exclusively to the prosecution of plaintiffs' aviation crash cases. These lawyers are indeed experts in the field and are thoroughly familiar with all aspects of aviation crash litigation. In most cases, they no longer take the "easy way out" and select the defendant that appears to be the *most* liable, against whom the easiest case can be prepared. These suits will now name the aircraft operator, owner, component manufacturer and the fixed base operator who maintained the aircraft.

Second-level products liability as I refer to it, or defense of fixed base operators and repair facilities has greatly expanded in the recent past. These suits generally deal with failure of some specific component and are quite detailed in nature, requiring much preparation and expert testing. In my own opinion, they have increased for two reasons: first, more than one defendant increases the prospect of full collectibility of verdicts and, second, more detailed and specialized defenses have taught plaintiffs' lawyers that the most obvious answer may not necessarily be the correct one. So why choose? Sue everyone and let the jury decide!

In addition, the plaintiff reaps the benefit of the dog fight that generally develops when two or more defendants are accused of causing the

same accident. The vastly increased value of aircraft hulls is another factor that insures there will be a great increase in product liability suits. The Boeing 747 costs approximately 20 million dollars. This figure far exceeds any total pay-out to date arising out of an airline crash. This, plus the increased passenger capacity of their new "jumbo jets" leads one to the obvious conclusion that dollar exposure from a single crash could run close to 100 million dollars.

The same is true of the smaller general aviation aircraft. They are far more sophisticated and costly today than they were a few years ago. Thus, hull loss claims are bound to increase against the manufacturer. These will be based upon product liability theories, of which there are many, not the least of which is something called "design induced pilot error." This theory is perhaps one of the greatest boons to plaintiffs since *strict liability in tort* ground Prosser's Citadel into the ground. Now, in the proper case, both the operator and the manufacturer can be held liable for the same loss, and not even the jury need make a decision as between the two.

There is no question that product liability suits against the manufacturers of aircraft will greatly increase in the future. The question is, what can be done to meet the challenge? On this point, I have some concrete suggestions to make.

The manufacturer must start *now* to prepare the defense of these cases! Many times I have been faced with the problem of presenting a defense that was good but, unfortunately, wasn't very long on proof. For example, a well qualified mechanic employed by a repair facility is called upon two or three years later to explain exactly what he did when he overhauled a certain component. In the intervening time, he has most likely overhauled dozens of the same type of items, thus he cannot remember specifically what he did, nor can he specifically recall doing the overhaul of this particular component. In this case, a much better defense would be possible if the facility had kept good records. The point is, good quality control records, designed to bolster a defense, can be easily worked up and kept at a minimum of expense and bother and with a maximum of effectiveness in the eventual product liability suit.

In the case of the large losses involving the "jumbo jets" and many passengers, it would seem mandatory that the defense attorney be at the scene of the accident as soon as possible. In this country, the National Transportation Safety Board does an excellent job of thoroughly investigating aircraft crashes. Investigation of crashes in other countries, however, are carried out with varying degrees of accuracy depending on the jurisdiction involved. Nevertheless, what the accident investigator accomplishes for his purpose will probably not be satisfactory for the purposes of evidence in a trial. Early preservation of evidence is one of the greatest problems facing the lawyer who will be called upon later to defend these cases. Thus, it is my recommendation that in the proper case the manufacturer send his trial lawyer as well as his technical representative to the scene of the accident. In other less disastrous accidents, a close liaison should

be maintained between the lawyer and the investigator so that the preparation of the defense can begin as soon as possible after the accident occurs.

The preparation for the defense of the product liability litigation that will arise out of the crash of one of the "new generation of jets" will not be effective unless it is begun now! The lawyer who assumes this task will be required to spend endless hours of study in extremely technical areas. He will necessarily become an expert on the system or component that is allegedly to have failed. Thereafter, and most importantly, he becomes the interpreter who speaks knowledgeably with engineers and explains clearly complex engineering principles to the jury.

The future in aviation product liability litigation promises, if nothing else, to be extremely busy. The increased dollar exposure to the manufacturers, and the threat of single crashes creating several millions of dollars worth of damage is a firm guarantee that these suits will be well prepared and hard fought.

The aviation lawyer who specializes in the defense of product liability cases can anticipate facing vastly more complex and new problems in the area of technical proof. Cases may take years to prepare and try to a successful conclusion. The successful defense will most assuredly depend in large part on how much expertise the aviation lawyer brings to each case. Surely there will be little time to learn after the suit is filed and the battle joined.